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## THIRD PARTY BENEFICIARY CONTRACTS IN MINNESOTA\*

J. KENNETH DE WERFF\*\*

**I**F E and R enter into a contract for the benefit of B, who is not a party to it, can B enforce that contract?

Briefly, this question raises the problem dealt with by the common law doctrine of third party beneficiary contracts.<sup>1</sup> The problems are old. But the present doctrine designed for their solution is comparatively young,<sup>2</sup> and it seems to illustrate very clearly the truth of the United States Supreme Court's repeated statement that "flexibility and capacity for growth and adaptation"<sup>3</sup> tends to be the nature of the common law. At *early* common law only a person who was actually a party to the contract was entitled or permitted to maintain an action upon it.<sup>4</sup> But, broadly speaking,

\*Rules concerning statutory bonds and beneficiaries thereof are not within the scope of this discussion. They have little, if any, bearing upon the common law third party beneficiary contracts. *Jefferson v. Asch*, (1893) 53 Minn. 446, At. 449, 55 N. W. 604, 25 L. R. A. 257, 40 A. S. R. 325.

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<sup>1</sup>Speaking generally in *Feldman v. Arnold*, (1924) 158 Minn. 243, 197 N. W. 219, the court said, at page 247, "In other words, this is a case where a contract was made in the name of one party for the benefit of another."

<sup>2</sup>Authorities generally recognize that *Lawrence v. Fox*, (1859) 20 N. Y. 268, was the case which really launched the doctrine into legal significance in America.

<sup>3</sup>*Hurtado v. California*, (1883) 110 U. S. 516, 530, 4 S. Ct. 111, 4 S. Ct. 292, 28 L. Ed. 232; *Funk v. United States*, (1933) 290 U. S. 371, 382, 54 S. Ct. 212, 78 L. Ed. 369, 93 A.L.R. 1136. In his last opinion, a dissent, the late Justice Royal Stone said of the third party beneficiary contract doctrine, "It illustrates the fact that the common law is not a matured, rigid, and inert mass. It is rather a live and growing organism, self-adapting to new problems and new truths. While avowing respect to precedent, it owes no allegiance either to ancient error or any concept invalidated by progress." *Farmer's State Bank v. Burns*, (1942) 212 Minn. 455, at 472, 5 N. W. (2d) 589, 591. For majority opinion, not considering this question, see 212 Minn. 455, 4 N. W. (2d) 330.

<sup>4</sup>"Privity" and consideration were required before a successful action in contract could be maintained. Street, 2 *Foundations of Legal Liability* 152 et seq; 2 *Williston on Contracts* Sec. 360, page 1053; Note, 77 A.L.R. 21; *Tweedle v. Atkinson*, (1861) 1 B and S 393, 121 Eng. Reprints 762. See also 17 *Corpus Juris Secundum*, Contracts, Sec. 519 (b), page 1118. In *Tomlinson v. Gill*, (1756) 1 Amb. 330, 27 Eng. Reprint 221, however, the English courts established a trust theory which permits recovery by the beneficiary. It is still followed today. See *Williston on Contracts*, *supra*. The doctrine of third party beneficiary contracts has been called an "American doctrine." *Barnes v. Hekla Ins. Co.*, (1893) 56 Minn. 38, 57 N. W. 314. For a detailed article upon the English doctrine, see Corbin, *Contracts for the Benefit of Third Persons*, 46 *Law Quart. Rev.* 12.

under the common law doctrine of third party beneficiary contracts which is *now* recognized by the majority of American courts, one who is not a party to the contract may recover in an action upon it if the contract was made and intended for his benefit.<sup>5</sup> The change from the old common law rule to the present one did not occur suddenly. In fact, reading only a few of the many cases will indicate clearly that the conversion process still is in progress in some states.

The purpose of this article is to determine the status of the third party beneficiary contract doctrine in Minnesota and, within limits, what reasonably may be expected in the future. The problem is important. Although the doctrine has been recognized as such for less than 100 years,<sup>6</sup> it has been applied in contract cases dealing with innumerable branches of the substantive law,<sup>7</sup> and often the doctrine affords a most direct, economical and speedy means for disposing of otherwise expensive and profitless litigation.<sup>8</sup>

## I.

### THE GENERAL PROPOSITION

A third party beneficiary contract situation arises when a promisee (hereinafter sometimes called "E") and a promisor (hereinafter sometimes called "R") enter into a contract for the benefit of one who is not a party to the contract (hereinafter sometimes called "B").<sup>9</sup> It must be distinguished from the situation in which X contracts with Y, and Z furnishes the consideration. And it also is different from the case in which one's agent contracts on his behalf. Moreover, it should not be confused with a trust or

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<sup>5</sup>See annotations in 81 A.L.R. 1271 and 148 A.L.R. 359. Also see annotations in 21 A.L.R. 439, 47 A.L.R. 339, 47 A.L.R. 502, 49 A.L.R. 534, 63 A.L.R. 1381, 77 A.L.R. 21, 89 A.L.R. 446, and 2 Williston on Contracts, Sec. 356, page 1041; 17 Corpus Juris Secundum, Contracts, Sec. 519 (c), page 1121.

<sup>6</sup>See note 2, *supra*. Sanders v. Clason, (1868) 13 Minn. 379 (Gil. 352) is one of the earliest Minnesota cases recognizing the problem (by dictum). But also note Van Eman v. Stanchfield, (1865) 10 Minn. 297 (Gil. 255).

<sup>7</sup>The problem has been raised, to mention only a few situations, in insurance law (Maxcy v. N. H. Fire Ins. Co., (1893) 54 Minn. 272, 55 N. W. 1131); mortgage law (Follansbee v. Johnson, (1881) 28 Minn. 311, 9 N. W. 882); suretyship (St. Paul Foundry Co. v. Evenson, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352); partnerships (Maxfield v. Schwartz, (1890) 43 Minn. 221, 45 N. W. 429); railroad reorganizations under Federal law (McCulloch v. Canadian Pacific Ry. Co., (U. S. Dist. Court for Minn. 1943) 53 Fed. Supp. 534); probate law (Mowry v. Thompson (1933) 189 Minn. 479, 250 N. W. 52); and many other branches of the substantive law.

<sup>8</sup>Golden v. Lerch Bros., (1941) 211 Minn. 30, 300 N. W. 2071 footnote 3.

<sup>9</sup>See footnote 1, *supra*.

subrogation situation. The third party beneficiary contract situation is peculiar to itself.<sup>10</sup>

Three general types of third party beneficiary contract situations exist: (1) A creditor beneficiary situation; (2) a donee beneficiary situation, and (3) an incidental beneficiary situation.<sup>11</sup> *The Restatement of Contracts*<sup>12</sup> defines each as follows:

“(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is

(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance is to make a gift to the beneficiary . . . ;

(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of all the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, . . . ;

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

Minnesota recognizes that these three beneficiary situations exist factually and has spoken favorably of this definition.<sup>13</sup> Obviously, the three factual situations include every conceivable situation in which a third party might receive a benefit from a contract made by other persons. The three types differ in Minnesota in that the donee and creditor situations *contemplate* receipt by the third party of the performance or gift provided for by the contract. In the in-

<sup>10</sup>For a detailed and helpful discussion of these distinctions see 2 Williston on Contracts, Secs. 352-355, pages 1038-1041, or Williston, Contracts for the Benefit of Third Persons, (1902) 15 Harv. Law. Rev. 767, which contains substantially the same material, and Corbin, Contracts for the Benefit of Third Persons, (1918) 27 Yale L. J. 1008.

<sup>11</sup>LaMourea v. Rhude, (1938) 209 Minn. 53, 295 N. W. 304.

<sup>12</sup>Restatement of Contracts, Sec. 133.

<sup>13</sup>LaMourea v. Rhude, (1938) 209 Minn. 53, 295 N. W. 304, speaks of all three situations and the decision of that case is based upon the Restatement's conclusions. Jefferson v. Asch, (1893) 53 Minn. 446, 55 N. W. 604, 25 L.R.A. 257, 40 A.S.R. 325, also recognizes that donee and creditor beneficiary situations can exist factually, but does not call them by name. Marshall State Bank v. Buesing, (1929) 179 Minn. 77, 228 N. W. 348, appears to be the first case which expressly refers to a "creditor beneficiary," and Dewey v. Kaplan, (1937) 200 Minn. 289, 274 N. W. 161, appears to be the first Minnesota case which refers expressly to a "donee beneficiary." The latter case also refers to "creditor beneficiary" and "incidental beneficiary" situations. The Restatement of Contracts is referred to therein.

cidental beneficiary situation, however, the third party receives whatever he receives as an incident of the contract. No intent to benefit him by the contract exists. The Minnesota Supreme Court has expressed this distinction by pointing out that in an incidental beneficiary situation the contract was made *primarily* in the interest and for the benefit of the parties to the contract.<sup>14</sup> In an incidental beneficiary situation the benefit to the third party also is termed "accidental,"<sup>15</sup> or "incidental," and the promise is not considered as made "directly" for the third person's benefit.<sup>16</sup>

Of course, the question immediately becomes, Why distinguish between the situations? The question is answered by noting the history of third party beneficiary contracts in Minnesota.

