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Contracts for the Benefit of Third Parties

James L. Parks

CONTRACTS FOR THE BENEFIT OF THIRD PARTIES

In *Landers Inv. Co. v. Brown*[1] S, being the owner in fee of land, demised the same to defendant's assignor for a period of ninety-nine years. The lease contained a covenant binding the tenant, his executors and assigns, to pay annual rent in quarterly instalments as follows: to S for her life, then to S's daughter should she survive S, and upon the death of S and her daughter to such persons as would then have been S's heirs had her daughter predeceased her. After both S and her daughter had died, this contract came before the Supreme Court for construction.

In the course of its opinion the court said, probably by way of *dictum*, that the covenant to pay rent was binding, and that S, in effect, had purchased "an annuity for the term of ninety-nine years."[2] It was stated that upon S's conveyance "the lessee . . . . . became bound to make the quarter annual payments according to the covenant . . ."[3] This portion of the opinion is taken as an intimation at least that a contract for the benefit of unascertained third persons[3a] is valid and binding, and such parties are privileged to sue thereon as if privy thereto, even though there is no debtor—creditor relationship between such beneficiaries and the promisee. Inasmuch as the distinction between contracts under seal and simple contracts seem to have been abolished by statute[4] the suggestion, if followed, will establish a rule applicable to all contracts. The statement by the court is the last at this

1. (1923) 254 S. W. 14.
2. 254 S. W. *l. c.* 15.
3. 254 S. W. *l. c.* 15.

3a. The fact that the beneficiaries could not be determined until the death of S and her daughter and were therefore unknown when the contract was made, should make no difference if it be conceded that contracts for the benefit of a person other than the promisee can be enforced. Granting that a promisor's obligation of this kind may be binding, the beneficiary when ascertained is the party qualified to sue. The case is not like an attempted gift of tangible property, where normally there must be a delivery and hence a person in being who is capable of receiving. The sole question in this case is the extent of a defendant's obligation. He has given his promise to his promisee; now will the law enforce it at the instance of the beneficiary? See *accord* with the suggestion, *Whitehead v. Burgess* (1897) 61 N. J. L. 75, 38 Atl. 802.

4. In the principal case the contract was probably under seal, but sec. 2159 R. S. Mo. 1919 abolishes the use of private seals, and provides further that "the addition of a private seal to any such instrument shall not in any manner affect its force, validity or character, or in any way change the construction thereof." This enactment should place covenants upon the same basis as simple contracts, hence the

writing dealing with this type of contract; it invites an examination of the authorities, and a consideration of the present condition of this branch of the law.

"In the history of simple contract it was necessary for the plaintiff to show detriment suffered by him, to-wit: that he had been deceived by the defendant's promise into giving something up. If he could not show this, he was non-suited, because the action of *assumpsit* (simple contract) came into the law as an action on the case in the nature of deceit, and if a plaintiff had not been deceived to his injury, he could not avail himself of that form of action."[5] According to strict common law principles, therefore, if A makes a contract with B to render a performance to C, it would have to be held that, in the event of A's breaching his agreement, C could not sue thereon. Obviously C is not B's assignee; neither is there present in the transaction, so far as C is concerned, the requisite element of consideration. C is not A's promisee and could not for that reason show that he had suffered detriment on the strength of A's promise. It is natural enough, therefore, to find most of the early decisions in cases similar to that supposed denying a plaintiff, situated as C, all rights under the contract, and some modern opinions to the same effect.[6] Strict adherence to technical rules will require a plaintiff, in an action sounding in contract, to show that he is the defendant's promisee,

assertion in the text that beneficiaries under a sealed contract are equally free to sue thereon. See *accord* with the general proposition *Bosley v. Bosley* (1900) 85 Mo. App. 424.

But even were there no such statute, the question of the right of a beneficiary to sue under a covenant and under a simple contract (aside from the matter of consideration) should be the same. It is in each case a matter of the extent of the obligation assumed. If a covenantor has clearly assumed a liability to a beneficiary, the latter should be free to sue just as he is when suing under similar conditions on a simple contract. "I see no good reason for keeping up this sort of a distinction between contracts under seal and not under seal. If the covenant is made for the benefit of a third person, why is he not a party to it so as to maintain an action in his own name?" *Rogers v. Gosnell* (1873) 51 Mo. 466, 469. See also *Fitzgerald v. Barker*, (1877) 4 Mo. App. 105; *Weinreich v. Weinreich* (1885) 18 Mo. App. 364, 371; *Jefferson v. Asch* (1893) 53 Minn. 446, 55 N. W. 604. *Contra, Robbins v. Ayres* (1847) 10 Mo. 539 (*dictum*): compare *Case v. Case* (1911) 203 N. Y. 263, 96 N. E. 440.

5. Charles T. Terry, 34 Harv. L. Rev. 893, in a scholarly review of Williston on Contracts; Ames, Lectures on Legal History, 129 *et seq.*; Williston, Contracts, sec. 99; *Anon.* (1504) Keilwey 77; *Coggs v. Bernard* (1703) 1 Salk. 26. Professor Ames tells us (op. cit. 145) that the proper allegation in early actions was as follows: "yet the said C. D. not regarding his said promise, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the plaintiff" etc.

6. *Page v. Becker* (1862) 31 Mo. 466; *Manny v. Frasier's Adm'r* (1858) 27 Mo. 419 (see also *Thornton v. Smith* (1840) 7 Mo. 86); *Price v. Easton* (1833) 4 B. & A. 433; *Tweddle v. Atkinson* (1861) 1 Best & Smith 393; *Marston v. Bigelow* (1889) 150 Mass.

and that he has surrendered a legal right, or promised so to do. If he can not prove these facts he has afforded no detriment to support the defendant's promise.

It is believed, however, that the whole course of the law of consideration has been away from the early notion of deceit. We do not today regard consideration as a fact going to prove something in the nature of deceit practiced by a defendant upon the plaintiff; this con-

45; *Linniemann v. Moross Estate* (1893) 98 Mich. 178, 57 N. W. 103. It was early held that if the beneficiary was a son or daughter, niece or nephew of the promisee, the action would lie, the nearness of relationship being said to cure the defect caused by the absence of consideration; *Dutton v. Poole* (1677) 2 Levinz 211; *Todd v. Weber* (1884) 95 N. Y. 181, *accord.* But see *contra*, *Tweddle v. Atkinson* and *Marston v. Bigelow*, *supra.* Obviously, if consideration moving from the beneficiary is essential to the latter's right, the fact that he is related to the promisee is in no sense the equivalent of such consideration. See *Scheele v. Bank* (1906) 120 Mo. App. 611, 97 S. W. 621; in that case the fact that plaintiff-beneficiary was the daughter of the promisee was mentioned, but no especial stress was placed upon this fact; the decision would have been the same, it is believed, had this not been the case.

It has been said that a beneficiary's right to sue is in equity alone; *Bird v. Larius* (1856) 7 Ind. 615; *Ross v. Milne* (1841) 12 Leigh (Va.) 204. Is the theory of these cases that there is a trust? It is hardly correct to say that the defendant is the beneficiary's trustee as his obligation is purely executory; see *infra* note 18, an text in coneection therewith. In *Ross v. Milne*, *supra*, it is said that it is the duty of the promisee to lend his name to the beneficiary to the end that the latter may sue. Such a theory seems to involve the supposition that the promisee exacts the promise for the benefit of a beneficiary and holds, so to speak, the obligation for the benefit of the beneficiary; it would then be the duty of the promisee to sue in the event of a breach and recover the amount of the damages suffered by the beneficiary, and turn the same over to the latter. Naturally if the promisee is a trustee to this extent, and fails in the performance of the trust, the beneficiary as a *cestui* could proceed in equity in the place of the defaulting trustee. *Sed quaere?* Conceding that the promisee intends to vest a right in the beneficiary, does he intend to assume the burden of seeing that the defendant's obligation is carried out? Does he not rather intend to give a right to the beneficiary, which the latter may enforce in his own name, if the courts will let him? If the courts are not so disposed, that is the beneficiary's own loss; there is no justification then for imposing a burden on the promisee which he never intended to assume and did not assume. If B exacts a promise from A to do something for C, there is no basis for assuming that B intends to see that A performs that duty to C, and that he undertakes a duty to this effect.

Sec. 1156 R. S. Mo. 1919 provides that a trustee of an express trust may sue in his own name without joining a person for whose benefit the suit is prosecuted, and states "a trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." It is not believed that this statutory provision does other than *authorize* a promisee to sue if he so desires. In other words the statute does not impose the *duty* of a trustee upon the promisee, but merely permits him to sue if he so desires. It goes without saying that the statute does not prevent a plaintiff-beneficiary from suing in his own name. See cases cited *infra* note 13; see also

ception, in the beginning, may have been essential to find a remedy for a broken contract,[7] but surely this ought not to be and is not the case now. Rather, we think of consideration as something done, or promised to be done at the request of the promisor in return for his promise.[8] The proposition normally is that a promise which is not bought and paid for with the promisee's act, or promise, is not binding, because there is no justice in requiring a promisor to carry out his undertaking when nothing moves from his promisee in return, and as compensation. On the other hand, if such compensation exists, the promise will be binding.

At the same time, the law has never concerned itself with the value of that which is done or promised to be done in return for the promise. "The value of most considerations as well as most promises (i. e. consideration in bilateral contracts) is a thing which the law can not measure; it is not merely a matter of fact, but a matter of opinion. If, therefore, the promisee[9] thinks that the consideration is equal to the (*i. e.* his) promise in value (*i. e.* if he is willing to give the promise for the

Rogers v. Gosnell (1873) 51 Mo. 466, and *Ellis v. Harrison* (1891) 104 Mo. 270, 16 S. W. 198, each holding that either the promisee or the beneficiary may sue. Compare *Belt v. McLaughlin* (1849) 12 Mo. 433. Occasionally a breach of the agreement may cause damage to the promisee as well as to the beneficiary. In such a case the promisee under the statute, *supra*, would have both individual and representative rights; could both be enforced in the same action, or would two separate suits be essential? The cases have not answered this question. In *Robbins v. Ayers*, *supra* note 4, it was held that, as the agreement was under seal, the action would have to be brought by the covenantee and could not be brought by the beneficiary; but see *Rogers v. Gosnell*, *supra*, note 4, holding that the beneficiary under such a contract may sue just as well as one under a simple contract.

7. See Ames, *op. cit.* 130 *et seq.*; Williston, *op. cit.* sec. 99 where the learned author states, "The defendant is regarded as a tort-feasor because, after assuming to act and inducing the plaintiff to change his position, he has negligently injured the plaintiff or his property.**".

