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Third Party Beneficiary Contracts in Missouri

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or request judgment in some other proper manner. If he wishes to claim against the plaintiffs it would be necessary to file a new petition.

4. Costs

The party who is made a defendant where he refuses to join has not submitted himself willingly to the jurisdiction of the court. If the plaintiff brings him in as a party to the action he should be required to indemnify him against having to bear any of the costs. Of course, this result would not be reached if after having been made a party he asserts a claim for relief against the actual defendant. Normally the party who prevails is entiled to costs in a civil action.[59] If the plaintiff wins the suit and costs are assessed against the defendants, it can hardly be said that the plaintiff has prevailed over the unwilling party whom he joined as a defendant and whose interests are identical to his own. The common law procedure for using the name of an indispensable party plaintiff who refused to join, upon indemnifying him against costs, would seem to serve a useful purpose in these cases insofar as the plaintiff who sues is required to indemnify the unwilling party.

BOBBY J. KEETER

THIRD PARTY BENEFICIARY CONTRACTS IN MISSOURI

Little is to be gained from a lengthy discussion of the theory or lack of theory supporting enforcement of contracts by persons not a party to the contract. For the purposes of this Comment it seems sufficient to accept the fact that in Missouri some, though not all, persons who may be benefited by a contract made by two or more other persons may recover on that contract. The decided cases will be examined to determine first, what persons are entitled to enforce contracts made by other persons, and secondly, when do these rights acquired by third persons become vested and free from modification by the parties to the agreement. The rights acquired by the third party beneficiary are determined by the facts and circumstances surrounding the execution of the agreement sought to be enforced.[1] Was the

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59. Crooks v. Crooks, 197 S.W.2d 678 (St. L. Ct. App. 1946); Rogers v. St. Charles, 54 Mo. 229 (1873); Saunders v. Scott, 132 Mo. App. 209, 111 S.W. 874 (K.C. Ct. App. 1908); Lucas v. Brown, 127 Mo. App. 645, 106 S.W. 1089 (K.C. Ct. App. 1908); Minor v. Garhart, 122 Mo. App. 124, 98 S.W. 88 (K.C. Ct. App. 1906); Downs v. P.R. & P.L. Growney, 114 Mo. App. 575, 90 S.W. 119 (K.C. Ct. App. 1905).

1. It is not required that the beneficiary be identified in the contract or even that he be known at the time of the agreement if he could be identified at the time the performance was due. Beattie Mfg. Co. v. Gerardi, 166 Mo. 142, 65 S.W. 1035 (1901); Porter v. Woods, 138 Mo. 539, 39 S.W. 794 (1897); Weber Engine Co. v. Lehrace, 262 S.W. 457 (K.C. Ct. App. 1924); Boone County Lumber Co. v. Niedermeyer. 187 Mo. App. 180, 173 S.W. 57 (K.C. Ct. App. 1915). Nor is it required that the obligation or debt be specifically identified in the agreement if it was one of an identified class of debts. State v. St. Louis & S. F. Ry., 125 Mo. 596, 28 S.W. 1074 (1894).

benefit to be conferred in the nature of a gift to the beneficiary, or was it in settlement of an obligation owed by the promisee to the beneficiary? Was it the apparent intention of the parties to the contract to confer a benefit on the third party? Was the conferring of a benefit on the third party the predominant reason for making the agreement? These and other factors have been considered by the courts in determining the rights of third party beneficiaries.