#### A.

##### *The Enforcement of Third Party Beneficiary Contracts*

Minnesota always has unequivocally *denied* an incidental beneficiary the right to enforce a contract to which he was not a party.<sup>17</sup> And in *Jefferson v. Asch*,<sup>18</sup> decided in 1893, the Minnesota Supreme Court declared of B's rights in that case,

" . . . we are prepared to say that, where there is nothing but the promise, no consideration from such a stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it.

"To enforce such a promise in favor of a third party, where there is no obligation to benefit him, nor anything such as near relationship, nor any consideration from the third party, would be much like enforcing an intended gift or gratuity."

Thus, B could not recover upon the contract between R and E unless he could establish an equitable, legal, or moral obligation

<sup>14</sup>Witzman v. Sjoberg, (1925) 164 Minn. 411, 205 N. W. 257. See also *Jefferson v. Asch*, (1893) 53 Minn. 446, 55 N. W. 604. But see *Morstain v. Kirscher*, (1933) 190 Minn. 78, 250 N. W. 727, which seems to use the terms loosely.

<sup>15</sup>Clark v. Hennessey Constr. Co., (1913) 122 Minn. 476, 478, 142 N. W. 873.

<sup>16</sup>Greenwood v. Sheldon, (1883) 31 Minn. 254, 17 N. W. 478.

<sup>17</sup>Cruickshank v. Ellis, (1929) 178 Minn. 103, 226 N. W. 192; *Witzman v. Sjoberg*, (1925) 164 Minn. 411, 205 N. W. 257. This rule has prevailed in Minnesota from the beginning, *Greenwood v. Sheldon*, (1883) 31 Minn. 254, 17 N. W. 478, and is still the rule; *Lincoln Finance Corp. v. Doe*, (1931) 183 Minn. 19, 235 N. W. 392.

<sup>18</sup>(1893) 53 Minn. 446, 451, 452, 55 N. W. 604, 25 L.R.A. 257, 39 A.S.R. 618.

owed himself by the promisee which, by the contract, R promised to satisfy.<sup>19</sup>

By this decision, the court early committed Minnesota to the rule that a creditor beneficiary, but *not* a donee beneficiary, could enforce the contract between E and R. It was justified upon the theory that the donee beneficiary furnished no consideration and was not privy to the contract.<sup>20</sup>

Under the *Jefferson v. Asch* doctrine, the obligation necessary to a creditor beneficiary situation might be shown (1) by proving a present or probable future monetary debt (not a mortgage debt) owed or soon to be owed to B by E and which R promised to pay in consideration for what he received from E;<sup>21</sup> (2) by proving that the promisor assumed and agreed to pay to B a mortgage debt owed to B by E and for which E was personally liable to B;<sup>22</sup> (3) by proving that the promisor was surety on a contractor's bond which concerned work or materials B was or would be furnishing to the contractor or by proving that B was within the class which the bond covered;<sup>23</sup> (4) by proving blood or moral relationship to the promisee to whom R made the promise,<sup>24</sup> or (5) by proving

<sup>19</sup>*Jefferson v. Asch*, (1893) 53 Minn. 446, 55 N. W. 604, 25 L.R.A. 257, 39 A.S.R. 618; *Kramer v. Gardner*, (1908) 104 Minn. 370, 116 N. W. 925. *St. Paul Foundry Co. v. Evenson*, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352, added the terminology, "or if the promisee has an interest in having it discharged."

<sup>20</sup>*Marshall State Bank v. Buesing*, (1929) 179 Minn. 77, 228 N. W. 348, (creditor beneficiary); *General Elec. Co. v. Jordon*, (1917) 137 Minn. 107, 162 N. W. 1061, *LaMourea v. Rhude*, (1940) 209 Minn. 53, 295 N. W. 304.

<sup>21</sup>*Hawley v. Wilkinson*, (1872) 18 Minn. 525. (Gil. 468); *Barry v. Jordan*, (1911) 116 Minn. 34, 133 N. W. 78; *Peterson v. Parviainen*, (1928) 174 Minn. 297, 219 N. W. 180; see *Saunders v. Clasen*, (1868) 13 Minn. 379 (Gil. 352).

<sup>22</sup>*Follansbee v. Johnson*, (1881) 28 Minn. 311, 9 N. W. 882; *Wood v. Johnson*, (1912) 117 Minn. 267, 135 N. W. 746; *Marshall State Bank v. Buesing*, (1929) 179 Minn. 77, 228 N. W. 348. The court also held that if E was not personally liable to B for the mortgage debt, B could not recover from R even if R assumed and agreed to pay the obligation, for no obligation of E's was assumed and the general rule of third party beneficiary contracts did not apply. *Brown v. Stillman*, (1890) 43 Minn. 126, 45 N. W. 2; *Nelson v. Rogers*, (1891) 47 Minn. 103, 49 N. W. 526; *Kramer v. Gardner*, (1908) 104 Minn. 370, 116 N. W. 925; *Clement v. Willett*, (1908) 105 Minn. 267, 117 N. W. 491. Query if this broad rule is not suspended now that donee beneficiary contracts have been held enforceable in Minnesota. (See *infra*.)

<sup>23</sup>*St. Paul Foundry Co. v. Evenson*, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352; *Harriet State Bank v. Samels*, (1925) 164 Minn. 265, 205 N. W. 938; *Feldman v. Arnold*, (1924) 158 Minn. 243, 197 N. W. 219.

<sup>24</sup>*Newton v. Newton*, (1891) 46 Minn. 33, 48 N. W. 450; *Clark v. Clark*, (1925) 164 Minn. 201, 204 N. W. 936; *Mowry v. Thompson*, (1933) 189 Minn. 479, 250 N. W. 52. See also *Peterson v. Parviainen*, (1928) 174 Minn. 297, 219 N. W. 180, which involves obligations arising out of an employer-employee relationship, although not stressed by the court.

that B was a citizen and/or inhabitant of the promisee municipality, and was included within the scope of the agreement.<sup>25</sup>

Obviously, the fourth class was seldom, if ever, a creditor beneficiary situation. And the rule of *Jefferson v. Asch* and the strict classifications originally resulting from it were not permitted to exist unmolested. Inroads upon them were gradually made.<sup>26</sup> In fact, the donee beneficiaries often were permitted to assert their rights in an action without mention of the rule enunciated in *Jefferson v. Asch*.<sup>27</sup> And cases with fact situations showing less and less existing obligations to B by E were included in the noted classes.<sup>28</sup> By 1927 the court began to recognize that the strict rule was no longer unassailable. It expressly recognized through Judge Dibell, in *St. Paul Foundry Co. v. Evenson*<sup>29</sup> (1927) that "the trend of the law favors the right of the third party beneficiary to recover in his own name in an action at law, and perhaps more readily in jurisdictions where law and equity are fused," and the court in that case then extended the rule of *Jefferson v. Asch* a little further. In *Peterson v. Parviainen* the court, apparently anticipating the future, said, "*Whatever may be the future attitude of this court as to the main holding in Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L.R.A. 257, 39 A.S.R. 618, the facts in the present case clearly bring it within the exception referred to in that case" (italics supplied). But not until 1940 did the court finally and expressly adopt the majority rule that a donee beneficiary can enforce the contract between R and E. At that time the court decided *La Mourea v. Rhude*<sup>31</sup> and committed Minnesota to the majority rule that a creditor or a donee beneficiary can recover directly upon the contract . . . .<sup>32</sup> The decision, written by Justice Stone, was unanimous. By it the rule of *Jefferson v. Asch* was "re-

<sup>25</sup>Consider *City of Red Wing v. Wisc.-Minn. Light and Power Co.*, (1918) 139 Minn. 240, 166 N. W. 175, discussed in 2 MINNESOTA LAW REVIEW 463. This case seems to indicate that the Minnesota court would have permitted recovery by a citizen of a municipality even before *LaMourea v. Rhude* was decided. The *Rhude* case does not refer to this case, which is factually similar.

<sup>26</sup>See cases cited in footnote 2 of *LaMourea v. Rhude*, (1940) 209 Minn. 53, 55, 295 N. W. 304; also consider *Knifel v. Keller*, (1940) 207 Minn. 109, 290 N. W. 218.

<sup>27</sup>*Odenbreit v. Utheim*, (1915) 131 Minn. 56, 154 N. W. 741; *Laird v. Vila*, (1904) 83 Minn. 45, 100 N. W. 656.

<sup>28</sup>*St. Paul Foundry Co. v. Evenson*, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352, held expressly that E need only have an "interest" in having the obligation assumed by R satisfied.

<sup>29</sup>See note 28.

<sup>30</sup>(1928) 174 Minn. 297, 301, 302, 219 N. W. 180.

<sup>31</sup>209 Minn. 53, 295 N. W. 204.

<sup>32</sup>25 MINNESOTA LAW REVIEW.

stated," and its premise that the lack of consideration and privity on the part of donee B prevented him from recovering was overruled expressly.