8. "Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking." *Philpot v. Gruninger* (1871) 14 Wall (U. S.) 570, *l. c.* 577, quoted in Keener's Cas. Contracts (2nd ed.) 203. "But nothing operated as a consideration which is not regarded or treated as an item of exchange by the parties. It must be offered by one party and accepted by the other as the 'conventional inducement' or reciprocal concession for what is promised. The phrases 'at defendant's request', 'in exchange for the promise', 'in consideration of', unmistakably point to the fact that the rules of consideration find their object, their reasons for existence in the law primarily as a test whether the engagement of the parties is put on the basis of a bargain, or whether it is gratuitous and so lacking any ground of enforcement." Ballantine, Doctrine of Consideration, 11 Mich. L. Rev. 423, 424. See also Williston, *op. cit.* sec. 102.

9. The quotation is from Professor Langdell's Summary of Contract Law. The author must mean a defendant-promisor in a bilateral contract, who receives consideration in the form of a promise, and is, for that reason, described as a promisee.

sake of getting the consideration) the consideration will be equal to the promise in value for all the purposes of the contract."[10] In other words, if a promisee does something, or promises to do something at the request of his promisor in return for the latter's promise, the promise is binding regardless of whether or not the court is of the opinion that value was received by the promisor for that which he promised to do. So, if A agrees to pay B $10 in return for B's promise to saw a stranger's wood, or if B will saw such wood, B has afforded consideration in the first case when he gives the promise, and in the second case when he saws the wood. B has bought and paid for A's promise in spite of the fact that it might be exceedingly difficult for a person less charitably inclined than A to discover any compensation moving from B for the promise at all. In short, the law is willing, for the most part, to consider any act which can be legally done, and any promise to do such an act, as adequate compensation to the promisor, and valid consideration to support his promise. The only usual limitation upon this rule is that the act done or promised to be done must not be one which the promisee is already bound to do for the promisor.[11]

If the modern theory of consideration is that it is conpensation in the form of either a promise, or an act for a promisor's agreement, it is impossible to contend that a defendant in a contract for the benefit of a third party has not received it, if the contract between him and his promisee complies with the requisites of simple contract law. Under these conditions there will be consideration, but it will move from the promisee and not from the plaintiff-beneficiary. This, however, should not render a defendant's promise unenforceable; the important question is not whence came the consideration, but rather did the defendant receive any consideration at all? If he did, he should not be heard to say that his promise, which has been paid for, is not obligatory because his pay came from a person other than the party who is suing. Why should not a promisee be free to acquire a contractual obligation for another? If it be the intention of parties to effect this result, what propriety is there is allowing a defendant to escape from his purposed duties upon grounds in which serve no useful end? It is believed that there really is no valid reason for so doing, and if it appears that it was intended by the

10. Langdell, Summary of the Law of Contract, sec. 55. See *accord*, *Bainbridge v. Firmstone* (1838) 8 A. & E. 743; *Brooks v. Haigh* (1840) 10 A. & E. 323; *Carlill v. Carbolic* etc. Co. L. R. (1893) 1 Q. B. 256.

11. See Williston, *op. cit.* sec. 130; *Lingenfelder v. Wainwright* (1890) 103 Mo. 578, 15 S. W. 844.

contracting parties to give a beneficiary such a right, a suit on the contract at his instance should be entertained.[12]

While it seems to be true that no court is justified in denying a plaintiff-beneficiary relief on the ground that consideration, necessary to support a defendant's promise is lacking, it does not follow that such a party should always be allowed an action for breach of contract in every case where a defendant's promisee has furnished consideration. Whether or not such an action should be sanctioned ought to depend upon the purpose of the contract; upon whether or not a promisee made the bargain with the end in view of vesting a right to sue for a breach in the beneficiary. The extent of a contractor's obligation should be as great and no greater than intended; therefore, unless a defendant appears reasonably to have assumed liability to suit, at the instance of the beneficiary, the latter should not be privileged to sue. If he is afforded this right, contrary to the intention of the parties, the defendant's contractual obligation is changed and his burden may be unwarrantably increased. It is not enough to say that a defendant's performance will benefit the plaintiff and therefore unless the latter is allowed to sue he will be deprived of a right. This conclusion is a *non-sequitur* unless the defendant *assumed a duty* to the beneficiary. The performance of many a contract may benefit a person who is not a party thereto; yet such performance is normally no concern of such person, and never should be unless the promisor bargains that the former should be given a right to sue upon the agreement.

The real problem then in this class of cases is one of construction; of determining in any given case whether or not there was an express or implied undertaking on the part of the defendant to respond in damages to *the beneficiary* in the event of a breach. It is accordingly proposed to examine the decisions on this basis, and to determine in what transactions presented to the courts there was a real contractual obligation to submit to suit by a beneficiary. In making this analysis of the cases, it is believed that they will divide themselves naturally into two classes, namely: first, those where a defendant agrees to discharge for his promisee a duty owing by the latter to the beneficiary, and second, those where a defendant undertakes to do an act for the beneficiary which will not constitute a discharge of a duty running from the promisee to the beneficiary and where the performance will not benefit the promisee. These two types of cases will therefore be dealt with separately. The discussion will be further restricted by excluding from consideration,

12. "The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay." *Seaver v. Ransom* (1918) 224 N. Y. 233, 237, 120 N. E. 639.

contracts by building-contractors and their sureties to pay laborers and materialmen who work upon and furnish materials for public buildings in the course of construction.

I

Suppose that A in consideration of a horse delivered to him by B promises to discharge B's debt to C, amounting to $500; or suppose that in consideration of $500 given to him by B, A makes the same agreement. In each case, in the event of A's failure to keep his promise, there are many decisions holding that C may sue A for a breach of the contract.[13] Various reasons are given to support this rule; it is occasionally

13. *Corl v. Riggs* (1849) 12 Mo. 431; *Belt v. McLaughlin* (1849) 12 Mo. 433; *Meyer v. Lowell* (1869) 44 Mo. 328; *Flanagan v. Hutchinson* (1871) 47 Mo. 237; *Rogers v. Gosnell* (1873) 51 Mo. 466; (see same case (1875) 58 Mo. 589); *Schuster v. K. C. etc. Ry.* (1875) 60 Mo. 290; *Holt v. Dollarhide* (1875) 61 Mo. 433; *Cress v. Blodgett* (1877) 64 Mo. 449 (*dictum*); *Fitzgerald v. Barker* (1879) 70 Mo. 685; *Wiggins v. Chicago etc. Co.* (1881) 73 Mo. 389; *Snider v. Adams etc. Co.* (1883) 77 Mo. 523; *Ellis v. Harrison* (1891) 104 Mo. 270, 16 S. W. 198; *Salmon Falls Bank v. Leyser* (1893) 116 Mo. 51, 22 S. W. 504 (a suit in equity); *Winn v. Lippincott Inc.* (1894) 125 Mo. 528, 28 S. W. 998; *State v. St. Louis etc. Co.* (1894) 125 Mo. 596, 28 S. W. 1074 (*dictum*); *Porter v. Woods* (1897) 138 Mo. 539, 39 S. W. 794; *Pratt v. Conway* (1899) 148 Mo. 291, 49 S. W. 1028; *Fitzgerald v. Barker* (1877) 4 Mo. App. 105 (see same case *supra*, 70 Mo. 685, and also (1884) 85 Mo. 14); *Beardslee v. Morgner* (1877) 4 Mo. App. 139; *Luthy v. Woods* (1878) 6 Mo. App. 67 (the rule stated to exist in equity); *Klein v. Isaacs* (1880) 8 Mo. App. 568; *Harvey Lumber Co. v. Herriman* (1889) 39 Mo. App. 215; *Duerre v. Reudiger* (1895) 65 Mo. App. 407, (*dictum*); *Van Meter v. Poole* (1906) 119 Mo. App. 296, 95 S. W. 960; *Bank v. Bright-Coy etc. Co.* (1909) 139 Mo. App. 110, 120 S. W. 648; *Leckie v. Bennett* (1911) 160 Mo. App. 145; 141 S. W. 706; *Gate etc. Bank v. Chick* (1913) 170 Mo. App. 343, 156 S. W. 743; *Bank v. Douglass* (1913) 178 Mo. App. 664, 161 S. W. 601 (*dictum*); *Boone etc. Co. v. Niedermeyer* (1914) 187 Mo. App. 180, 173 S. W. 54; *Miles v. Bank* (1914) 187 Mo. App. 230, 173 S. W. 713; *Shockley v. Booker* (1918) 204 S. W. 569 (*dictum*). But see (*contra* and to be disregarded) *Uhrich v. Globe Co.* (1915) 191 Mo. App. 111, 166 S. W. 345; *Bay v. Williams* (1884) 112 Ill. 91; *Lawrence v. Fox* (1859) 20 N. Y. 268 ("the doctrine of *Lawrence v. Fox*"); see *Bank v. Benoist* (1847) 10 Mo. 521; *Robbins v. Ayres*, *supra* note 4; *Amonett v. Montague* (1876) 63 Mo. 201, (same case (1881) 75 Mo. 43); compare *Moseman v. Bender* (1883) 80 Mo. 579, where the court erroneously applied the rule. In *Jones v. Miller* (1849) 12 Mo. 408, the rule was recognized, but the contract between the parties was held invalid, there being no consideration to support the defendant's promise. The early cases of *Thornton v. Smith*, *Page v. Becker*, and *Manny v. Fraser*, *supra* note 6, which are *contra*, to the foregoing line of authority must be taken as overruled. In *Mellen v. Whipple* (1854) 1 Gray (Mass.) 317, it was held that as a general rule a beneficiary could not recover on the contract. Three exceptions, however, were stated as follows: (1) where A has put money or property into the hands of B as a fund from which A's creditors are to be paid; (2) where promises have been made to the father or uncle for the benefit of a child or nephew (see *supra* note 6); (3) where a tenant assigns a lease to a defendant who

said that A is C's trustee, or that the relationship between the parties is substantially that of trustee and *cestui que trust*.[14] Again it is suggested that B in making such an agreement acted as C's agent and the latter is accordingly privileged to ratify the transaction.[15] Finally, statements are found in the opinions, to the effect that it is just and proper to entertain an action for C; that the equities are with C.[16], [17]

agrees to pay the rent and enters upon the demised premises. In the first assumed case, a recovery by the beneficiary would seem to be proper. See statements to the same effect in *State v. St. Louis etc. Co.* and *Bank v. Bright-Coy etc Co. supra*; but in each instance the statement is to be regarded as unnecessary to the decision. In the last case (mentioned in Mellen's case) as the covenant ran with the land, it would seem that the defendant would be liable in any event, and without any special agreement.