The *Restatement of Contracts* attempts to solve the problem of acquisition of rights by classifying all persons, other than the promisee, who may be benefited by the performance of a promise as donee, creditor, or incidental beneficiaries.[2] If it appears that the purpose of the promisee in obtaining the promise of all or part of the performance is to make a gift to the beneficiary, then that beneficary is a donee beneficiary. If it appears that the purpose was to satisfy an actual, supposed or asserted duty of the promisee to the beneficiary, then that beneficiary is a creditor beneficiary. If neither of the situations stated above exists, then the beneficiary is an incidental beneficiary. The *Restatement* would give to the donee[3] and creditor[4] beneficiaries a right to enforce the promise, but would deny any right of action to the incidental beneficiary.[5]

Another approach is to disregard the donee and creditor labels and look to the *intention* of the parties making the contract. If it appears that the intent was to confer a benefit on the third person, recovery would be allowed.[6] While the intent of the *promisee* logically would appear controlling in this matter, at least one recent case indicates that the intent of the *promisor* must be considered in some situations.[7] The intent to confer a benefit on a third party must be a major reason for making the contract.[8] The conferring of the benefit must be essential to the accomplishment of the objective sought by the parties to the agreement.[9] Some of the earlier cases would impose the additional requirement that the promisee owe the intended beneficiary some legal or equitable duty if the beneficiary is to have an enforceable claim.[10]

2. RESTATEMENT, CONTRACTS § 133 (1932).

3. *Id.* § 135.

4. *Id.* § 136.

5. *Id.* § 147.

6. Beattie Mfg. Co. v. Gerardi, *supra* note 1; City of St. Louis *ex rel.* Glencoe Lime & Cement Co. v. Von Phul, 133 Mo. 561, 34 S.W. 843 (1896); Farris v. Pitts, 221 Mo. App. 1204, 300 S.W. 840 (K.C. Ct. App. 1927); Austin v. Seligman, 18 Fed. 519 (C.C.N.Y. 1883); 4 CORBIN, CONTRACTS § 776 (1951); 2 WILLISTON, CONTRACTS § 356A (1936).

7. Ridder v. Blethen, 24 Wash. 2d 552, 166 P.2d 834 (1946).

8. State v. St. Louis & S. F. Ry., *supra* note 1; 4 CORBIN, CONTRACTS § 776 (1951).

9. Howsmon v. Trenton Water Co., 119 Mo. 304, 24 S.W. 784 (1893); Gate City Nat'l Bank v. Chick, 170 Mo. App. 343, 156 S.W. 743 (K.C. Ct. App. 1913). See City of Kansas *ex rel.* Blumb v. O'Connell, 99 Mo. 357, 12 S.W. 791 (1889); 4 CORBIN, CONTRACTS § 776 (1951).

10. Uhrich v. Globe Sur. Co., 191 Mo. App. 111, 166 S.W. 845 (K.C. Ct. App. 1914); Dickinson v. McCoppin, 121 Ark. 414, 181 S.W. 151 (1915); Vrooman v. Turner, 69 N.Y. 280, 25 Am. Rep. 195 (1877).

Earlier Missouri cases may be found recognizing[11] and denying[12] the right of a third person to recover on a contract made by two or more other persons. Since the case of *Rogers v. Gosnell*,[13] Missouri courts have consistently affirmed the rule that a third person has a common law right[14] to enforce a contract made for his benefit.[15] The test for allowing recovery seems to be the intent of the promisee to confer a benefit on the third person.[16] Some of these cases,[17] influenced by early New York decisions, have imposed, or purported to impose, a requirement that the promisee owe the intended beneficiary some legal or equitable duty.[18] It is doubtful whether this requirement was ever an effective bar to recovery where it was clear that the parties intended to confer an enforceable right upon the beneficiary.[19] In at least one instance a moral obligation was sufficient to meet this requirement,[20] while another case affirmatively indicates that no duty is required.[21] However, the supposed requirement has been repeated at least as recently as 1930 by a Missouri court, although in that instance it was held that such a duty