*La Mourea v. Rhude* seems entirely correct in overruling a case applying such rules to third party beneficiary contracts. Many authorities and the majority of American courts recognize that it is unsound in these modern days to deprive a donee beneficiary of the right to recover, as did the decision in *Jefferson v. Asch*, because he is not privy to the contract and has furnished no consideration.<sup>33</sup>

If R contracts *directly* with B and E furnishes the consideration, B obviously can now (and long has been able to) enforce the contract,<sup>34</sup> although at common law he could not do so.<sup>35</sup> How that situation can be distinguished in principle from a third party beneficiary contract situation insofar as consideration is concerned is difficult to understand. Moreover, the doctrine of promissory estoppel, now recognized in Minnesota,<sup>36</sup> and the doctrine of *Rye v. Phillips*<sup>37</sup> recognize that the lack of legally sufficient consideration or even consideration itself is not fatal in justifiable cases. Certainly consideration is furnished by *someone* in a third party beneficiary contract situation. The doctrine does not *deprive* anyone of consideration or, like the other doctrines mentioned, omit the consideration requirement.<sup>38</sup> R receives compensation for what he does. E is the only person who is "out of pocket" by the transaction, and he intends to be. Certainly the strict requirement of consideration can be overlooked just as properly in the donee beneficiary contract situation as in the other situations noted. Here, as there, the intent of the parties should govern. Justice Stone expressed the argument very concisely in his concurring opinion in *Peterson v. Parviainen*.<sup>39</sup> He said,

<sup>33</sup>2 Williston on Contracts, Sec. 356, page 1041. Some states have granted both a donee and a creditor beneficiary a right of action by statute. See, for example, Calif. Civil Code, Sec. 1559; Idaho Code Annot. (1932) Art. 28-102; North Dakota Comp. Laws (1913) Civ. Code 5841. For a general discussion, see 2 Williston on Contracts, Sec. 365, page 1066.

<sup>34</sup>Van Eman v. Stanchfield, (1865) 10 Minn. 197 (Gil. 255); Corpus Juris Secundum, Contracts, Sec. 74, page 427.

<sup>35</sup>The early common law rule required at one time that the consideration move from the promisee or plaintiff. Street, 2 Foundations of Legal Liability, 152 et seq.

<sup>36</sup>Thom v. Thom, (1940) 208 Minn. 461, 294 N.W. 461; Restatement of Contracts, Minnesota Annotations, Sec. 90.

<sup>37</sup>Rye v. Phillips, (1938) 203 Minn. 567, 282 N. W. 459, 119 A.L.R. 1120; 23 MINNESOTA LAW REVIEW 223.

<sup>38</sup>A third party beneficiary cannot enforce the contract if R received no consideration for his promise. See "Defenses," *infra*.

<sup>39</sup>(1928) 174 Minn. 297, 303, 219 N. W. 180.



"Consideration is a test of actionability, a determinant of the presence of obligation, and not of its quantity or the identity of the obligee. In express contract we look not at all to the source of the consideration but exclusively to the terms of the agreement to determine by whom and against whom its obligations are enforceable, and it is common to find an enforceable obligation in favor of one who has furnished no consideration. It is, therefore, no objection to an action on an express contract by a beneficiary of it that he did not furnish or was not a party to the consideration."

The requirement of privity belongs to the old common law, not to modern doctrines such as third party beneficiary contracts. Continued support of such a technical common law rule without any further justification than its common law existence<sup>40</sup> afford only an excuse, not a reason, for its preservation, and it ignores the trend away from the technical common law rules<sup>41</sup> and toward the adoption of modern codes for modern practice.<sup>42</sup>

One of the few reasons for so preserving the requirement of privity today might be the desire to assure performance of the contract according to the intent and desire of the parties who made it. In the absence of illegality or some comparable objection, a contract concededly should be performed to and by the persons whom the parties paying for such performance intended and desired should receive or make performance. Adherence to the privity requirement might be justifiable if its object were to accomplish this purpose and protect the parties to the contract. But because the third party donee and creditor beneficiary contracts both de-

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<sup>40</sup>The Minnesota Supreme Court invariably referred to the privity requirement in donee beneficiary cases without stating reasons which would justify its continued existence. For example, see *Greenwood v. Sheldon*, (1883) 31 Minn. 254, 17 N. W. 478, in which Chief Justice Gilfillan held, at page 255, "Allowing a stranger to a contract to maintain an action to enforce its stipulation is inconsistent with the general rule that to sustain such an action, there must be privity of contract between the parties; . . ." See also *Union Ry. Storage Co. v. McDermott*, (1893) 53 Minn. 407, 55 N. W. 606; *Wood v. Johnson*, (1912) 117 Minn. 267, 135 N. W. 746; and *Jefferson v. Asch*, (1893) 53 Minn. 446, 55 N. W. 604, 25 L.R.A. 257, 39 A.S.R. 618.

<sup>41</sup>Ironically, *Jefferson v. Asch*, 53 Minn. 446, held, at pages 448 and 449, that third party beneficiary contracts under seal would be decided henceforth according to the same rules applied to simple contracts which raised third party beneficiary questions because "If there ever was any reason for the distinction, it could only have been a technical one, which no longer has any merit to commend it, and we do not think we ought to recognize it."

<sup>42</sup>*Street*, 2 *Foundations of Legal Liability*, 152 et seq. In *St. Paul Foundry Co. v. Evenson*, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352, Judge Dibell said, at page 488, "The trend of the law favors the right of the third party beneficiary to recover in his own name in an action at law, and perhaps more readily in jurisdictions where law and equity are fused." They are fused in Minnesota.

pend for their existence upon the intent and wishes of the parties to the contract, surely this doctrine would itself better guarantee fulfillment of that desire than would the preservation of a doctrine (privity) which prevents the achievement of that end.<sup>43</sup>

One writer has suggested that to apply the rule of "privity"<sup>44</sup> to third party beneficiary contract situations is historically unsound. A Minnesota Supreme Court Justice first objected with specific reasons to the "privity" requirement in third party beneficiary contract situations in *Peterson v. Parviainen*.<sup>45</sup> In that case Justice Stone said, in a concurring opinion,

"Another reason formerly urged in support of the doctrine of *Jefferson v. Asch* was that the beneficiary, as distinguished from a party to a contract, was not in privity with those who were parties. With respect to contracts, privity is an effect rather than a cause. It denotes 'mutual or successive relationship to the same rights of property' (6 Wd. & Phr. 5606) or 'the relationship' between contracting parties. 3 Bouvier, Law Dic. 2722. It signifies a relationship and not what creates it. Privity of contract arises from the agreement which vests certain rights and imposes obligations from which privity results. So, with respect either to a party or a beneficiary, the first thing to determine is what rights he has under the contract; and if the presence of right be determined, privity necessarily follows. And if, with respect either to a party or a beneficiary, there is a right to enforce a contract, there is necessarily the relationship called privity. Therefore, to say that there is no right because there is no privity, rather than that there is no privity because there is no right, is a plain case of transposing the cart and horse."

In the *Rhude Case* the same judge, speaking for a now unanimous court, said,<sup>46</sup>

"Privity, in the law of contracts, is merely the name for a legal relation arising from right and obligation. For example, A, by contract, secures a promise from B. A may transfer his right of enforcement to C. C thereby succeeds to A's right of action, and, in consequence, comes into the relationship with A and B which we call privity of contract. Instead of waiting to do it by assignment, A may, at the outset, exact from B the same promise in

<sup>43</sup>In *LaMourea v. Rhude*, (1940) 209 Minn. 53, 295 N. W. 304, Justice Stone said at page 56 of the holding that a donee beneficiary could enforce the contract, "An opposite holding would defeat obligation where obligation is not only intended but also expressed and paid for . . . In the contractual promise for the benefit of one not a party, there is nothing illegal or contrary to public policy. The promise is within the right of one party to exact and the other to make." No dissents were registered to this statement.

<sup>44</sup>Street, 2 Foundations of Legal Liability, 152 et Seq.

<sup>45</sup>Justice Stone stated specific reasons for his objections in his concurring opinion, found in 174 Minn. 297, 302, 219 N. W. 180.

<sup>46</sup>(1940) 209 Minn. 53, 57, 295 N. W. 304.

favor of C. It is enforceable by C, who thereby has come directly into legal relationship with B. That illustrates the normal course of things resulting in privity of contract, which is but a descriptive term, designating effect rather than cause. In short, privity of contract is legal relationship to the contract or its parties. To affirm one's right under a contract is, therefore, to affirm his privity with the party liable to him.

"That simple truth removes the difficulty arising from the complicated notions expressed by judges and text writers concerning privity of contract. The term has been much misused."