14. *Follansbee v. Johnson* (1881) 28 Minn. 311; *Urquhart v. Brayton* (1880) 12 R. I. 169: "The duty of the trustee to pay the *cestui que trust*, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration * * * * promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so if he had been made a trustee of property to be converted into cash with which to pay." *Lawrence v. Fox, supra* note 13, 20 N. Y. *l. c.* 274. In *Luthy v. Woods, supra* note 13, it was held that a contract of this nature did not create a trust: "As the plaintiff was a mere general creditor, showing no trust, there was no trust fund** and therefore no jurisdiction on the distinct ground of trust." 6 Mo. App. *l. c.* 69; the action was in equity.

15. Two of the judges in *Lawrence v. Fox, supra*, note 13, based their decision on this ground (20 N. Y. *l. c.* 275). See also *Howsman v. Trenton etc. Co.* (1893) 119 Mo. *l. c.* 309, 24 S. W. 784, where there is *dictum* to the effect that a beneficiary's right might be based on an implied agency. In several of the Missouri cases it is said that there is privity if the beneficiary "adopts" the promise made for his benefit, and occasionally it is intimated that his adoption, until the contrary be proved, will be presumed. See: *Meyer v. Lowell*; *Rogers v. Gosnell*; *Amonett v. Montague*; *Porter v. Woods*; *Beardslee v. Morgner*; *Fitzgerald v. Barker*; *Bank v. Douglas, supra* note 13. Apparently this conception of a possible adoption is the same as that of an implied agency. In New York, the theory of an implied agency has been repudiated. *Gifford v. Corrigan* (1889) 117 N. Y. 257, 22 N. E. 756.

16. "This result involved no injustice to the defendant, but simply holds him to accountability upon his understanding, according to its evident purpose and intent." *Meyer v. Lowell, supra* note 13, 44 Mo. *l. c.* 331.

17. In cases where a mortgagor grants the mortgaged premises to another, and the latter assumes the mortgage debt, the courts have developed the peculiar doctrine that the grantee becomes the principal debtor and the grantor-mortgagor his surety. It is then held that the mortgagee can look to the grantee for the payment of the mortgage debt on the "familar doctrine in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt." *Keller v. Ashford* (1890) 133 U. S. 610, 622, 33 L. Ed. 667. In the case last cited the federal Supreme Court said (p. 623): "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety

for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal." Professor Williston (op. cit. sec. 384) states that "the relief granted is merely the application towards the payment of the debt by a court of equity of the mortgagor's property, consisting of the promise running to him from the grantee of the mortgaged premises." Our Supreme Court has from time to time asserted the proposition that a grantee of mortgaged premises, assuming the mortgage debt, becomes the principal debtor and the mortgagor and prior grantees holding under the mortgagor, who have assumed the mortgage debt, becomes merely sureties. See to this effect: *Orrick v. Durham* (1883) 79 Mo. 174 (holding that where a mortgagor pays the debt assumed he is entitled to be subrogated to the rights of the mortgagee, he having as surety paid the principal's indebtedness); *Nelson v. Brown* (1897) 140 Mo. 580, 41 S. W. 960 (holding that a valid extension agreement between the grantee and mortgagee discharged the mortgagor, he being merely a surety); *Hicks v. Hamilton* (1898) 144 Mo. 495, 46 S. W. 432 (holding that a mortgagee could not recover against a grantee from one holding under the mortgagor who had *not* assumed the debt, because defendant's grantee was not the mortgagee's debtor and was not therefore in the position of a surety; but see *Crone v. Stinde, infra*; *Pratt v. Conway* (1899) 148 Mo. 291, 49 S. W. 1028 (*dictum*) *Regan v. Williams* (1904) 185 Mo. 620, 84 S. W. 959 (same case (1901) 88 Mo. App. 577) (extension granted to grantee discharges mortgagor); *Higgins v. Evans* (1905) 188 Mo. 627, 87 S. W. 973 (a grantee is bound to pay the debt to the mortgagee even though the mortgagor may have been released because of an extension granted to a former grantee); *Terry v. Groves* (1914) 258 Mo. 450, 167 S. W. 563 (*dictum*).

The various Courts of Appeals have likewise stated the same rule. See: *Commercial Bank v. Wood* (1893) 56 Mo. App. 214 (extension of time to grantee discharges the mortgagor); *Wayman v. Jones* (1894) 58 Mo. App. 313 (same facts); *American etc. Bank v. Klock* (1894) 58 Mo. App. 335 (*dictum*); *Bank v. Pettit* (1900) 85 Mo. App. 499 (*dictum*); *Smith v. Davis* (1901) 90 Mo. App. 533 (action at law by mortgagee against grantee to recover a deficiency after foreclosure); *Steele v. Johnson* (1902) 96 Mo. App. 147, 69 S. W. 1065 (extension of time to grantee discharges mortgagor); *Hoffman v. Loudon* (1902) 96 Mo. App. 185, 70 S. W. 162 (action by mortgagor); *Laumeier v. Hallock* (1903) 103 Mo. App. 116, 77 S. W. 347 (extension releases mortgagor as well as endorser of note); *Fender v. Haseltine* (1904) 106 Mo. App. 28, 79 S. W. 1018 (action by mortgagor); *Wonderly v. Giessler* (1906) 118 Mo. App. 708, 93 S. W. 1130 (*dictum*); *Priddy v. Miner's Bank* (1908) 132 Mo. App. 279, 111 S. W. 865 (*dictum*); *Gerardi v. Christie* (1910) 148 Mo. App. 75, 127 S. W. 635 (*dictum*); *Greer v. Orchard* (1913) 175 Mo. App. 494, 161 S. W. 875 (*dictum*); *Haley v. Branham* (1915) 192 Mo. App. 125, 180 S. W. 423 (*dictum*); *Hildrith v. Walker* (1916) 187 S. W. 608 (mortgagor cannot recover from grantee until he has paid the mortgagee); *Speer v. Home Bank* (1918) 200 Mo. App. 269, 206 S. W. 405 (mortgagee may proceed directly against mortgagor, in which event the relation of principal and surety exists merely between the parties to the agreement); *Dent v. Matthews* (1919) 202 Mo. App. 451, 213 S. W. 141 (*dictum*).

In *Salmon Falls Bank v. Leyser* (1893) 116 Mo. 51, 22 S. W. 504, S sold property

to B taking B's notes secured by a mortgage upon the chattels. Later B sold the goods to S who assumed the debt evidenced by the notes. It was held that S became liable to a transferee of the notes and was the principal debtor. The action was on *the contract* to pay the notes. In *Citizens Bank v. Douglas* (1913) 178 Mo. App. 664, 161 S. W. 601, D assumed C's debt to plaintiff who granted D an extension of time. It was held that D became the principal debtor and C a mere surety, and that the extension released C from his obligation to pay the debt. See also *accord* with the general principle, *Miles v. Bank* (1914) 187 Mo. App. 230, 244, 173 S. W. 713. In the following cases a grantee who assumed the mortgage debt was held liable therefor at the instance of the mortgagee upon the general ground that the contract of assumption was for the latter's benefit: *Cress v. Blodgett* (1877) 64 Mo. 449 (*dictum*); *Fitzgerald v. Barker* (1879) 70 Mo. 685 (same case (1884) 85 Mo. 13; (1888) 96 Mo. 661; (1877) 4 Mo. App. 105; (1883) 13 Mo. App. 192); *Heim v. Vogel* (1879) 69 Mo. 529; *Winn v. Lippincott Co.* (1894) 125 Mo. 528, 28 S. W. 998 (*dictum*); *Tomlinson v. Given* (1898) 144 Mo. 19, 45 S. W. 645 (*dictum*); *Crone v. Stinde* (1900) 156 Mo. 262, 55 S. W. 863, 56 S. W. 907 (reversing (1896) 68 Mo. App. 122); *Klein v. Isaacs* (1880) 8 Mo. App. 568; *McAdaras v. King* (1881) 10 Mo. App. 577; *Drake v. Bageley* (1896) 69 Mo. App. 39; *Keifer v. Shacklett* (1900) 85 Mo. App. 449; *Nixon v. Knollenberg* (1901) 92 Mo. App. 20; *Curry v. Lafon* (1908) 133 Mo. App. 163, 113 S. W. 246. See also *Beardslee v. Morgner* (1877) 4 Mo. App. 139; *Van Meter v. Poole* (1906) 119 Mo. App. 296, 95 S. W. 960; *Grace v. Gill* (1908) 136 Mo. App. 186, 116 S. W. 442. The early case of *Page v. Becker* (1862) 31 Mo. 466 and that of *Mason v. Fithian* (1865) 36 Mo. 384, which are *contra* to the rule as stated above must be taken as overruled. In *Hicks v. Hamilton, supra* (1898) 144 Mo. 495, the Court said (p. 499): "The mortgagee is declared to be entitled to enforce for his benefit all 'collateral obligations for the payment of the debt, which a person standing in the situation of a surety* * * * has received for his benefit.' As between the parties to the deed, the grantor becomes the surety, and the grantee the principal debtor. Of course no such rule could obtain, where the grantor was not, and had never become, bound for the debt." It was accordingly held in that case that the grantee of the mortgagor's grantee, the latter not having assumed the debt, could not be held liable for the debt at the instance of the mortgagee. But there were possibly other reasons for the decision. In *Crone v. Stinde* (1900) 156 Mo. 262, 55 S. W. 863, however, the Supreme Court disapproved the *Hicks* case, saying (p. 266): "It has always been held by this court that where one person for a valuable consideration makes a promise to the person from whom the consideration moves for the benefit of a third person, such third person may maintain an action in his own name against the promisor on the promise." In view of the foregoing decisions the writer ventures to say that the right of the mortgagee to hold the assuming grantee is not based upon rules peculiar to subrogation and principal and surety. In the Crone case, *supra*, the grantee's promisee was not the mortgagee's debtor, hence the latter could not be subrogated to any right that the promisee had against the grantee. In truth the only justification for permitting the creditor-beneficiary to recover is the fact that the defendant has bound himself contractually in this direction; if he has done this, what difference can it make what relation his promisee bears to the mortgagee?

The cases cited *supra* established also the following propositions: (1) that an extension of time granted to the defendant discharges all others (*i. e.* the mortgagor and prior assuming grantees) liable to pay the debt, and (2) if a mortgagor or other person liable pays the debt he is entitled to be subrogated to the mortgage security as against the assuming grantee. The cases say that these are the results which flow from the grantee's becoming the principal debtor and the others becoming sureties.