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11. Meyer v. Lowell, 44 Mo. 328 (1869); Robbins v. Ayres, 10 Mo. 539 (1847); Bank v. Benoist, 10 Mo. 521 (1847).
12. Manny v. Fraiser's Adm'r, 27 Mo. 419 (1858); Thornton v. Smith, 7 Mo. 86 (1841).
13. 58 Mo. 589 (1875).
14. Text writers, 4 CORBIN, CONTRACTS § 835; 2 WILLISTON, CONTRACTS § 366 (1936), have indicated that the third party's right to sue in his own name is derived from statute in Missouri. § 507.010, RSMo 1949. This statute provides generally that an action shall be brought by the real party in interest. In the same section the statute specifically allows the promisee of a third party beneficiary contract to maintain an action upon it, thus giving rise to the implication that the beneficiary is the real party in interest. The substance of the present statute was construed in Ellis v. Harrison, 104 Mo. 270, 16 S.W. 198 (1891), as allowing the beneficiary to maintain an action in his own name. It is apparent, however, that this result had already been obtained without reference to the statute. Several years before the *Ellis* case beneficiaries had been allowed to sue in their own names. Rogers v. Gosnell, 58 Mo. 589 (1875); Meyer v. Lowell, 44 Mo. 328 (1869). In the *Ellis* case it was pointed out that this practice was already the established rule in Missouri and the statute only served to confirm the rule. Since the *Ellis* case little reference has been made to the statute as a basis for allowing the beneficiaries to sue in their own name. Until recently the statute described the promisee of a third party beneficiary contract as a trustee of an express trust for the purposes of that section. This apparently has had little effect on the application of the statute but was discussed in Wilson & Co. v. Hartford Fire Ins. Co., 300 Mo. 1, 254 S.W. 266 (1923).
15. Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 182 S.W.2d 624 (1944); Fitzgerald v. Barker, 70 Mo. 685 (1879).
16. Farris v. Pitts, *supra* note 6.
17. Uhrich v. Globe Sur. Co., *supra* note 10.
18. This doctrine was first set forth in New York, Vrooman v. Turner, *supra* note 10 as a reaction against the doctrine of Lawrence v. Fox, 20 N.Y. 268 (1859). Later New York cases seem to have moved away from the strict view of *Vrooman v. Turner* and would allow recovery without the presence of any obligation of the promisee to the beneficiary. 4 CORBIN, CONTRACTS § 827 (1951).
19. See Devers v. Howard, 144 Mo. 671, 46 S.W. 625 (1898); Buffalo Forge Co. v. Cullen & Stock Mfg. Co., 105 Mo. App. 484, 79 S.W. 1024 (St. L. Ct. App. 1904).
20. City of St. Louis *ex rel.* Glencoe Lime & Cement Co. v. Von Phul, *supra* note 6
21. Crone v. Stinde, 156 Mo. 262, 55 S.W. 863 (1900).

existed.[22] A more recent federal case, applying Missouri law, quoted the requirement but found such a duty to be present and allowed recovery.[23] Recent Missouri cases have allowed recovery where no duty existed and have not discussed the "legal or equitable duty" requirement.[24]

There is considerable doubt as to whether there is any actual difference between the "intent to benefit" test applied in Missouri, and the donee-creditor approach of the *Restatement* as they relate to the right of a third party to enforce a contract. The *Restatement* definitions of donee and creditor beneficiaries seem to be broad enough to include all persons necessarily benefited in order to accomplish the objectives sought by the promisee in procuring the promise. The words "to confer . . . a right . . . to some performance neither due nor supposed or asserted to be due . . ."[25] and ". . . [to] satisfy an actual or supposed or asserted duty . . ."[26] seem broad enough to include any situation where the parties to the agreement intended to confer a benefit on a third person.