In any event, what equitable reason justifies discrimination between creditor and donee beneficiary contracts with respect to their being enforceable? In principle they cannot be distinguished. A creditor beneficiary, like a donee, is actually a gratuitous beneficiary. Neither type of beneficiary pays anything for their rights. As a practical matter, the creditor beneficiary who recovers upon the contract violates the outmoded rule of "privity" just as surely as does the donee beneficiary who recovers. He is no more a direct party to the contract than is a donee beneficiary. The belief that the obligation owed by E makes a creditor beneficiary privity to the contract but that the "gift" from E does not make a donee beneficiary privity to the contract subscribes to common law fiction, not to a willingness that modern law conform to the ideal of reality. Fictions furnish only an excuse, not a reason. The original rules of privity do not seem to require such a distinction. It is submitted that, in the final analysis, the only real connection which *either* the donee or creditor beneficiary has with the contract arises from the promise and intent of the parties.

Further, the case of *Lawrence v. Fox*,<sup>47</sup> from which Minnesota obtained its third party beneficiary contract doctrine,<sup>48</sup> intended to hold generally that both a donee and creditor beneficiary could recover.<sup>49</sup> So the precedent for the new Minnesota doctrine supports it.

Finally, the Minnesota court recognizes that the third party beneficiary contract doctrine is applied because "Justice would be imperfectly administered if no exceptions were allowed to that general rule" "that an action on contract cannot be maintained unless

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<sup>47</sup>(1869) 20 N. Y. 268.

<sup>48</sup>*St. Paul Foundry v. Evenson*, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352. See also *Jefferson v. Asch*, (1893) 53 Minn. 446, 55 N. W. 604.

<sup>49</sup>*Seaver v. Ransome*, (1918) 224 N. Y. 233, 120 N. E. 639, 2 A.L.R. 1187.

there is privity of contract between the parties."<sup>50</sup> If justice requires the exception as to creditor beneficiaries, what sound reason forbids such justice to donee beneficiaries? The arguments in favor of the former are, at least for the most part, applicable also to the latter. The mere fact that one is a creditor should not necessarily entitle him to a higher standing in a court of justice than one who is not a creditor, who gives just as much for his rights as does the creditor (i. e., nothing), and whose recovery does not affect the rights or assets of that creditor's debtor. Law and equity being fused, the court, if properly apprised of the problem, can forestall any double recoveries by a creditor beneficiary.<sup>51</sup> The original intent and hopes of all the parties to the contract will be realized. And that elusive "justice" will invariably result to all parties. The trend today is towards the enforcement of *both* the donee and the creditor beneficiary type of contracts.<sup>52</sup> The doctrine is an American one. It does not look to the common law for its origin.<sup>53</sup> It is a matter of *modern* public policy.

In view of these premises, therefore, the Minnesota Supreme Court seems to have been clearly correct when it decided *La Mourea v. Rhude* and placed this state in accord with the general rule that a creditor beneficiary *and* a donee beneficiary may enforce the contract made by R and E for his (B's) benefit, absent any valid defense in favor of R.

Some members of the bar have suggested that the rule of *La Mourea v. Rhude* is limited to the rule that B may sue where he is a resident or citizen of the promisee municipality which enters into a contract for his benefit. A special class of cases does recognize that the relationship between a municipality and its inhabitants creates obligations between them which permits the inhabitant to sue upon a contract made for the benefit of the class to which he belongs.<sup>54</sup> But *La Mourea v. Rhude* is not confined to this rule. It requires no obligation or relationship between B and E.

The case commences with the premise that the doctrine of *Jefferson v. Asch*, which required an obligation from the promisee, is

<sup>50</sup>*Follansbee v. Johnson*, (1881) 28 Minn. 311, 9 N. W. 882.

<sup>51</sup>*Heins v. Byers*, (1928) 174 Minn. 350, 219 N. W. 287 (quoted on page 458). See also *Gustafson v. Koehler*, (1929) 177 Minn. 115, 225 N. W. 699.

<sup>52</sup>*St. Paul Foundry Co. v. Evenson*, (1927) 169 Minn. 485, at 488, 211 N. W. 834, 213 N. W. 352. See quotation in footnote 42, *supra*.

<sup>53</sup>In *Barnes v. Hekla Fire Ins. Co.*, (1893) 56 Minn. 38, 57 N. W. 314, the court observed, "It is called the 'American doctrine' because peculiar to the courts in this country."

<sup>54</sup>Restatement of Contracts, Sec. 145; also see footnote 25, *supra*.

outmoded and needs restatement. It then proceeds to cite Sec. 133 of Restatement of Contracts as authority which correctly restates the rule. That states the donee rule broadly, not only with respect to the municipality cases. The opinion then recognizes that a specific section of the Restatement (Sec. 145) covers the problem at hand. That section, concededly, pertains to a situation which is enforceable because of the declared obligation from the municipal promisee to the beneficiary. But the court immediately qualifies its reference to that section by pointing out that actually the specific rule stems from the general one which was first stated in the opinion. And then the court makes itself perfectly clear and shows that it rested its decision upon the general donee beneficiary rule, and not the creditor beneficiary rule which requires an obligation of the promisee. For after discussing the problem at hand in general terms without reference to any obligation owed by the promisee, and after referring to the "contrary" doctrine of *Jefferson v. Asch* (which required an obligation of E), it says,<sup>55</sup>

"Under the rule as we view it, such obligation is immaterial" (italics supplied).

Privity is expressly abandoned. So, clearly the decision is based upon no theory of an obligation being satisfied between the parties. Nothing in the opinion speaks of relationship between E and B. And in *Schau v. Buss*,<sup>56</sup> decided about the same time as the *Rhude Case*, the court expressly applied the rule of the *Rhude Case* to a situation in which a title insurance company promised a home owner that it would pay certain laborers. The laborer was held to possess a cause of action upon that promise. So, again the court showed that municipality promisee fact situation is not the basis for the rule in the *Rhude Case*. And in *Farmer's State Bank v. Burns*,<sup>57</sup> Justice Stone, who wrote the opinion in the *Rhude Case*, said of it that it gave a cause of action both to a donee and to a creditor beneficiary. To avoid its broad rule that all donee beneficiary contracts are enforceable, the court either must overrule that case or forget it. To distinguish it seems basically impossible.

Consequently, it seems clear that Minnesota now recognizes the donee beneficiary contract also, and that, subject to the rules noted under the heading, "Defenses," both a third party creditor and a donee beneficiary may maintain in Minnesota an action on

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<sup>55</sup>(1940) 209 Minn. 53, 57, 295 N. W. 304.

<sup>56</sup>(1940) 209 Minn. 99, 104, 295 N. W. 910.

<sup>57</sup>(1942) 212 Minn. 455, 5 N. W. (2d) 589, 590. The majority opinion, 4 N. W. (2d) 330, does not affect this statement.

the contract between R and E. When dealing with these problems, however, the Minnesota conflict of laws rule regarding third party beneficiary contracts must be kept in mind. It provides that the law of the State in which the third party beneficiary contract is made and performable governs questions of the contract's existence and performance.<sup>58</sup>

The beneficiary may assert his rights against R at law and recover damages<sup>59</sup> or, if the legal remedy is inadequate, he may secure specific performance in equity.<sup>60</sup> Minnesota's original theory for enforcing a creditor beneficiary contract was that something in the nature of a trust existed.<sup>61</sup> The Court also has hinted at the so-called "agency" theory.<sup>62</sup> That is, that E was B's agent in the transaction. Both theories are fictitious, and later cases have not mentioned them. In view of the court's increasingly liberal decisions in third party beneficiary contract situations, culminating in its commendable position in *La Mourea v. Rhude*, the court seems in an ideal position to say expressly that trust or agency theories are no longer the basis for enforcing third party beneficiary contracts in Minnesota. Action on a contract theory seems the most desirable and realistic and has been so recognized.<sup>63</sup>

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<sup>58</sup>*Clement v. Willett*, (1908) 105 Minn. 267, 117 N. W. 491; *Wood v. Johnson*, (1912) 117 Minn. 267, 135 N. W. 746; *McCulloch v. Canadian Pacific Ry. Co.*, (U. S. Dist. Court, Minn., 1943) 53 Fed. Supp. 534, 540; *Federal Surety Co. v. Mpls. Steel & Mach. Co.*, (8 C.C.A., 1927) 17 Fed. (2d) 242, 245.

<sup>59</sup>*LaMourea v. Rhude*, (1940) 209 Minn. 53, 295 N. W. 304.

<sup>60</sup>*Newton v. Newton*, (1891) 46 Minn. 33, 48 N. W. 450; *Fiske v. Lawton*, (1913) 124 Minn. 85, 144 N. W. 455.

<sup>61</sup>In *Follansbee v. Johnson*, (1881) 28 Minn. 311, 9 N. W. 882, the court said, at page 312, ". . . the consideration retained might well be regarded as held in the nature of a trust for the persons indicated by the contract." In *Greenwood v. Sheldon*, (1883) 31 Minn. 254, at 255, the court said of B's actions, "In this state the courts have not sustained such an action except where the contract created a duty or relation in the nature of a trust."

<sup>62</sup>Consider *Michaud v. Erickson*, (1909) 108 Minn. 356, 122 N. W. 324.