A contractual obligation can not be classified as a trust. A trust exists only in cases where one party has, or is invested with a title for the benefit of another; where there is a present "grant" of the beneficial ownership to the beneficiary, the mere legal title being in the trustee.[18] Now it is quite evident that in the first assumed case, where A receives a horse from B in return for his obligation to pay B's debt there are present none of the elements requisite to the finding of a trust. All that A receives, he is privileged to keep and use; he is merely bound to give different property, namely money, at a future date to C. There is, therefore, no justification for saying that A is C's trustee in any sense. Even in the second assumed case, that is, where A receives $500 promising to pay B's debt of a like amount there is no trust, because A does not receive the money to hold and deliver to C. There would be a trust in this case if A were under a duty to *keep the fund* which he received for the benefit of C. But, absent this attribute, the transaction is only a contract to pay C money.

It is believed that just because A is under a contract duty to pay C the same amount that he received from B, as consideration for his obligation, a court is not warranted in saying that the transaction is substantially the same as a trust. This is because there is no trust *res*, tangible, or intangible. Moreover, as the undertaking on the part of A

As to the first rule, why should not the mortgagor and others liable be discharged in the event of such an extension on equitable principles, even though the relation of principal and surety does not exist? The second proposition does not depend upon the relation of principal and surety in the least. Any one who pays the obligation of another and who is not an intermedller is entitled to be subrogated to the rights of the creditor against the defaulting debtor. See *Hoover v. Epler* (1866) 52 Pa. 522. The authorities seem to admit very generally that the relation of principal and surety at the outset exists only between the parties to the contract and does not bind the creditor-beneficiary until he "adopts" in some way or other the transaction. In other words, a mortgagee may, if he sees fit, sue the mortgagor first. But if he chooses to sue the assuming grantee first, he must recognize the mortgagor and others liable as sureties. See: cases cited *supra*, and especially *Smith v. Davis*, and *Speer v. Home Bank*. In *Conn. etc. Co. v. Mayer* (1879) 8 Mo. App. 18, defendant was the mortgagor and conveyed to A who assumed the mortgaged debt. Thereafter the mortgagee permitted A to remove a part of the mortgaged property thereby depreciating the value of the security. It was held that the defendant was nevertheless liable as a principal debtor. *Sed qu?* Compare *Regan v. Williams, supra.*

It may well be the fact that the so-called doctrine of subrogation, based upon the relationship of principal and surety had its origin in equity, but the principle is recognized now at law. Professor Williston's statement to the effect that the doctrine merely amounts to allowing the mortgagee to get at one of the mortgagor's assets in an action in equity (*supra*) should therefore be broadened. The "asset", it appears, can be reached equally well at law.

18. Perry, Trusts (6th ed.) sec. 1. See Declarations of Trusts, 27 U. of Mo. Bulletin, L. Ser. 3 *et seq.* Williston, *op. cit.* sec. 355.

is merely to pay money, the obligation of A normally would not even be specifically enforceable.

Undoubtedly if B, in exacting from A a promise to discharge his debt or duty to C, was acting for C, C could ratify the transaction, and become a party to the contract. The difficulty, in construing the arrangement in this way and permitting such a ratification, is that the facts do not seem to bear out or sustain the suggestion. B's aim in making such a contract would usually be to protect himself; to procure for his own advantage freedom from liability to suit at the instance of C. He would be seeking, in a certain sense, to have A save him harmless. It is hard to believe that under the existing conditions B paid A with his own money or property as the agent of C for the latter's protection, and not for his, B's, own personal advantage. It is for these reasons urged that, unless there is a specific stipulation authorizing C to sue A on the contract, courts are not justified in finding an implied agency and allowing C to ratify.[19]

There are some decisions holding that the agreement between A and B, in addition to binding A to discharge B's debt, also amounts to an offer extended to C to novate. Under this theory, if C accepts A's obligation, B is discharged from his, and there is a substitution of one contracting party for another. On the other hand, if C declines the benefits offered by the contract, he will be held to have no right to look to A for the satisfaction of the debt, but A's liability will continue solely to B.[20] If such a construction of the agreement is reasonable, and

19. See however, cases cited, *supra* note 15.

20. "A agrees with B, for a consideration moving from B, to pay C the debt which B owes to C.* * * * * The contract, as between A and B, is not collateral, but substitutional. But, this being so, how does C, who is not a party to it, get the right to sue A upon or by reason of it? It has been held that he gets this right directly from the contract itself, because B, in making it with A, makes it for C, if C desires to accede to it, as well as for himself, so that C has only to ratify or assent to it, which he does unequivocally by suing on it. But, in this view, if C accepts the contract, he must accept it as made; that is, as a contract by which A agrees that he, instead of B, will pay the debt which B owes C. C cannot, at the same time assent to the contract and dissent from the terms of it. Accordingly if he sues A on the contract, he must sue him instead of B, and cannot also sue B, and B is therefore released." *Wood v. Moriarty* (1887) 15 R. I. 518, 521. Placing such a construction on the contract effects some desirable results. It prevents for instance any question of liability on the defendant's part to two suits. If the creditor recognizes the defendant, this discharges at once the debtor-promisee. On the other hand, if the beneficiary refuses to recognize the defendant's assumption of the debt, he will have no rights against him at all. His rights will be against the promisee-debtor alone, and the latter will be the one entitled to sue the defendant. If the transaction is not construed as an offer to novate, it may well be that the defendant will be liable to two suits, one by the

fairly represents the intentions of the parties, it would be accurate to say that B, in making the contract, was procuring a privilege for C, in the form of an offer, of which C could avail himself. In a certain sense, under such an interpretation, C, by accepting the proposition extended to him, would be ratifying B's act, done in his behalf.

Again, however, the difficulty in finding this agency is that it is unreasonable to construe the arrangement as an offer to novate. Conceding that C should be given a right as beneficiary under the bargain, what is there in the transaction to cause C to believe that there is an implied condition to the effect that his proceeding against A will discharge B? What is there, in the nature of the transaction, to cause B reasonably to assume that C will know if he, C, does sue A, his right as a creditor of B will be lost? B is not justified in such an assumption; nor should C be held to such a condition. If it is to be the rule that C has any right against A, it should be regarded as a new and cumulative one; as one in addition to that which he already has against B, and which, if exercised, will in no wise disturb the existence of B's original obligation to him.[21]

The problem still remains of determining whether or not there are any so-called "equities", in favor of C, of such a nature as to require a court to allow him to sue on a contract. As already noted, there are statements contained in the decisions that the parties intended that C should have a right to sue and because of this there is no justice in denying him this power. Occasionally it is also said that allowing C to hold A prevents circuity of action.[22] It seems certain that if this were the real intention of the parties, C should be afforded his remedy. Con-

beneficiary, and one by the promisee. Did the defendant intend to assume a liability to this extent? It is believed that, as a rule, he did not.

21. Williston, *op. cit.* sec. 353; Corbin's Anson on Contracts 347, where the learned editor says "the beneficiary has no reason to believe that in taking advantage of the new contract he is extinguishing his previous rights." See also *Harvey v. Lumber Co.* (1890) 39 Mo. App. 214 and *Citizens Bank v. Douglas* (1913) 178 Mo. App. 664, 161 S. W. 601, where it is stated that there is no novation even after the obligation of the defendant is recognized by the beneficiary. Compare *Pratt v. Conway* (1899) 148 Mo. 291, 49 S. W. 1028; *Shepherd v. May* (1885) 115 U. S. 505, 29 L. Ed. 456.

22. "It (*i. e.* the doctrine allowing a creditor-beneficiary to sue) has been accepted here, as it most of the American States, because it is supposed to furnish a useful rule in practice, tending to simplify litigation. By following it, one action often effects the same results that two would be required to accomplish without it." *Ellis v. Harrison, supra* note 13, 104 Mo. *l. c.* 277. The same reason was advanced in *Lawrence v. Fox, supra* note 13. It is also stated in the *Ellis* case *supra* (l. c. 277) that the creditor-beneficiary is the real party in interest under the Missouri statute (now sec. 1156 R. S. Mo. 1919). But this does not necessarily result from the making

versely, if it were not, the action should not lie, even though the result of allowing it is an accidental prevention of circuity of action. There is no justice in changing a contractual obligation just because the change saves time. Moreover, allowing the action, where it was not agreed to, may result in subjecting A to two suits, where only one was intended to be possible, if the rights of B, under the contract, are fully recognized, as of course they should be.

Unless the contract expressly provides that C may sue A, there seems no reason for concluding that the intention of either of the parties was to give C such a right, and it is therefore believed that decisions denying C an action are the better ones.[23] It is not even plausible to say that B was making a gift to C of any kind. As a matter of fact, in most

of the contract. As Professor Williston has well said (*op. cit.* sec. 366): "The difficult question is whether the third person is the real party in interest. It is a question of substantive law as to the existence of rights rather than of procedure appropriate for their enforcement. * * * The provision (*i. e.* the "real party in interest statute") has served in some states to add another element of confusion."