Missouri has consistently allowed recovery where the performance was to satisfy an existing obligation of the promisee to the beneficiary,[27] and recent cases make it clear that a third party can enforce the promise where the promisee intended to make a gift of the performance.[28] Where the status of the beneficiary is not clear the Missouri courts have looked to the intent of the promisee in securing the promise, without becoming concerned with the problem of fitting the beneficiary into either the creditor or donee category. This approach may be seen in the treatment of surety bond agreements. Such bonds fall roughly into three classes: (1) statutory bonds required for protection of materialmen and laborers on public construction or for protection of the general public;[29] (2) bonds where private construction is involved; and (3) bonds not required by statute but contracted for by public agencies or municipalities to guarantee payment of materialmen or laborers. Public bonds, statutory and common law (as described in (1) and (3) above), have been found to be clearly intended by the promisee to be for the benefit of the materialmen or laborers since such persons could not acquire liens

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22. Binswanger v. Employers' Liab. Assur. Co., 224 Mo. App. 1025, 28 S.W.2d 448 (K.C. Ct. App. 1930).

23. Wackerle v. Pacific Employers Ins. Co., 219 F.2d 1 (8th Cir. 1955).

24. Kansas City Life Ins. Co. v. Rainey, *supra* note 15; Schoen v. Lange, 238 S.W.2d 902 (St. L. Ct. App. 1951); Norris v. Walker, 232 Mo. App. 645, 110 S.W.2d 404 (K.C. Ct. App. 1937); Trimble v. Edwards, 220 Mo. App. 160, 281 S.W. 121 (Spr. Ct. App. 1926).

25. RESTATMENT, CONTRACTS § 133(1)a (1932).

26. *Id.* § 133(1)b.

27. Ellis v. Harrison, *supra* note 14; Rogers v. Gosnell, *supra* note 14.

28. Kansas City Life Ins. Co. v. Rainey, *supra* note 15; Schoen v. Lange, *supra* note 24.

29. For a case allowing recovery by a member of the general public on a statutory plumber's bond see Weinhaus v. Massachusetts Bonding & Ins. Co., 210 S.W.2d 710 (St. L. Ct. App. 1948).

Willard: Willard: Third Party Beneficiary Contracts in Missouri

on public property.[30] However, a different situation is presented by bonds involving private construction. Where the bond is worded to protect the property from liens the intention of the promisee is not to confer a benefit on the laborers and materialmen but to protect the property from liens. Recovery by laborers and materialmen is therefore refused.[31] Since the objective sought by the promisee could be gained by means other than the bond, the conferring of a third party benefit was not essential to the accomplishment of the objective. The third parties would be incidentally benefited by the performance if it became necessary to pay them, but that is immaterial.

It appears that the same result could be reached by the *Restatement* approach. In the cases involving public construction the purpose of the promisee seems to be to procure some performance neither due nor supposed or asserted to be due, while in the case of private construction the purpose is neither to confer a right to such performance nor to satisfy an obligation but to protect the property from liens. If the bond were drafted in such a way as to indicate an intention of the promisee that the creditors of the contractor should be paid without regard to their right to a lien the *Restatement* would allow recovery.[32] The same result would probably be reached in Missouri since the intent of the promisee would appear to be to confer a benefit on such third persons.

In cases involving the assumption of a mortgage debt, recovery by the beneficiary is allowed when the promisee had a duty to pay the debt assumed.[33] One Missouri case refused recovery where the promisee was not obligated to pay the debt.[34] This decision was based largely on the theory that there was no consideration for the promise to assume the debt. The court regarded this as an independent promise. The court also relied, to some extent, on the doctrine that the promisee must owe the beneficiary some enforceable obligation. This decision was expressly overruled two years after it was handed down.[35] Since that time Missouri courts have allowed recovery on the assumption of mortgage debts when the promisee was under no obligation to pay the debt.[36] The *Restatement* would apparently reach the same result by calling the original creditor a donee beneficiary where the promisee had no duty to pay and a creditor beneficiary where the promisee had a duty to pay the debt assumed.