<sup>63</sup>For discussion of the theories, see Corbin, *Contracts for the Benefit of Third Persons*, (1918) 27 Yale L. J. 1008; Williston, *Contracts for the Benefit of a Third Person*, 15 Harv. L. Rev. 767. In *Barnes v. Hekla Fire Ins. Co.*, (1893) 56 Minn. 38, 57 N. W. 314, the court said, at page 42, "It is an equitable rule, adopted for convenience, and to avoid circuitry of action, and the formality of an assignment by the original debtor of the new agreement with him, and is strictly in accord with the intention of the parties to the contract in creating a liability in favor of a third party creditor." In Minnesota the action seems to be in contract. *McCulloch v. Canadian Pacific Ry.*, (U. S. Dist. Ct. for Minn., 1943) 53 Fed. Supp. 534. See also Justice Stone's dissent in *Farmer's Stat Bank v. Burns*, (1942) 212 Minn. 455, 472.

## B.

*Existence Tests*

Because the enforcement of both donee and creditor beneficiary contracts seems clear in Minnesota, a more detailed study of the problems which arise when creating them seems desirable. As summarily noted heretofore, the donee and creditor beneficiary contract situations are distinguishable from the incidental beneficiary situation in Minnesota upon the basis of intent.

When determining if the factual situation presents a donee or creditor beneficiary situation as distinguished from an incidental beneficiary situation, the court invariably has resorted to one of three tests which, for brevity, will be called (1) the "intent to benefit" test,<sup>64</sup> (2) the "contract made for the benefit of B" test<sup>65</sup> and (3) the "intent to permit B to enforce the contract" test.<sup>66</sup> The court never has discussed which test it prefers or why three exist. A count of the cases using each theory indicates, however, that the second test has been used more often than the others. The third test has been used seldom.

In the first test the court considers if, although the promise was made directly to another, it was "intended to benefit" the third person.<sup>67</sup> In the second test the court determines "for whose benefit the promise was made"<sup>68</sup> or "for whose benefit the contract was made."<sup>69</sup> In the third test the court inquires if the contract "was intended to give persons in the position of plaintiff (B) the right to maintain an action upon it."<sup>70</sup> One case<sup>71</sup> appears to have con-

<sup>64</sup>Maxfield v. Schwartz, (1890) 43 Minn. 221, 45 N. W. 429, 10 L.R.A. 606; Feldman v. Arnold, (1924) 158 Minn. 243, 197 N. W. 219.

<sup>65</sup>Follansbee v. Johnson, (1881) 28 Minn. 311, 9 N. W. 882; Sayre v. Burdock, (1891) 47 Minn. 367, 50 N. W. 245; Peterson v. Parviainen, (1928) 174 Minn. 297, 219 N. W. 180.

<sup>66</sup>Moore v. Mann, (1915) 130 Minn. 318, 153 N. W. 609; St. Paul Foundry Co. v. Evenson, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352; see also Cruickshank v. Ellis, (1929) 178 Minn. 103, 104, 226 N. W. 192.

<sup>67</sup>Feldman v. Arnold, (1924) 158 Minn. 243, 197 N. W. 219.

<sup>68</sup>Stariha v. Greenwood, (1881) 28 Minn. 521, 11 N. W. 76; Sayre v. Burdock, (1891) 47 Minn. 367, 50 N. W. 245; Bosting v. Northern Trust Co., (1895) 61 Minn. 307, 63 N. W. 721.

<sup>69</sup>Kriske v. Jevne, (1928) 174 Minn. 484, 219 N. W. 766; Wood v. Johnson, (1912) 117 Minn. 267, 135 N. W. 746; Maxcy v. N. H. Fire Ins. Co., (1893) 54 Minn. 272, 55 N. W. 1130. Although the court variously speaks of the promise and/or the contract as the basis of the second test, it makes no distinction between them in applying the test. In reality, of course, any distinction would be imaginary.

<sup>70</sup>See footnote 66, *supra*.

<sup>71</sup>Michaud v. Erickson, (1909) 108 Minn. 356, 122 N. W. 324.

sidered mainly whether a *benefit* was received by the third party and to have slighted the question of intent. But such a test seems so contrary to the general Minnesota tests that probably no attention need be paid to it.<sup>72</sup>

The first and second tests seem identical in substance but different in expression. For the court must determine what the parties intended, or meant, in their contract before it can determine whether the contract was made for the benefit of B. And the court seems to determine the intent under the second test, although often it does not speak expressly of intent.

The third test presents a peculiar problem. Generally speaking, "intent" creates a *factual* situation and the *court* determines whether the law should enforce that factual situation in view of the rules of law and sound public policy. According to this test, however, the *intent* determines the enforceability of the promise. If it is applied according to its potentials, it seems objectionable for obvious reasons.<sup>73</sup>

That the "intent" tests are sound seems to follow from the conclusion that the court correctly refuses an incidental beneficiary a right of recovery. Any other practical test would probably require a relaxing of that rule. The need for a test like "intent" seems inherent in the very nature of the third party beneficiary contract situations. It is a limiting, but not a *prohibiting*, influence. Because of it, no avalanche of recoveries upon third party beneficiary contracts seems likely, and if it is applied strictly, recovery will tend to result only in those cases where the third party is justly entitled to it.

When applying the tests, however, the Minnesota court, like other courts, encounters difficulty.<sup>74</sup> For in some cases, as mortgage assumption cases, recovery is permitted in situations in which the promisee's main *purpose* for entering into the contract was to

<sup>72</sup>Certainly such a test seems contrary to the rule that an incidental beneficiary cannot recover, for if the benefit resulting to B from the contract between R and E were the sole test, many incidental beneficiaries could recover. This is true also if the "intent" necessary in the other tests is based upon the benefits actually received by B. It is submitted that the actual benefit received by B should be used only to *raise* the question of whether a third party donee or creditor beneficiary contract exists in a given situation, not to *settle* the question.

<sup>73</sup>Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds*, (1928) 38 *Yale L. J.* 1; 2 *Williston on Contracts*, Sec. 356 A, p. 1045.

<sup>74</sup>In *St. Paul Foundry Co. v. Evenson*, (1927) 169 *Minn.* 485, Judge Dibell observed, at page 488, that the third party beneficiaries rules involve "difficulties in application and some confusion in the limitations and conditions attached to it."



benefit himself.<sup>75</sup> Apparently the *Restatement of Contracts* did not expressly adopt the intent test in creditor beneficiary situations<sup>76</sup> for this reason.<sup>77</sup> (See page 438, *supra*, for definition.) The Minnesota court, however, apparently does not agree that purpose necessarily determines intent, and the court soundly adheres to the intent theory both in creditor and donee beneficiary contract situations. Application of the test, however, brings Minnesota in substantial agreement with the Restatement, for the court tends to find a creditor beneficiary situation to exist when R assumes E's obligation to B and his performance will satisfy the obligation. This result is the one also obtained under the Restatement rule. Minnesota apparently reasons that E intends B to receive *something* (at least R's performance of his promise) and, therefore, a sufficient intent to benefit B exists. Under the Minnesota test, however, a creditor beneficiary contract does not seem inevitable when R assumes E's obligation. A clear indication of a contrary intent might change the result. The court has so indicated.<sup>78</sup>

The same "intent" tests used to determine the existence of a creditor beneficiary contract are used to determine the existence of a donee beneficiary contract.<sup>79</sup> The test, of course, raises a fact question. So each case turns on its own facts.<sup>80</sup> When determining

<sup>75</sup>See cases cited in footnote 22; also see 2 Williston on Contracts, Sec. 356 A.

<sup>76</sup>Illustration 12 of Section 133, Restatement of Contracts, seems to indicate that, although Section 133 (1) (a) refers to "purpose" in defining a donee beneficiary situation, actually the Restatement continues to rely upon "intent."

<sup>77</sup>See 2 Williston on Contracts, Sec. 356, page 1047. Professor Williston was the Reporter for this part of the Restatement of Contracts. (See page v of the Restatement of Contracts.)

<sup>78</sup>Consider *Brown v. Stillman*, (1890) 45 Minn. 126, 45 N. W. 2. The Restatement of Contracts appears to attempt to abolish the "intent" theory in creditor beneficiary situations. (2 Williston on Contracts, Sec. 356A, page 1047.) However, query if an incidental beneficiary under the intent rule could not recover under the strict wording of the Restatement rule. Or does the intent enter into the determination of the creditor beneficiary situation, as defined by the Restatement, by virtue of the requirement that no *purpose* to make a gift can appear? Consider footnote 76.

<sup>79</sup>Compare *LaMourea v. Rhude*, 209 Minn. 53, 295 N. W. 304, (a donee beneficiary situation) and *Peterson v. Parviainen*, (1928) 174 Minn. 297, 219 N. W. 180 (a creditor beneficiary situation).