23. See *supra* note 6 and cases there cited. The Missouri cases all admit that a beneficiary should not be allowed an action unless the parties to the contract intended to afford him such a right, yet in view of the long line of authority allowing a creditor to sue (see *supra* note 13) it must be taken as established law that in the absence of an express provision to the contrary, it will be presumed that such a right was intended to be vested in the creditor. Occasionally, but not often, an inconsistent statement is to be found in the cases. In *State v. St. Louis etc. Co.* (1894) 125 Mo. *l. c.* 617, 28 S. W. 1074, the Supreme Court said, "To entitle a third person to sue it must clearly appear that the contract was made for the benefit of such third person or persons, as one of its principal objects. A mere indirect or incidental benefit is not sufficient." In that case defendant agreed to save the promisee-debtor harmless from obligations and "to pay and surrender the same cancelled and discharged" to the promisee. It was held that this was a mere contract of indemnity and that for this reason the creditor could not sue as a beneficiary." * * these words ("pay and surrender" etc.) were subordinate to the agreement to save harmless. * * * They cannot have the effect to change the agreement from one of indemnity to a contract made for the benefit of third persons." *Id.* 619. Authority abounds to the effect that a contract to indemnify and save a debtor harmless vests no right in a creditor to sue; see for example: *City v. Blumb* (1889) 99 Mo. 357, 12 S. W. 791; *Hill v. Omaha etc. Co.* (1899) 82 Mo. App. 188; *Carpenter v. Realty Co.* (1903) 103 Mo. App. 402, 77 S. W. 1004; *Uhrich v. Globe Works* (1915) 191 Mo. App. 111, 166 S. W. 845; see also *O'Connell v. Trust Co.* (1912) 165 Mo. App. 398, 147 S. W. 841. In *Street v. Johnson* (1898) 77 Mo. App. 318, a contract was alleged whereby defendant bound himself to pay checks drawn on him by his promisee. In an action by a payee of such a check it was held that plaintiff could not recover and intimated that such a contract was not intended to be for the benefit of plaintiff. But this suggestion seems clearly out of line with the cases cited *supra* note 13. It would seem then (1) that a contract to pay the promisee's debt gives a beneficiary a right to sue; (2) that a contract to save harmless gives no such right; and (3) that a contract to pay and indemnify gives no such right. The writer ventures to suggest that in all three types of cases the purpose of the contract

cases, B's scheme was to save himself from trouble, and that alone. He asked A to pay his debt; the contract's purpose was to save him harmless. True, the performance by A will incidentally benefit C, but this fact, standing alone, should not give him a right to enforce the obligation. In such a case as that assumed most courts would hold that damages would accrue to B as soon as A failed to pay the debt, and B himself should have a right to sue at once.[24] It is not reasonable to assume that A undertook liability to suit at the instance of both B and C, but if C is permitted to sue this will be the result so far as A is concerned unless, indeed, some mechanical rule be adopted providing that, if one party sues A, the other thereafter will be precluded from so doing.[25]

Perhaps in this sort of case, if C brings an action against A and does not molest B, C's judgment against A, if satisfied, will likewise satisfy B's injury; the result under this supposition will be that B's debt will be fully paid, and he will have no grounds to fear an action against himself by C. But suppose that C remains passive for a protracted period and does not sue either party, B then should surely have a right to proceed against A; suppose that B does and his judgment goes unpaid, could C thereafter, if it seemed desirable also sue A? If he could not, what theory, consistent with the rights of a creditor-beneficiary intervenes to prevent such action?

is *identical*, and the intention is the same; that there is no intention in any of the cases to give the creditor-beneficiary a right to sue; that if the decision in *State v. St. Louis Co.*, *supra*, is correct (and it is submitted that it is) the decisions cited *supra* note 13 allowing a creditor to recover where the defendant agrees to pay the promisee's debt are wrong. The contract in the *St. Louis Co.* case merely described more fully and aptly the intention of the parties. But the intention of the parties in all cases of this class is in reality the same. "The object of such a contract must always be primarily, and generally solely, to secure an advantage to the promisee. He wishes to be relieved from liability and he exacts a promise to pay the third person only because that is a way of relieving himself." Williston, *op. cit.* sec. 361. *National Bank v. Grand Lodge* (1878) 98 U. S. 123. But see Corbin, *op. cit.* secs. 289, 295. In *Van Meter v. Poole* (1906) 119 Mo. App. 296, 95 S. W. 960, it was held that a contract to pay a promisee's debt was for the benefit of the promisee's surety, who could sue thereon. Did the promisee in making such an agreement intend to benefit his surety; if he did, did he likewise intend to vest a right to sue in his creditor? Sometimes it would seem that all a court requires to allow a creditor to sue is the fact that he is a creditor.

24. Sedgwick, Damages sec. 789 *et seq*; Williston, *op. cit.* sec. 1408; *Ham v. Hill* (1860) 29 Mo. 275; *Loosemore v. Radford* (1842) 9 M. & W. 657. But in *Hildreth v. Walker*, *supra* note 17, 187 S. W. 608, it was held that a mortgagor could not recover from his promisor until he had paid the assumed debt. This decision is not in line with the usual holding, although it has been suggested that such should be the rule. Sedgwick *op. cit.* sec. 790.

25. As to this, see *infra*, note 57 and text in connection therewith.

Again, it might happen that C will sue A and recover judgment, but the same will go unsatisfied; that C will then sue B and procure payment; should not B under these conditions, if a turn for the better occurs in A's fortunes, be free to sue A and recover for the debt, which he should not have been compelled to pay? He should have such a right; yet if the second action be entertained, A is once more subjected to two suits, whereas it seems safe to say he assumed only one liability. The matter is not so simple as it appears, and it is not to be disposed of by an offhand statement that C's action will prevent circuity of action, or that there are broad equities of one kind of another in favor of C.

There is still another type of case where it appears that there may be two suits against a defendant, only one being intended. Suppose that M holds land subject to a mortgage in favor of X for $10,000. Suppose that for a valid and adequate consideration N agrees with M to discharge this mortgage debt and that the purpose of this agreement, known to N, is to enable M to carry out a contract to convey the premises to Z free and clear. In such a case if N breaches the agreement, under the prevailing rule, X can sue N and recover the amount of the mortgage debt. But suppose that Z refuses to perform and the land is not saleable in the market for the price which M was to get under his contract of sale; in such a case it would be only just to allow M to sue N and recover the amount of profits which he would have received, had he been able to carry out his bargain, which N alone has prevented. Yet it is submitted that N never intended a dual liability of this kind, and forcing him to respond to two suits is unjust and unwarranted. It would be correct to say in all cases where a promisee seeks, in addition to the discharge of his obligation to the beneficiary, a further advantage to himself, that two suits may be inevitable, contrary to the intended obligation of the promisor, if the promisee's rights are to be fully protected. For this reason, allowing a beneficiary to sue in this class of cases is especially objectionable.

Professor Williston in his very excellent treatise on the law of contracts, while he does not approve the doctrine of *Lawrence v. Fox*[26] which allows a creditor-beneficiary to sue at law and recover the amount of the assumed debt,[27] at the same time submits that such a party should be allowed to sue in equity, both the promisor and the promisee being made parties defendant.[28] The learned author would have the courts proceed on the theory that a promisor's promise to pay his promisee's debt is an increase in the assets of the promisee, which the

26. (1859) 20 N. Y. 268.
27. Williston, *op. cit.* sec. 361.
28. Williston, *op. cit.* sec. 363.

law should be able to reach and apply to the payment of the creditor-beneficiary's claim. It is urged that as this "asset" of the promisee-debtor can not be reached through garnishment the remedy afforded at law is inadequate, and equity should therefore intervene.[29] It is also said that as "the promisee is a party to the litigation, his right will be concluded by such a decree (*i. e.* by one in favor of, or against the creditor) and the promisor will not be subjected to the hardship of the possibility of two actions against him by virtue of one promise."[30]

To sustain the foregoing suggestions, Professor Williston intimates that the promisor's promise is an "asset" which the creditor-beneficiary alone may avail himself of as the promise is to pay this particular debt.[31] If this suggestion were true, there might be some justification for permitting such a beneficiary to sue in equity, his action being somewhat analogous to "equitable execution." But the writer ventures to question the soundness of Professor Williston's premise. This "asset" is not deemed to be an asset peculiarly applicable to the payment of the creditor-beneficiary's claim. There is considerable authority to the effect that the breach of the agreement entitles the promisee to recover the full amount of the debt even though he has not paid the creditor-beneficiary.[32] Surely such a claim when realized by the promisee would constitute general assets, and could not be appropriated to the payment of the beneficiary's claim to the exclusion of all others. The fact that prior to a breach of the contract the promisor was obligated to pay money to the beneficiary, and not to render any other performance to the promisee does not appear to be material, because, prior to breach,

29. Williston, *op. cit.* sec. 362.

30. Williston, *op. cit.* sec. 362. Suppose that the beneficiary sues and the promisee also claims and is entitled to damages; will these damages also be collectible in this action? There would seem to be no real objection to compelling the promisee to assert and collect for any injury suffered at this time or else be precluded from ever thereafter asserting such a right.

31. "If a solvent promisor has agreed to discharge a debt of the promisee to the amount of a thousand dollars, it is as real an increase of the assets of the promisee as a promise to pay the latter directly that sum, or indeed as the actual payment thereof." Williston, *op. cit.* sec. 362. "It is, then, a peculiarity in regard to the application of such a promise to the debt of the promisee, that the promise is an asset of which not every creditor can take advantage * * * certainly so long as a promise to pay A's debt to B is not broken, it cannot be made available to any creditor except B, since the promisor cannot be required to do anything other than what he promised." *Id.* sec. 363. But concealing the learned author's statement, prior to breach the promisor is not liable to any one. After breach he is liable to A; his failure to pay B has damaged A; is B peculiarly entitled to those damages? It is thought that B is not.

32. See *supra* note 24.

neither party would have a right to sue the promisor, and after breach, as already noted, damages accrue to the promisee.[33]

As to Professor Williston's argument that the creditor-beneficiary should be entitled to sue in equity because no remedy exists under the usual garnishment statute, it would seem that the St. Louis Court of Appeals has well answered that by saying, "Equity does not supplement the statutory law, or where from motives of policy the Legislature have denied a remedy, afford what has thus been denied."[34]

II

Suppose that A, for a good and sufficient consideration, moving from B, agrees with B to render a performance to C, which will not materially benefit B, and that such performance will not constitute a discharge of any *duty* owing by B to C. It would seem that under this state of facts, C ought to be able to sue A, in the event of a breach, in an action sounding in *assumpsit* and recover. There is authority so holding, and it is considered sound.[35] If a careful analysis of the transaction be made, it will be found that B's only reasonable purpose in making such

33. Professor Williston seems to recognize this suggested difficulty for he says (*op. cit.* sec. 363): "It may also be urged that after breach of his contract the promisor, even though B (the creditor-beneficiary) has not been paid, a right of action for damages arises in favor of the promisee of which he could avail himself for his own advantage; and, of which therefore, any creditor should be able to avail himself."

34. *Luthy v. Woods* (1878) 6 Mo. App. *l. c.* 70. But in *Pendleton v. Perkins* (1872) 49 Mo. 565, it was held that a creditor could bring his bill against an absconding debtor, whose property could not be gotten at under the garnishment statute. It is suggested in the *Luthy* case that a creditor-beneficiary should not be able to proceed in equity in any event unless he had first recovered his judgment in a legal action; but see same case (1876) 1 Mo. App. 167, where the court decided *contra*. The usual rule is that a creditor must so reduce his claim. See *Coleman v. Hagey* (1913) 252 Mo. 102, 158 S. W. 829. The reason usually advanced to support the rule is that the claim which it is sought to have satisfied should be litigated at law; the defendant is entitled to a trial at law; see *Taylor v. Bowker* (1884) 111 U. S. 110, 28 L. Ed. 368 Compare *Merchants etc. Bank v. Paine* (1882) 13 R. I. 592. If the theory of the creditor-beneficiary's right is as suggested by Professor Williston, why should he not be required first to obtain his judgment at law, before pursuing his remedy in equity in pursuit of his debtor's asset?