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30. Statutory bonds: School Dist. v. Livers, 147 Mo. 580, 49 S.W. 507 (1899); City of St. Louis v. Hill-O'Meara Const. Co., 175 Mo. App. 555, 158 S.W. 98 (St. L. Ct. App. 1913); School Dist. of Fredericktown v. Beggs, 147 Mo. App. 177, 126 S.W. 530 (St. L. Ct. App. 1910). Common law bonds: Board of St. Louis Public Schools v. Woods, 77 Mo. 197 (1883); La Crosse Lumber Co. v. Schwartz, 163 Mo. App. 659, 147 S.W. 501 (K.C. Ct. App. 1912). *But see* State *ex rel* Maggi v. Loomis, 88 Mo. App. 500 (St. L. Ct. App. 1901).

31. Burton Mach. Co. v. Ruth, 196 Mo. App. 459, 194 S.W. 526 (Spr. Ct. App. 1917); Uhrich v. Globe Sur. Co., 191 Mo. App. 111, 166 S.W. 845 (K.C. Ct. App. 1914).

32. RESTATEMENT, CONTRACTS § 133 (1932).

33. Fitzgerald v. Barker, 70 Mo. 685 (1879).

34. Hicks v. Hamilton, 144 Mo. 495, 46 S.W. 432 (1898).

35. Crone v. Stinde, 156 Mo. 262, 55 S.W. 863 (1900).

36. Trimble v. Edwards, *supra* note 24.

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An area which has assumed greater importance because of the increased use of collective bargaining is the status of an employee of a firm which has entered into a collective bargaining agreement with a union. Several Missouri decisions have allowed the employee to enforce such an agreement as a third party beneficiary.[37] The courts have devoted little discussion to the nature of this right, apparently taking the position that the contract was made for the benefit of the individual employee and he was therefore entitled to enforce it. An interesting question is raised when the employee is not a member of the union making the agreement. This apparently has not been raised as a serious objection to the employee's enforcement of the agreement. In one case the court stated that it saw no reason why the employer should not be bound by a contract made with the union ". . . for and on behalf of the members of that union. . . ."[38] In a later case the court indicated that the contract was made ". . . for the benefit of *each and every individual employee* in the yards coming within the classification of the term 'yardmen' or 'switchmen'. . . ." (Emphasis added.)[39] In both cases it appears that the employee was a member of the union making the agreement and recovery was allowed. In a still more recent case the employee was a member of the union when laid off, but was not a member at the time his cause of action arose out of the company's failure to rehire him under the seniority provisions of the contract.[40] It was held that the employee could recover on the contract. It seems probable that Missouri courts would allow enforcement by any employee without regard to union membership if the employee were working under the provisions of the contract. The worker's coverage by the contract might be determined from wage, overtime, holiday, and vacation provisions, among others. The *presumption* of coverage arising from the above facts could, of course, be rebutted by the specific language of the agreement, or perhaps by provisions of a specific contract of employment between the worker and the employer.

Apparently a like result is possible under the *Restatement* approach. However, confusion might arise as to whether the employee is a donee or creditor beneficiary as defined by the *Restatment.* It is possible to argue that the union's purpose in obtaining the promise was to confer a right on the employee where no duty was owed, thus making the employee a donee beneficiary. On the other hand, it could be contended that the union had an implied or express obligation to bargain for the employees, thus making them creditor beneficiaries. The membership or non-membership of the employee might become important in determining the existence of an obligation on the part of the union to bargain for the employee, or the purpose of the union to confer a right in the nature of a gift. Under the *Restatement* view it is quite important to determine whether the employee was a

37. Baron v. Kurn, 349 Mo. 1202, 164 S.W.2d 310 (1942); McCoy v. St. Joseph Belt Ry., 229 Mo. App. 506, 77 S.W.2d 175 (K.C. Ct. App. 1934); Hall v. St. Louis & S.F. Ry., 224 Mo. App. 431, 28 S.W.2d 687 (Spr. Ct. App. 1930).