<sup>80</sup>See *Fiske v. Lawton*, (1913) 124 Minn. 85, 144 N. W. 455; see also *Moore v. Mann*, (1915) 130 Minn. 318, 153 N. W. 609, in which Judge Dibell said, at page 319, "Nothing is to be gained by investigating the cases where one is permitted to sue on a promise made to another for his benefit." Compare *Nelson v. Rogers*, (1891) 47 Minn. 103, 49 N. W. 526, in which the court held that even if a mortgagor's grantee assumed the mortgage, a lack of intent to benefit is "presumed" if the mortgage obligation had not been assumed by the mortgagor. This result no longer seems

if the facts show the required intent or whether the contract was made for the benefit of a third party, the court looks to almost anything which may throw light upon the problem. "The acts and stipulations of the parties viewed in the light of the conditions which existed and the obvious purpose sought to be accomplished . . .,"<sup>81</sup> the reasonableness or equitableness of the interpretation in light of the facts, the parties' relation to the subject matter of the contract,<sup>82</sup> the wording of the contract,<sup>83</sup> whether its purpose could be achieved if an intent to benefit B existed,<sup>84</sup> the promissor's interest in the transaction, and the general situation existing when the contract was made,<sup>85</sup> common experience,<sup>86</sup> whether B knew of the contract,<sup>87</sup> the power of control which E retained over performance of the contract and whether the obligation to E is consistent with a duty to B,<sup>88</sup> are some of the factors upon which the court has relied in determining the uncertain intent of the parties. If a contract contains an express provision that it was made for the benefit of the third party, however, the court relies upon that statement.<sup>89</sup> Consequently, persons wishing to assure recognition of their intent to the fullest possible extent might be able to achieve their objective by including such an express provision in their

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necessary since *LaMourea v. Rhude*, (1940) 209 Minn. 53, 295 N. W. 304. Professor Corbin suggests that it would not be unreasonable to draw an invariable inference that a mortgagee was contemplated as a beneficiary in the assumption contract between the mortgagor and his grantee, and that the mortgagee was the holder of a new and additional right of action. Corbin, *Contracts for the Benefit of Third Persons*, (1927) 27 Yale L. J. 1008, 1018. Although "intent" originally was the test applied in mortgage cases, in Minnesota, *Follansbee v. Johnson*, (1881) 28 Minn. 311, 9 N. W. 882, the court often relies merely upon precedent now when determining if a third party beneficiary contract exists. Also see 2 Williston on Contracts, 15 Harv. L. Rev. 791.

<sup>81</sup>*Feldman v. Arnold*, (1924) 158 Minn. 243, 197 N. W. 219.

<sup>82</sup>*Brown v. Stillman*, (1890) 43 Minn. 126, 45 N. W. 2.

<sup>83</sup>*Moore v. Mann*, (1915) 130 Minn. 318, 153 N. W. 609.

<sup>84</sup>*St. Paul Foundry Co. v. Evenson*, (1927) 169 Minn. 485, 211 N. W. 834, 213 N. W. 352.

<sup>85</sup>*Gaffney v. Sederberg*, (1911) 114 Minn. 319, 131 N. W. 333.

<sup>86</sup>*Odenbreit v. Utheim*, (1915) 131 Minn. 56, 154 N. W. 741.

<sup>87</sup>*Witzman v. Sjoberg*, (1925) 164 Minn. 411, 205 N. W. 257.

<sup>88</sup>*Clark v. Hennessey Constr. Co.*, (1913) 122 Minn. 476, 142 N. W. 837.

<sup>89</sup>*Kniefel v. Keller*, (1940) 207 Minn. 109, 290 N. W. 218. "Such an agreement . . . having been made expressly for plaintiff's benefit he may maintain an action thereon against the defendant . . ." *Pullman v. Adamson*, (1890) 43 Minn. 511, 512, 45 N. W. 1132. The provision in *Kniefel v. Keller*, *supra*, read, "This agreement is for the express benefit of the debtor(s) or any of them, as well as the Federal Land Bank of St. Paul, the Land Bank Commissioner, and the Federal Farm Mortgage Corporation." (The court seems to consider some phrases sufficiently express to show an intent even though they do not mention intent. Mortgage assumption clauses are an example.)

contract. It is submitted also that a short statement of the reasons for such intent would help if the situation created by the contract is not such a one as would necessarily create a benefit to the intended third person. By specifically naming the only third party (or parties) intended to be benefited, and specifically excluding all others, the performance of the contract in accordance with the intent of the parties would be better guaranteed. Conversely, the parties to a contract intended only for their own benefit might be able to avoid compelled performance of the contract to an incidental beneficiary. Although situations in which the express words might be avoided can be imagined, those situations would seem to be the unusual rather than the usual ones<sup>90</sup> if Minnesota continues to adhere to the "intent" tests for donee and creditor beneficiary contracts.

The intent of the promisee appears to be the intent which governs in Minnesota.<sup>91</sup> Certainly the promisor's intent would seem less important. He receives consideration for his performance, and he generally would be little concerned in determining to whom the contract should require him to perform.

Briefly, therefore, the Minnesota Supreme Court's position with respect to the creation and enforceability of third party beneficiary contracts may be summarized as follows:

(a) *Both* third party donee and creditor beneficiary contracts are enforceable in Minnesota in the absence of a valid defense (as hereinafter noted).

(b) The existence of both types of contract is determined by the test whether the contract was made for the benefit of a third party, which, in effect, is a test of the promisee's intent.

These conclusions seem to be a justifiable reason for inquiring whether the distinction between donee and creditor beneficiary contract situations should be preserved when determining if a third party beneficiary contract cognizable in law or equity exists in a given situation. *Both* are recognized as enforceable and the existence of *both* is determined by the same test. *Both* are really gratuitous situations with respect to B. If the mortgage class of

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<sup>90</sup>In connection with this problem, consider Professor Corbin's observations referred to in footnote 80. Can express words such as these change a rule of absolute substantive law permitting or denying the right to recover? It is submitted that they would and should not do so.

<sup>91</sup>Consider *Jefferson v. Asch*, (1893) 53 Minn. 446, 55 N. W. 604, 25 L.R.A. 257, 39 A.S.R. 325; *Union Ry. Storage Co. v. McDermott*, (1893) 53 Minn. 407, 55 N. W. 606; also note the wording of the definitions in the Restatement of Contracts, Sec. 133.

creditor beneficiary contracts becomes a class unto itself, little reason why the two could not be treated similarly in Minnesota seems apparent. For in the other situations the court generally applies the intent theory somewhat realistically. Little adjustment in the application of the rules would seem necessary.

### C.

#### "Defenses"

If a donee or creditor beneficiary situation exists, what defenses may be raised to prevent its enforcement in an action by the beneficiary?

According to the majority of American Courts, the beneficiary's rights against the promisor are no better and no greater than those possessed by the promisee.<sup>92</sup> Minnesota decisions follow this rule. In *Maxfield v. Schwartz*<sup>93</sup> the Minnesota Supreme Court stated of the beneficiary's rights against the promisor,

"These plaintiffs have no rights under this alleged contract, so far as appears, superior to those of Beren & Nachtsheim (the promisees). . . . If the contract sued upon was affected by any infirmity which would have constituted a defense to an action on it by Berens and Nachtsheim, the same defense may be made as against the plaintiffs."

Consequently, the general rule that defenses good against the promisee are good against the beneficiary prevails in Minnesota. Justice Mitchell pointed this out in *Gold v. Ogden*,<sup>94</sup> when he said, without any dissents,

"All the authorities, however, are agreed that . . . he (B) acquires no greater rights than the . . . promisee has, and takes the covenant, if at all, subject to all the defenses, legal or equitable, which should have been available against the latter (E)."

But the defense must be pleaded affirmatively in order to be effective.<sup>95</sup> Although these cases represent creditor beneficiary situa-

<sup>92</sup>Note, 81 A.L.R. 1271, at 1292; 2 Williston on Contracts, Secs. 394, 395, pages 136, 137; 17 Corpus Juris Secundum, Contr., Sec. 529, page 1152.

<sup>93</sup>(1890) 45 Minn. 150, 152, 47 N. W. 448, 10 L.R.A. 606. See also *Rogers v. Castle*, (1892) 51 Minn. 428, 53 N. W. 651; *Gold v. Ogden*, (1895) 61 Minn. 88, 63 N. W. 266. *Sayre v. Burdock*, (1891) 47 Minn. 367, 50 N. W. 245, apparently extends the rule to parol evidence rule problems.

<sup>94</sup>(1895) 61 Minn. 88, 63 N. W. 266. See also *Conn. Mutual Life Ins. Co. v. Knapp*, (1895) 62 Minn. 405, at 407, 64 N. W. 1137. Also refer to cases in footnote 93, *supra*.

<sup>95</sup>*Germain v. Great Northern Lbr. Co.*, (1919) 143 Minn. 311, 173 N. W. 667; also see *Wood v. Johnson*, (1912) 117 Minn. 267, 270, 135 N. W. 746.

tions, the general rule has been applied to donee beneficiary situations in other states, and no sound reason why it should not be applied similarly in Minnesota seems apparent.