35. *Heim v. Vogel* (1879) 69 Mo. 529; *Crone v. Stinde* (1900) 156 Mo. 262, 55 S. W. 863, (reversing same case (1896) 68 Mo. App. 122; and *Hicks v. Hamilton* (1898) 144 Mo. 495, 46 S. W. 432); *Barboro v. Occidental Grove* (1877) 4 Mo. App. 429; *Lampert v. Laclede etc. Co.* (1883) 14 Mo. App. 376; *Scheele v. Bank* (1906) 120 Mo. App. 611, 97 S. W. 621; *Howard v. Hardy* (1907) 128 Mo. App. 349; 107 S. W. 466; *Fellows v. Kreutz* (1915) 189 Mo. App. 547, 176 S. W. 1080.

The case under review would seem to be in *accord* with the foregoing authorities and is believed to be sound. Compare (*accord* in principle) *Board v. Woods* (1883) 77 Mo. 197; *Snider v. Adams etc. Co.* (1876) 63 Mo. 376; *State ex rel. v. Laclede etc.*

a bargain must have been to benefit *not himself* but C. If A were to break the agreement, what loss could B show that he had suffered? Nothing was to come to him, measurable in dollars and cents, through performance by A. In fact, if B were to sue A for violating his agreement, it is not perceived how he could recover more than nominal damages.[36] For these reasons, neither party to the contract should be heard to say that it was not made to benefit C, and the latter, upon principles heretofore discussed,[37] should be allowed to sue in contract.

Strange as it may seem, courts have been reluctant to allow a "gift beneficiary" an action against the promisor. It has been said that no beneficiary may sue on a contract unless the performance undertaken to be rendered was to discharge a duty running from the promisee to the beneficiary; that the debtor-creditor relationship between the promisee

Co. (1890) 102 Mo. 472, 14 S. W. 974; *City v. Howard* (1899) 149 Mo. 504, 51 S. W. 94. In *Crone v. Stinde, supra*, the Court said (156 Mo. *l. c.* 269): "Nor do we think an action can not be maintained by a person for whose benefit a contract is made by others upon a valuable consideration, although he is not a party thereto, provided he adopts it. The consideration passing between the two contracting parties, by which one of them promises to pay a third, is just as available to the beneficiary as if he himself had paid the consideration."

In *Markel v. Western Union Co.* (1885) 19 Mo. App. 80, a sendee of a telegram was denied a right to recover upon the contract between the defendant and the sender to deliver the telegram. In such a case the contract is for the benefit of the sender (or usually is) and there is no debtor-creditor relationship between the defendant's promisee and the sendee. But if a creditor-beneficiary may recover (which he can do) why can not a sendee of the telegram? There is authority *contra* which at least is consistent with the creditor-beneficiary cases; see Williston, *op. cit.* sec. 376 and cases cited. In *St. Louis etc. Co. v. Mo. Pac. Co.* (1889) 35 Mo. App. 272, defendant railroad agreed with a shipper to transfer goods to plaintiff's line. It was held that plaintiff could not recover. Performance again benefited the promisee. In *Bissell v. Roden* (1863) 34 Mo. 63, plaintiff employed B and C to build a house, and B and C employed defendant to do the plumbing work. It was held that plaintiff could not recover; it was said that the contract was for the benefit of B. and C. Perhaps in this case nothing was to be rendered to plaintiff, and performance benefited the promisee; otherwise the only distinction between this case and the creditor-beneficiary cases is that there was no debtor-creditor relationship. It should be noted that in all jurisdictions a beneficiary under an insurance policy may sue; Williston, *op. cit.* sec. 369. Such a contract best illustrates the particular transaction under discussion. Yet, as Professor Williston points out the courts have paid little attention to this controlling fact.

36. Williston, *op. cit.* sec. 357. Of course if the promisee sues as a trustee under R. S. Mo. 1919 sec. 1156, he will recover to the amount of the loss occasioned the beneficiary, but for the benefit of the latter; see *supra* note 6.

37. See *supra* note 12 and text in connection therewith; *Crone v. Stinde, supra* note 35.

and beneficiary is essential to the latter's right to sue.[38] It is rather difficult to get at the bottom of this notion. Perhaps the idea is to be explained on the ground that an action by a creditor-beneficiary was usually first recognized, and the theory of the beneficiary's rights first formulated in connection with contracts where the debtor-creditor relationship existed. Sometimes it is said that without this relationship there is no privity between the beneficiary and the promisee.[39] But after

38. Probably the case most often cited to sustain this view is that of *Vrooman v. Turner* (1877) 69 N. Y. 280, 25 Am. Rep. 95; there a defendant-grantee assumed a mortgage debt, his grantor not being liable to pay the same. It was held that the mortgagee could not recover because there was no debtor-creditor relationship between the promisee and defendant. Said the court (p. 285): "* * * there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." Again the court said (p. 285): "* * * in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." This proposition has had a marked influence upon the Missouri cases; see, for example, *Crone v. Stinde, supra* note 35, 68 Mo. App. 122, 55 S. W. 863, holding with the *Vrooman* case. But *Crone's* case was overruled by the Supreme Court (*supra* note 35). It is to be hoped that the case under review will end for all time the contention that a beneficiary must be a creditor of the promisee in order to sue. At various times the Missouri courts have justified a suit by a beneficiary who was not a creditor on the ground that the promisee owed the former a moral duty. The courts have seemed to feel that some kind of a duty "moral", or otherwise, is essential to cure the defect of "lack of privity", (whatever that term may mean in this connection). See: *City v. Von Phul* (1895) 133 Mo. 561, 34 S. W. 843; *Devers v. Howard* (1898) 144 Mo. 671, 46 S. W. 625; *Kansas City v. Schroeder* (1906) 196 Mo. 281, 93 S. W. 405; *Glencoe etc. Co. v. Wind* (1900) 86 Mo. App. 163: *Buffalo etc. Co. v. Culien etc. Co.* (1904) 105 Mo. App. 484, 79 S. W. 1024. In the following cases a beneficiary was denied a right to recover because there was no debtor-creditor relationship between him and the promisee; *K. C. etc. Co. v. Thompson* (1894) 120 Mo. 218, 25 S. W. 522 (but there were other controlling reasons for the decision); *Armstrong v. School District* (1887) 28 Mo. App. 169; *Harberg v. Arnold* (1898) 78 Mo. App. 237. Compare *Street v. Johnson* (1898) 77 Mo. App. 318. In *Phoenix etc. Co. v. Trenton etc. Co.* (1890) 42 Mo. App. 118, and *Howsmon v. Trenton etc. Co.* (1893) 119 Mo. 304, 24 S. W. 784, defendant agreed with a city to keep an adequate supply of water for putting out fires; it was held in each case that a property owner whose property was destroyed by fire because of an inadequate water supply could not hold the defendant. The court in each instance said that the city-promisee owed no duty to owners in this direction. See Corbin, Liability of Water Companies, 19 Yale L. J. 425. The cases are generally in *accord*. Professor Costigan says (Cases, Contracts 621 n.): "The courts seem to fear, unnecessarily, that if they allow a recovery, they will be turning water companies into fire insurance companies. That fear undoubtedly has played its part in causing the great majority of courts to decide against a recovery by the individual citizen and property owner." It is submitted that as a matter of principle, Professor Costigan is correct; the property owner is a real beneficiary and should recover, all matters of policy aside.

39. "It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty, legal or equitable (does

all, "privity of contract" is nothing but a phrase, when used in discussing this type of contract and a beneficiary's rights thereunder. All that it should mean is that the law is willing to allow a person, who is intended to have a contract right, such a right, even though he is not a party to the agreement whence the right sprang. As such an intention must be present in this class of cases (otherwise, the contract would serve no useful purpose) privity must be present. Again it is said that no beneficiary may sue unless it is clear that he was intended to have such a right.[40] This, of course, is true, but the contention, in reality, is nothing but the same argument over again expressed in a different way. Probably, the best explanation of this rather extraordinary limitation upon the rule is the fact that there has existed (and rightly so[41]) considerable dissatisfaction with, and doubt as to the soundness of the rule permitted a creditor-beneficiary to sue for a breach of the agreement, and because of this, the courts have been loath to extend the doctrine to other cases, where as a matter of fact, its application would be entirely unobjectionable.[42]

III

Conceding that a contract is of the nature to entitle a beneficiary to sue thereon, under the authorities, it must not be forgotten that his rights are derivative, just as much so as if he were the assignee suing in the right of the promisee. Unless, therefore, the contract between the parties is valid, he will not be entitled to sue thereon; all legal requsites to the existence of an enforceable contractual obligation must be present. There would be no propriety in permitting a beneficiary to sue unless he can show that the defendant-promisor should be bound upon principles of contract law. He must show that the promisee procured for him a valid contractual obligation, and not merely a promise subject to some legal defense.[43] The possible fact that a beneficiary may have known of the promise for his benefit, and have relied thereon to his detriment,

"equitable" mean "moral"?) which would give him a just claim." *City v. Von Phul*, *supra* note 38, 133 Mo. *l. c.* 565. See *supra* note 38.

40. See cases cited *supra*, note 38, especially *Vrooman v. Turner*.

41. See *supra*, text following note 13.

42. In *Vrooman v. Turner*, *supra* note 38, th e court said (69 N. Y. *l. c.* 285, 25 Am. Rep. 195) "The courts are not inclined to extend the doctrine of *Lawrence v. Fox* (*supra* note 13) to cases not clearly within the principle of that decision."

43. *Raithel v. Smith* (1878) 68 Mo. 258; *Saunders v. McClintock* (1891) 46 Mo. App. 216; *American etc. Bank v. Klock* (1894) 58 Mo. App. 335; *Davis v. Dunn* (1906) 121 Mo. App. 490, 97 S. W. 226; *Frase v. Lee* (1910) 152 Mo. App. 562, 134 S. W. 10; *Llewellyn v. Butler* (1915) 186 Mo. App. 525, 172 S. W. 413; *Johnson v. Maier* (1916) 194 Mo. App. 169, 187 S. W. 143; *Episcopal Mission v. Brown* (1894) 158 U. S. 222, 39 L. Ed. 960; *Arnold v. Nichols* (1876) 64 N. Y. 117; Williston, *op. cit.*

believing that the defendant was bound to perform should make no difference, and his action nevertheless should be subject to all the usually prevailing defenses in an action by a promisee against his promisor.[44]

sec. 394. Compare *Jones v. Miller* (1849) 12 Mo. 408; *Ellis v. Harrison* (1891) 104 Mo. 270, 16 S. W. 198 (*dictum*); *Gate Bank v. Chick* (1913) 170 Mo. App. 343, 156 S. W. 743. In *School District v. Livers* (1898) 147 Mo. 580, 49 S. W. 507, defendant was surety on a contractor's bond; the contractor agreed to pay all materialmen, and failed to do so. Plaintiff was a materialman and was not paid and sued defendant. Defendant's bond stated that it was for the protection of parties furnishing material. Defendant pleaded and proved that his promisee had breached the agreement materially, but the court allowed plaintiff to recover, holding that defendant made a separate agreement with plaintiff, promising him in effect to pay if the contractor failed to pay. Unless there were two contracts (and this seems more than doubtful) the decision cannot be sustained.