38. Hall v. St. Louis & S. F. Ry., *supra* note 37, at 435, 28 S.W.2d at 689.

39. McCoy v. St. Joseph Belt Ry., 229 Mo. App. at 514, 77 S.W.2d at 180.

40. Baron v. Kurn, *supra* note 37.

Willard: Willard: Third Party Beneficiary Contracts in Missouri

donee or creditor beneficiary if the parties subsequently seek to modify the agreement to remove the benefit that the employee claims.

It seems that the test used by Missouri courts in determining the legal rights of third party beneficiaries has been successful in carrying out the intention of the parties to the agreement. It is somewhat more flexible than the donee-creditor test of the *Restatement* as it bases recovery solely on the intent and objectives of the parties without the necessity of classifying all persons who may recover. The nature of the test makes it simpler to achieve a fair result in new situations not previously contemplated, such as the collective bargaining contract situation. It is seriously questioned whether there is any sound reason for, or need to apply, the labels of the *Restatement* to obtain the same result.

In Missouri it is not clear when the rights of the third party beneficiary become fixed and no longer subject to modification by the parties to the contract. Only two cases have been found which deal with this problem. In *Rogers v. Gosnell*[41] the court stated that "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."[42] In this case the beneficiary had negotiated a sale of real estate for the parties to the contract. The beneficiary drafted the contract for the parties which provided that the defendant in this action should pay the beneficiary's commission. This contract was signed but not carried out. The parties to the sale then entered into another contract to complete the transaction but made no provision for the plaintiff's commission. The court noted that the beneficiary was aware of the promise in the first contract and allowed recovery. In a much more recent case involving a third person described by the court as a donee beneficiary, the court answered defendant's argument that there was no acceptance by the beneficiary by pointing out that the beneficiary had refrained from contesting a will and had sued on the agreement before any modification was attempted.[43] These cases appear to be in conflict with the *Restatement* view which fixes the rights of the donee beneficiary at the moment the contract is made, even though the beneficiary is not aware of the agreement,[44] and allows the parties to the agreement to modify or eliminate the rights of the creditor beneficiary at any time before the beneficiary materially changes his position in reliance upon the promise or sues on the contract.[45]

The question might reasonably be raised as to whether there should be any difference in the treatment accorded different types of beneficiaries once their general right to recover has been established. The *Restatement* does offer a clear and simple rule that could be adopted. Its advantages other than clarity and simplicity are, however, less clear. Litigation could turn on the obscure motives

41. 58 Mo. 589 (1875).
42. *Id.* at 591.
43. Schoen v. Lange, 238 S.W.2d 902 (St. L. Ct. App. 1951).
44. RESTATEMENT, CONTRACTS § 142 (1932).
45. *Id.* § 143.

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of the parties to the agreement. Such a case might be *Schoen v. Lange*[46] where the court calls the third party a donee beneficiary when the obvious motive of the parties was to keep the third party from contesting a will, under which the parties to the agreement were legatees. Is this person actually a donee beneficiary?

Since in all cases the beneficiary receives something for which he has given no consideration it would seem only reasonable to give the parties to the agreement the greatest possible freedom in conferring or denying this benefit. The beneficiary would lose nothing, except the hope of a windfall, by the withdrawal of the benefit until such time as he materially changes his position in reliance upon the agreement. Fixing the rights of the beneficiary as of this moment would give the debtor the greatest possible flexibility in the settlement of his obligations and the donor the opportunity to confer gifts in the manner that he desired at the time the actual benefit was to be received. A consistent approach to the vesting of the rights of all third party beneficiaries is particularly appropriate in Missouri since the courts have generally refrained from any donee-creditor classification of beneficiaries. To impose such a classification might well create considerable confusion without any resulting benefit. Since Missouri courts have not been concerned with the *motive* of the promisee in securing the promise in order to determine the general right to recovery, it is quite possible that they will not ask whether the promisee's motive was to make a gift or fulfill an obligation when they determine when the beneficiary's rights vest.

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46. 238 S.W.2d 902 (St. L. Ct. App. 1950).