This rule, therefore, prevents B from recovering against R if any of the elements of a valid contract are absent as between R and E. That is, the offer must be accepted by the party to the contract.<sup>96</sup> R must have made a promise,<sup>97</sup> and it must be supported by legally sufficient consideration from E.<sup>98</sup> The promise, however, may be a limited one. And the third party can claim the performance of the promise only to the extent of its intent.<sup>99</sup> Moreover, "the promisor's promise to the promisee need not be express but can be . . . implied."<sup>100</sup> But, in any event, the promise would seem to be required to be a clear, distinct, and definite one before a beneficiary can base any rights upon it.<sup>101</sup> B also must belong to the class for whose benefit the promise is made.<sup>102</sup> But his rights thereunder need not be certain at the time the contract is made.<sup>103</sup> The promise may be conditional, but B cannot enforce it until that condition exists.<sup>104</sup> Likewise, B must have performed whatever was required of him before he can enforce the contract.<sup>105</sup> Apparently B need not be the beneficiary of *all* the promises in the contract.<sup>106</sup> Moreover, R's

<sup>96</sup>Kruske v. Jevne, (1928) 174 Minn. 484, 219 N. W. 766.

<sup>97</sup>Nelson v. Rogers, (1891) 47 Minn. 103, 49 N. W. 526; Gold v. Ogden, (1895) 61 Minn. 88, 63 N. W. 266; Clement v. Willett, (1908) 105 Minn. 267, 117 N. W. 491; Odenbreit v. Utheim, (1915) 131 Minn. 56, 154 N. W. 741.

<sup>98</sup>Becker v. Nelson, (1925) 164 Minn. 367, 205 N. W. 262; cf. Moulton v. Haskell, (1892) 50 Minn. 367, 52 N. W. 960, and similar cases.

<sup>99</sup>Bell v. Mendenhall, (1898) 71 Minn. 331, 73 N. W. 886.

<sup>100</sup>National Cash Register Co. v. Ness, (1938) 204 Minn. 148, 282 N. W. 827.

<sup>101</sup>Allen v. Hoopes, (1933) 189 Minn. 391, 249 N. W. 570.

<sup>102</sup>Maxfield v. Schwartz, (1890) 43 Minn. 221, 45 N. W. 429, 10 L.R.A. 606; Gaffney v. Sederberg, (1911) 114 Minn. 319, 131 N. W. 333; Bell v. Mendenhall, (1898) 71 Minn. 331, 73 N. W. 1086. See also Lovejoy v. Howe, (1893) 55 Minn. 353, 57 N. W. 57.

<sup>103</sup>LaMourea v. Rhude, (1940) 209 Minn. 53, 295 N. W. 304. See also McCulloch v. Canadian Pacific Ry. Co., (U. S. Dist. Ct. for Minn. 1943) 53 Fed. Supp. 534, and Moulton v. Haskell, (1892) 50 Minn. 367, 52 N. W. 960.

<sup>104</sup>Greenwood v. Sheldon, (1883) 31 Minn. 254, 17 N. W. 478.

<sup>105</sup>Odenbreit v. Utheim, (1915) 131 Minn. 56, 154 N. W. 741; see Brasch v. Reeves, (1913) 124 Minn. 114, 144 N. W. 744; compare *In re Oertle*, (1885) 34 Minn. 173, 24 N. W. 924, 57 A.S.R. 48 and similar cases.

<sup>106</sup>Starha v. Greenwood, (1883) 28 Minn. 521, 11 N. W. 76, holds that the promise to pay the mortgage therein need only be a part of the consideration, thus necessarily holding that other promises of which B is not the beneficiary can exist without defeating his rights. See also McCulloch v. Canadian Pacific Ry. Co., (U. S. Dist. Ct. for Minn., 1943) 53 Fed. Supp. 534.

promise may be such that the beneficiary is relieved of an obligation and can raise the promise as a defense to another action.<sup>107</sup>

Fraud also is a defense, although the proof must be strong,<sup>108</sup> and the parol evidence rule and the Statute of Limitations<sup>109</sup> may prevent proof of some of the facts necessary to the action. Likewise, the court may lack jurisdiction.<sup>110</sup> And in cases involving suretyship rules a change of the agreement without the surety's (R) consent can terminate B's rights against R.<sup>111</sup> Such equitable defenses as a mutual mistake can defeat B's action without first seeking to reform the contract.<sup>112</sup> But the Statute of Frauds has been held not to be a defense against a creditor beneficiary.<sup>113</sup> The defense of "res adjudicata" does not seem valid as against a beneficiary merely because that defense exists as against the promisee.<sup>114</sup> Moreover, the beneficiary is a real party in interest within the meaning of the statute and can maintain an action in his own

<sup>107</sup>*DeCock v. O'Connell*, (1933) 188 Minn. 228, 246 N. W. 885, 248 N. W. 829.

<sup>108</sup>*Maxfield v. Schwartz*, (1890) 45 Minn. 150, 47 N. W. 448, 10 L.R.A. 606; *Becker v. Nelson*, (1925) 164 Minn. 367, 205 N. W. 262. In the *Maxfield* case the court pointed out, at page 152, that the beneficiaries did "not stand in such a position that the doctrine of estoppel, or any rule of necessity under the common law, as might be the case with respect to negotiable paper, should bar the defense of fraud." Whether the court was talking of the third party beneficiaries generally or of these particular beneficiaries is not entirely clear from the opinion. Probably the latter is intended, however.

<sup>109</sup>*Sayre v. Burdock*, (1891) 47 Minn. 367, 50 N. W. 246; *Kramer v. Gardner*, (1908) 104 Minn. 370, 116 N. W. 925; *Germain v. Great Northern Lbr. Co.*, (1919) 143 Minn. 311, 173 N. W. 667 (all parol evidence rule cases). *Pinch v. McCulloch*, (1898) 72 Minn. 71, 74 N. W. 897. (Statute of Limitations. Here defendant contended that the statute started to run when the promise was made. The court held that it started to run against R in this creditor beneficiary case when the debt obligation became due and an action on it was possible.)

<sup>110</sup>See *Odenbreit v. Utheim*, (1915) 131 Minn. 56, 154 N. W. 741.

<sup>111</sup>*Travers v. Dorr*, (1895) 60 Minn. 173, 62 N. W. 269, is the leading case. Other cases holding similarly are *Goesbech v. Mattison*, (1890) 43 Minn. 546, 46 N. W. 135; *Heidahl v. Geiser Mfg. Co.*, (1910) 112 Minn. 319, 127 N. W. 1050, and cases cited therein.

<sup>112</sup>*Rogers v. Castle*, (1892) 51 Minn. 428, 53 N. W. 651.

<sup>113</sup>*Goetz v. Foes*, (1869) 14 Minn. 265 (Gil. 196); *Sullivan v. Murphy*, (1876) 23 Minn. 6; *Stariha v. Greenwood*, (1881) 28 Minn. 521, 11 N. W. 76. All three cases hold that R's promise to E was not within the Statute of Frauds provision relating to promises to answer for the debt, default, or doings of another, because the promise was made to one to whom the debt was owed.

<sup>114</sup>Consider *Ingelson v. Olson*, (1937) 199 Minn. 422, 272 N. W. 270. As a practical matter, however, the existence of such a defense against E probably would discourage many beneficiaries from suing, for B's rights are no greater than E's and probably would be determined in most instances upon the same premises as E's rights.

name.<sup>115</sup> He also may assign his chose in action on the contract after it had accrued.<sup>116</sup>

An early Minnesota case held that a creditor beneficiary cannot join R and E as defendants in the action to enforce his rights on the contract between them,<sup>117</sup> but in later cases B has joined them and no objection has been made.<sup>118</sup> There is no doubt that a creditor beneficiary invariably possesses separate rights of action against E on the debt in addition to his rights against R on the contract.<sup>119</sup> Such remedies are consistent and concurrent, and he need not elect between them.<sup>120</sup> Although action against one is not fatal to an action against the other, only one satisfaction may be obtained, of course.<sup>121</sup> Moreover, if R and E are not joined by the beneficiary, E, on R's motion, "might be compelled to interplead and take part in the litigation; but this does not demonstrate anything more than that, under some circumstances, one or both might be proper parties to the action."<sup>122</sup> The modern tendency would seem to be contrary to the early case preventing joinder. The beneficiary's right to intervene in an action between the promisee and promisor (in the court's discretion) seems clear.<sup>123</sup>

The promisor (R) also may be sued by the promisee (E) of the third party creditor beneficiary contract in Minnesota, although

<sup>115</sup>Maxcy v. N. H. Fire Ins. Co., (1893) 54 Minn. 272, 55 N. W. 1130, 40 A.S.R. 325; Harriet State Bank v. Samels, (1925) 164 Minn. 265, 204 N. W. 938.

<sup>116</sup>Maxcy v. N. H. Fire Ins. Co., (1893) 54 Minn. 272, 55 N. W. 1130 40 A.S.R. 325.

<sup>117</sup>Sanders v. Classon, (1868) 13 Minn. 379 (Gil. 352).

<sup>118</sup>In Peterson v. Parviainen, (1928) 174 Minn. 279, 219 N. W. 180, judgment was entered against both the promisor and the promisee by the beneficiary. See also Gaffney v. Sederberg, (1911) 114 Minn. 319, 131 N. W. 333; Marshall State Bank v. Buesing, (1929) 179 Minn. 77, 228 N. W. 348.