In *Crone v. Stinde, supra*, (1896) 68 Mo. App. 122, note 35, defendant assumed a mortgage debt, his promisee not being bound to pay the same. The court held that the creditor could recover, but that his damages would be merely nominal because his right was derivative, and because the promisee (from whom his right was derived) could recover only nominal damages. This decision (overruled by the Supreme Court, *supra* note 35, 156 Mo. 262) shows an entire misapprehension of the meaning of the rule that a beneficiary's rights are derivative. All that the proposition means is that unless the defendant is *contractually* bound to perform, the beneficiary may not sue. The right comes from the contract *between the defendant and his promisee*, and is derived from that. It does not follow that because there is a good contract right thus derived that the beneficiary's right is identical in amount with that of the promisee. If A pays B $10 to deliver a watch to C, C has a valid power to sue B; he derives this right from the contract made by B with A. His damages are the value of the watch. A's rights are very different. Probably he should recover nothing, because he intended to get no value from B's performance. At most, he should get only nominal damages for B's breach. It is not correct to say that because C's rights are derived from the A-B contract, that C's remedy is confined to recovering merely the amount that A could recover. The decision in *Crone's* case, *supra*, by the Court of Appeals is not to be regarded as sound, or as representing the law.

44. Suppose that the debt assumed by a defendant is evidenced by a negotiable instrument and comes into the hands of a holder in due course who is the plaintiff beneficiary; should such a holder be able to hold the defendant regardless of whether or not the latter has a defense against his promisee which would defeat a recovery by the promisee on the contract of assumption? This question was answered in the affirmative in *Fitzgerald v. Barker* (1888) 96 Mo. 661, 10 S. W. 45. But in that case plaintiff at the time that he purchased the assumed note knew of the assumption by defendant. In *American etc. Bank v. Klock* (1894) 58 Mo. App. 335, 343, the Kansas City Court of Appeals said: "But we are much disinclined to say that such a promise (*i. e.* to pay a debt) possesses the negotiable qualities, incidents and attributes which pertain to the note to which it relates. The promisor who thus assumes the payment of a note * * * is in no worse position when sued by the third party for whose benefit the promise is made than if he had been sued by the grantor (*i. e.* the promisee) in the deed. In the absence of an estoppel, such third party in attempting to enforce the promise * * is in no better position than the original party, since his right is derivative

The perplexing question remains as to the point of time at which a beneficiary acquires his right under a contract made for his benefit. In the case of a gift beneficiary, the right should be regarded as vested as soon as the agreement is made, subject only to the beneficiary's disclaimer, which of course would preclude him from asserting any powers or privileges.[45] So far as the parties to the agreement are concerned this seems to be their intention; the undertaking exacted from the promisor is to confer a benefit on the beneficiary, and the obligation to perform is fixed at that time. What objection can there be to holding that a gift of the obligation is then consummated, and acceptance thereof (as in other like cases[46]) by the beneficiary will be presumed until the contrary is shown?

Turning to the cases where the beneficiary is the creditor of the promisee and the agreement is to discharge the promisee's obligation, there should be no reason for applying a different rule than in the case where the beneficiary is the promisee's donee; his right should be considered as vested as soon as the agreement is completed between the parties, and his assent to privileges thereunder should likewise be presumed.[47] The possible justification for permitting such a beneficiary to

and he stands in the shoes of the promisee. * * * * * * By an examination of *Fitzgerald v. Barker* * * * it will be noticed that the note assumed was purchased by the plaintiff in that case after the deed reciting the assumption of the note was filed for record. Presumably the purchase was made with a knowledge of its having been assumed * * * and on the faith thereof." See also *Saunders v. McClintock* (1891) 46 Mo. App. 216, 226, denying negotiability to the contract of assumption in the absence of an estoppel. It is urged that defendant ought to be free to set up any defense against the beneficiary that he would be free to set up against his promisee in the absence of an express or implied representation to the effect that he is absolutely bound, on the faith of which the beneficiary purchases the note. The mere fact that the beneficiary knows of the agreement at the time that he purchases the negotiable instrument should not give him any superior rights against the defendant. He is not buying the defendant's promise and is not a *bona fide purchaser* thereof in any sense; if the promise is binding on the defendant then he may avail himself thereof, but not otherwise. The decision in *Fitzgerald v. Barker, supra*, is unfortunate and an illogical extension of the doctrine allowing a creditor-beneficiary a right to sue.

45. *Central Bank v. Hume* (1888) 128 U. S. 195; *Henderson v. McDonald* (1882) 84 Ind. 149. *Contra*, holding the contract rescindable until acted upon the by beneficiary, *Peoples Bank v. Weidinger* (1906) 73 N. J. L. 433, 64 Atl. 179.

46. See Williston, *op. cit.* sec. 396, and cases cited. As Professor Williston suggests, "The question is analogous to that arising upon a gift of property or the creation of a trust for the benefit of another. As a gift is a pure benefit to the donee, there seems no reason why his assent should not be presumed, unless and until he expresses dissent."

47. "It is a presumption of law that when a promise is made for the benefit of a third person he accepts it, and to overthrow this presumption a dissent must be shown." *Rogers v. Gosnell* (1875) 58 Mo. 589, 591. See also *Klein v. Isaacs* (1889) 8

sue is because the law finds that the parties to the contract intended to give him such power, or because (which amounts to the same thing) courts will not hear the defendant-promisor say that he did not assume such an obligation, thereby establishing a so-called "privity" of contract.[48] If such be the nature of the beneficiary's rights it is not perceived why the power to sue should not be recognized as vesting at once upon the completion of the transaction. Of course if the creditor-beneficiary's right to sue is predicated upon an agency,[49] or upon the acceptance of an offer to novate,[50] his right would not be complete until he recognized what had been done for him, either by ratifying the act done in his behalf, or by accepting the offer extended to him. It would seem that bringing an action against a defendant-promisor would accomplish either of these ends, and that also giving notice of assent to the arrangement would be equally effective.

The matter above discussed becomes of importance, and is dealt with in cases where the parties to the agreement have either attempted its recission, or to release the promisor-defendant from his obligation, thereby, in each instance, depriving the beneficiary of his right to sue. As already noted, some cases (dealing with both types of beneficiaries) hold the right vested as soon as the contract is completed,[51] and these decisions are considered sound. Yet there is no unanimity of decision; authority can be found which holds that a beneficiary's rights are destructible before he knows of the contract;[52] others hold that he must know and assent to the agreement;[53] still other cases hold that he must change his position, as if the contract were the basis for an estoppel, it

Mo. App. 568. In *Amonett v. Montague* (1881) 75 Mo. 43, there is *dictum* that a creditor-beneficiary's right is destructible until he has assented thereto. See *accord* with the suggestion in the text: *Bay v. Williams* (1884) 112 Ill. 91; *Tweeddale v. Tweeddale* (1903) 116 Wis. 517, 93 N. W. 440.

48. As already intimated, there is not in this class of case any *real* intention to benefit the creditor-beneficiary. See *supra* note 13 and text in connection therewith. "But where a debt already exists from one person to another, a promise by a third person to pay such a debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue." *National Bank v. Grand Lodge* (1878) 98 U. S. 123, 124, 25 L. Ed. 75.

49. See *supra*, note 15 and text in connection therewith.

50. See *supra*, note 20 and text in connection therewith. *Wood v. Moriarty* (1887) 15 R. I. 518; see also, *Bohanon v. Pope* (1856) 42 Me. 93.

51. See *supra* notes 45 and 47.

52. *Hill v. Hoeldtke* (1912) 104 Tex. 594, 142 S. W. 871.

53. *Gifford v. Corrigan* (1889) 117 N. Y. 257, 22 N. E. 756.

becoming effective as such when detriment to the beneficiary is shown.[54] It is impossible to reconcile all the various holdings. The truth is that the courts in dealing with this phase of the situation have failed to keep in mind the nature of the contract, and the basis on which the beneficiary's rights have been developed and recognized.[54a]

IV

Whenever a beneficiary is given a right to sue a defendant-promisor it becomes necessary to determine whether or not the latter is liable also to his promisee. If the beneficiary may sue, may the promisee also have this privilege? In the case of a donee-beneficiary, there is really no reason for allowing the promisee to recover for a breach of the agreement. As heretofore suggested, if he were granted such a right, his recovery should be only nominal, because he does not appear to have intended to procure any benefit for himself.[55] The correct rule, therefore,

54. *Crowell v. Currier* (1876) 27 N. J. Eq. 152. "But in *Crowell v. Currier* * * it was held that a rescission was permissable because the third party had not altered his position, the court apparently requiring something like an estoppel to prevent a rescission. * * *" 1 Williston, Cases on Contracts (1st ed.) 410 n. *Ferris v. Water Co.* (1881) 16 Nev. 44.

54a. Professor Williston (Williston, Contracts sec. 397) urges that where the contract is to pay the promisee's debt, due the beneficiary, the parties to the agreement ought to be free to rescind the same unless the promisee is insolvent and the promisee receives an inadequate consideration for releasing the promisor. "The promisor to the debtor to pay the debt is a valuable right belonging to the debtor. Like his other property the debtor has no right to give it away if he thereby deprives himself of sufficient means to pay his debt. Even though insolvent, however, he has a right to change the form of his assets. Consequently to a rescission or release for adquate consideration paid to the debtor, the creditor should never have a right to object." To sustain his suggestion, Professor Williston cites three cases (*Trustees v. Anderson* (1879) 30 N. J. Eq. 366; *Young v. Trustees* (1879) 31 N. J. Eq. 290; and *Willard v. Worsham* (1882) 76 Va. 392.), each holding that a mortgagor can release a party who has assumed the mortgage debt only if he is solvent. Most of the cases, however, do not regard the beneficiary's right as that of a creditor "attaching" upon equitable principles his debtor's debt. The right is regarded, for the most part as a *substantive right growing* out of the contract, just as much as if the *beneficiary were a party thereto.* Moreover, it is believed that there are serious obstacles and practical objections in the way of the application of Professor Williston's theory; see *supra* note 26, and text in connection therewith.

55. *Levet v. Hawes* (1599) Cro. Eliz. 619; Williston, Contracts sec. 390. Professor Corbin (*op. cit.* p. 351) says: "The promisee has paid the consideration and the law should vindicate his right that performance shall take place, even though the damage to the plaintiff is nominal." *Sed qu?* If he has any right (*i. e.* power to sue) it should be vindicated. But did the parties to the bargain intend to vest any right in this regard in the promisee? Performance was not for him, but the beneficiary. The party whose right is to be vindicated is the beneficiary. It is the latter's concern whether or not the promisor shall perform; he may enforce or forgive as he sees fit.

in this type of case is that the beneficiary alone may sue; he is the sole party interested in the performance of the bargain, and he alone should therefore be afforded redress.

In cases, however, where the beneficiary is a creditor and the defendant has assumed an obligation running to him from the promisee, the agreement is for the benefit of the latter as well as the beneficiary, and the beneficiary can not be regarded as the party *solely* interested in performance by the defendant. With very few exceptions,[56] the courts have recognized this fact, and have to a more or less degree afforded the promisee a right to sue, holding that either the promisee or beneficiary may sue, but both may not.[57] Under this line of decisions, apparently a race of diligence is staged; if the beneficiary sues first, the promisee may not thereafter, and *vice versa*. Obviously such a rule is purely mechanical, and appears to be a means adopted by some courts to circumvent the improper results that will be reached by carrying the doctrine, which affords a credit-beneficiary privileges under the contract, to its logical conclusion. If the promisor really did agree to subject himself to a suit by the beneficiary, why not the latter sue in spite of the fact that the promisee has already brought an action on the same contract? It is surmised that two suits are not allowed because the courts are conscious of the fact that only one liability was agreed to.[58]

It should also be noted in this connection that wherever the rule is that either the promisee or the beneficiary may sue the promisor-defendant, but not both, if the promisee sues first he thereby *destroys* the beneficiary's right to do likewise. Yet the proposition is that a beneficiary's right, once vested (and it may vest before suit is brought) is indestructible.[59] This inconsistency, however, is inevitable and is due to the incorrect decision in the first instance, which affords the beneficiary any powers where actually none were intended to be given to him.

If the theory of a beneficiary's right is that it results from his acceptance of an offer to novate,[60] there is usually no possibility of a

56. See *Burbank v. Gould* (1838) 15 Me. 118 and *Dye v. Mann* (1862) 10 Mich. 291, holding that a creditor-beneficiary may not recover from the promisor.

57. *Rogers v. Gosnell* (1873) 51 Mo. 466 (*dictum*); *Snider v. Adams etc. Co.* (1883) 77 Mo. 523 (*dictum*); *Anthony v. German etc. Co.* (1891) 48 Mo. App. 65 (*dictum*); Williston, Contracts sec. 392 and cases cited.

58. See *National Bank v. Grand Lodge, supra* note 48.

59. This result is pointed out by Professor Costigan. Costigan, Cases on Contracts, 643 n.

60. See *Wood v. Moriarty, supra* note 50.

double liability being imposed upon the promisor.[61] Under such an interpretation of the contract, if the beneficiary sues the defendant, the promisee is released from his obligation, and thus not damaged. On the other hand, if the beneficiary sues the debtor, he rejects the offer to novate, and the defendant will be liable only to his promisee. Such a construction of the transaction, while it may be forced and artificial, has this desirable result, and is for this reason perhaps to be commended.

It will sometimes happen that a creditor-beneficiary will desire to sue both the promisor and the promisee-debtor. Absent any theory of novation,[62] there appears to be no objection to his so doing. His right, if he is conceded any against the promisor, should be regarded as one in addition to his original power to sue the debtor, and not as a privilege in the alternative.[63]

V

What are the limits placed around the doctrine allowing a party benefited by the performance of a contract to sue for a breach? A plaintiff should show more than the fact that performance will be to his advantage to entitle him to an action, and courts for the most part have so held. But the actual decisions, while conceding this proposition, have established for the solution of this difficult problem no logical test, which has been consistently adhered to and followed. For example, as already indicated, at one time in Missouri, as well as in some other jurisdictions,[64] it was held that a beneficiary could not sue unless he was a creditor-beneficiary, and the defendant had assumed his promisee's debt. Such a decision obviously imposed an artificial limitation upon the rule, and denied many a beneficiary a right, when he was actually

61. But suppose that the contract contemplates an additional benefit to the promisee besides the discharge of his indebtedness to the beneficiary; in such a case the promisee could show damage to himself even though the beneficiary has accepted the offer to novate and by so doing discharged the promisee from his original indebtedness. See *supra* text following note 25.

62. If the contract amounts to an offer to novate, a suit against the promisee-debtor is a rejection of the promisor's offer; on the other hand, an action against the promisor discharges the promisee from his original obligation. See *supra* note 60.

63. In *Leckie v. Bennett* (1911) 160 Mo. App. 145, 141 S. W. 706, there is *dictum* that a beneficiary's right against the promisor is cumulative; that he may sue both the debtor and the promisor. The case repudiates the proposition that a contract to assume a debt is an offer to novate. But there is authority that a beneficiary has merely an election as to which party he will hold, and that he cannot hold both. See Williston, Contracts sec. 393. It seems needless to add that, where a beneficiary is allowed an action against both the debtor and the promisor, he may obtain but on satisfaction of the debt.

64. See *supra* note 38 and text in connection therewith.

intended to have such.[65] The courts have usually recognized this fact and such a relationship between the parties is not now usually insisted upon as a condition to the beneficiary's right to sue.[66]

The cases as a rule require at least the contract to call for the rendering of performance to the beneficiary. Something must be done for or delivered to the latter.[67] But even this rule has not been consistently applied, and courts have refused a beneficiary relief in a considerable number of cases where it was agreed to render performance to the latter.[68] As a matter of fact, it seems impossible to say, from a study of the cases, upon what general principles a beneficiary's rights are to be tested. If we are fortunate enough to have a case on "all fours" with one previously decided (as in the creditor-beneficiary cases), our path may be safe, but if no such transaction is presented, the outcome is uncertain. The courts sometimes say that it all depends upon the intention of the parties to the agreement,[69] but enough has been heretofore noted to show that this view has not always been followed. Too often have plaintiffs been allowed to sue as beneficiaries where nothing points to such an intention on the part of the contracting parties.[70]

As a matter of principle, the suggestion is ventured that no beneficiary should be afforded a right to sue on the contract (unless such a privilege is expressly stipulated for) if its breach will cause real (as

65. See *supra* note 38.

66. See *supra* note 38; as there noted, in many a case the courts have struggled to find a "moral" duty upon which to predicate a beneficiary's right.

67. Professor Corbin (*op. cit.* p. 344) says that "incidental" and "unintended" beneficiaries "are persons not intended by the contracting parties to have new rights, and not named as beneficiaries or even as the persons to whom payment is to be made or other performance given." Perhaps the leading case on this point is *Durnherr v. Rau* (1892) 135 N. Y. 219, 32 N. E. 49. There, defendant promised plaintiff's husband to discharge a mortgage upon land in which plaintiff had a right of dower. Plaintiff was not bound to pay the morgtgage. It was held that plaintiff was an "incidental beneficiary." Professor Costigan considers the decision wrong (Costigan Cases on Contracts 624 n.) The learned author contends that the wife was entitled to exoneration by the payment of the debt and that for this reason the defendant's promise was exacted for plaintiff's benefit. See also: *Cragin v. Lovell* (1883) 109 U. S. 194, 27 L. Ed. 903; *New Orleans etc. Ass'n v. Magnier* (1861) 16 La. Ann. 338. See also *Lewis v. Brookdale etc. Co.* (1894) 124 Mo. 672, 28 S. W. 324.

68. See for example: *Markel v. Western Union, St. Louis etc. Co. v. Mo. Pac. Co., supra* note 35, and the so-called water company cases discussed *supra*, note 38.

69. *Beattie v. Gerardi* (1907) 208 Mo. 89, 106 S. W. 29 (same case 166 Mo. 142, 65 S. W. 1035); *O'Connell v. Mercantile Trust Co.* (1912) 165 Mo. App. 398, 147 S. W. 841; *Uhrich v. Globe etc. Co.* (1915) 191 Mo. App. 111, 166 S. W. 845.

70. The creditor-beneficiary's right to sue is the best example of such a right. See also *Van Meter v. Poole, supra* note 23, 119 Mo. App. 296, 95 S. W. 96, a case certainly of questionable authority.

distinguished from nominal) damage to the promisee. If such is the result of the defendant's violation of the bargain, it is only reasonable to believe that the contract was made for the promisee's own benefit. That is the function which such a contract is designed to perform. There is no reason when performance of a contract can accomplish this purpose for assuming that it is entered into to accomplish some other and different purpose, just because the defendant's promised act is going to benefit another more or less directly. On the other hand, if the defendant's failure to carry out his promise will not cause his promisee any substantial injury, the beneficiary should be allowed to recover for the breach, if *performance is to be rendered to him*, unless perhaps the promisee made the contract under mistake, believing that he was under an obligation to render the agreed performance to the beneficiary.[71] In the last assumed case, the only purpose of the agreement, (absent a mistake on the promisee's part as to his duty to the beneficiary) must have been to procure a benefit for the beneficiary. If nothing was to come to the promisee under the agreement, and a *real* agreement was contemplated, who else could have been intended, other than the beneficiary, as the recipient of rights and as the party to sue for a breach?[72]

JAMES LEWIS PARKS

University of Missouri,
School of Law.

71. See *State ex rel. v. Loomis* (1901) 88 Mo. App. 500. But see *LaCrosse Co. v. Schwartz* (1912) 163 Mo. App. 659, 147 S. W. 501. Perhaps the decision in *Vrooman v. Turner, supra* note 38, and kindred cases may be supported on this basis. Is not the grantor who has taken subject to a mortgage and grants away, exacting an obligation that the debt be paid by his grantee, to be taken as laboring under the delusion that he was bound to pay the debt? If this be the case then the contract should not be binding; the parties contracted under a mutual mistake.

72. The writer obviously would be ungrateful were he not to acknowledge the great assistance that he has received from Professor Williston's treatise on Contracts and Professor Costigan's Cases. Each work is outstanding in its particular field.