<sup>119</sup>Barnes v. Hekla Fire Ins. Co., (1893) 56 Minn. 38, 57 N. W. 314; Bell v. Mendenhall, (1898) 71 Minn. 331, 73 N. W. 1086. ("The plaintiff may maintain a separate action upon each promise at the same or different times, for such remedies are consistent and concurrent." at page 337); Maddy v. Nat'l. Life Ins. Co., (1923) 156 Minn. 375, 194 N. W. 880; see also Guderian v. Leland, (1895) 61 Minn. 67, 63 N. W. 175, and Pinch v. McCulloch, (1898) 72 Minn. 71, 74 N. W. 897, in which the action was against E. Compare Sherwood v. O'Brien, (1894) 58 Minn. 76, 79, 59 N. W. 957, 958.

<sup>120</sup>Refer to first three cases cited in footnote 119, *supra*.

<sup>121</sup>Barnes v. Hekla Fire Ins. Co., (1893) 56 Minn. 38, 57 N. W. 314; Heins v. Byers, (1928) 174 Minn. 350, 219 N. W. 287.

<sup>122</sup>Maxcy v. N. H. Fire Ins. Co., (1893) 54 Minn. 272, at 275 and 276, 55 N. W. 1130.

<sup>123</sup>Kniefel v. Keller, (1940) 207 Minn. 109, 290 N. W. 218.

other courts are split on the question.<sup>124</sup> Generally speaking, the measure of damages is the amount of debt which R promised to pay to B for E.<sup>125</sup> E need not pay the debt before suing R,<sup>126</sup> and he may join several promisors as defendants, at least if their promises pertain to related debts and contracts.<sup>127</sup> Although the promisors have argued that two recoveries are possible under this rule, the court has replied that

“With us equity and law are fused. It may be that the defendants could require the money paid to the plaintiff to be applied to the debt; or if judgment is obtained against them could obtain relief giving them equivalent protection, or before judgment could adopt such procedure as would prevent double payment. The danger of being subjected to double payment is not great.<sup>128</sup>

Whether this rule also applies to promisees in donee beneficiary contracts has been questioned by some writers, and Minnesota really never has decided the question. *Clearwater Creamery Association v. Hoveland*,<sup>129</sup> which pertains to the problem, was decided before donee beneficiary contracts were recognized in Minnesota. Consequently, most of its reasoning is not applicable now, and the result of the case seems open to criticism.

## II.

### TERMINATION OF THIRD PARTY BENEFICIARY CONTRACTS

The Minnesota Supreme Court recognizes that B's rights are based upon the contract between E and R and not upon an inde-

<sup>124</sup>*Merriam v. Pine City Lbr. Co.*, (1877) 23 Minn. 314; *Heins v. Byers*, (1928) 174 Minn. 350, 219 N. W. 287; *Gustafson v. Koehler*, (1929) 177 Minn. 115, 224 N. W. 699; cf. *Price v. Doyle*, (1885) 34 Minn. 400, 26 N. W. 14.

<sup>125</sup>*Merriam v. Pine City Lbr. Co.*, (1877) 23 Minn. 214; *Heins v. Byers*, (1928) 174 Minn. 350, 219 N. W. 287. In *Klemnik v. Henrickson Jewelry Co.*, (1913) 122 Minn. 380, 142 N. W. 871, the court said E could recover “at least nominal damages.”

<sup>126</sup>*Merriam v. Pine City Lbr. Co.*, (1877) 23 Minn. 314; “In *Peterson v. Herrington*, (1926) 169 Minn. 65, 210 N. W. 617, the court held that a mortgage assumption clause imposes an absolute liability and not a contract of indemnity; . . .” *Gustafson v. Koehler*, (1929) 177 Minn. 115, 224 N. W. 699.

<sup>127</sup>*Klemnik v. Henrickson Jewelry Co.*, (1913) 122 Minn. 380, 142 N. W. 871. In this case the plaintiff entered into separate contracts with separate persons in which the latter in each instance agreed to pay different debts than the promisors in the other contracts agreed to pay. The court permitted E to join all of them as defendants in one action. The debts involved had been contracted by plaintiff in the jewelry business which the defendants purchased at different times.

<sup>128</sup>*Heins v. Byers*, (1928) 174 Minn. 350, 353, 219 N. W. 287; see also *Gustafson v. Koehler*, (1929) 177 Minn. 115, 224 N. W. 699.

<sup>129</sup>(1925) 165 Minn. 163, 205 N. W. 895.



pendent theory of action.<sup>130</sup> But few Minnesota cases have involved the question of how and when a third party beneficiary contract is terminated. Perhaps the best way to avoid the problem is to include in the third party beneficiary contract a clear provision governing its duration and termination. But in the absence of such a provision, certain rules must be applied.

No doubt exists that in the creditor beneficiary situation represented by the mortgage cases the contract can be terminated as to E's liability (mortgagor-grantor) if B (the mortgagee) extends the time for payment of the mortgage by R (the mortgagor's assuming grantee) without obtaining E's consent.<sup>131</sup> However, the promisee's liability is terminated only to the extent it is affected by the release.<sup>132</sup> This rule is based upon equity rules, since the promisee is held to be in a suretyship relation with B.<sup>133</sup> The broad reasoning of the Minnesota cases dealing with this rule seems applicable to all creditor beneficiary situations, and the Restatement of Contracts has stated the rule as applying to all creditor beneficiary contracts.<sup>134</sup> Minnesota also has recognized the Restatement rule that a creditor beneficiary contract may be terminated, within limits, by the parties (E and R) to the contract.<sup>135</sup> Thus, in Minnesota,

"A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if

<sup>130</sup>*LaMourea v. Rhude*, (1940) 209 Minn. 53, 295 N. W. 304; *McCulloch v. Canadian Pacific Ry. Co.*, (U. S. Dist. Ct. for Minn., 1943) 53 Fed. Supp. 534.

<sup>131</sup>*Travers v. Dorr*, (1895) 60 Minn. 173, 62 N. W. 269; *Jefferson County Bank v. Erickson*, (1933) 188 Minn. 354, 247 N. W. 245; *Klise Lbr. Co. v. Enkema*, (1921) 148 Minn. 5, 181 N. W. 201. The Negotiable Instruments Law (2 Mason's 1927 Minn. Statutes, Sec. 7044) does not prevent the release by lack of consent to extension. *Jefferson County Bank v. Erickson*, *supra*.

<sup>132</sup>*Travers v. Dorr*, (1895) 60 Minn. 173, 62 N. W. 269.

<sup>133</sup>*Travers v. Dorr*, (1895) 60 Minn. 173, 62 N. W. 269.

<sup>134</sup>Restatement of Contracts, Sec. 146. In determining if E has given his consent to the extension, "The law does not require consent to be in writing, nor does it call for the action by a board of directors when a corporation is an actor. 'Whether the surety in any given case did or did not consent to such an extension is a question of fact, which may be proved in the same manner as any other fact, the evidence of which need not be in writing, by circumstantial evidence.' *Bandler v. Bradley*, 110 Minn. 66, 124 N. W. 644, 645. Since it need not be in writing, an officer in active charge of the business of a corporation ought not to be required to have written authorization to consent to an extension. By consenting to the extension the corporation entered into no obligation." *Amidon v. Traverse Land Co.*, (1930) 181 Minn. 249, 232 N. W. 33.

<sup>135</sup>*Morstain v. Kirscher*, (1933) 190 Minn. 78, 250 N. W. 727.

(a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation."<sup>136</sup>

Although the court seemed to recognize the rule only as it applied "to the facts of this case," the rule seems sound when applied to creditor beneficiary contracts generally. In *Maxfield v. Schwartz*,<sup>137</sup> which was not a mortgage case, the court recognized that rescission of the contract after suit is commenced is "impossible." It said, ". . . it being, as they now admit, impossible to now rescind, they would be bound to perform the agreement." And in *Gold v. Ogden*<sup>138</sup> Justice Mitchell pointed out, *obiter dictum*, that B had not shown he relied upon the contract or even knew of its existence until action was commenced and that "neither are there any facts proven to have intervened from which any equity could arise in their favor." Consequently, it seems reasonable to conclude that Minnesota is in accord with Section 143 of the *Restatement of Contracts*.<sup>139</sup>

Minnesota appears never to have decided if a donee beneficiary contract may be rescinded by the acts of the promisor and promisee. The *Restatement of Contracts*, Section 142, declares that a donee beneficiary contract cannot be rescinded without the consent of the beneficiary. This rule, however, is based upon an analogy to life insurance policies which, according to Professor Williston, the Reporter for the Restatement of Contracts, is a law peculiar to itself.<sup>140</sup> Certainly rules which govern a subject peculiar to itself cannot be sound precedent for a situation which is not necessarily within the scope of the subject. The problem raised by this section has been dealt with expressly by the United States District Court for Minnesota in *McCulloch v. Canadian Pacific Ry. Co.*<sup>141</sup> That case involved New York law. But Minnesota derived its third party beneficiary law from New York and, like New York, uses many of the same rules. Consequently, that case seems to have weight in Minnesota. Moreover, the question never had been decided specifically in New York, so this case represents what the United States Court for this District believes is a sound rule in light of principles

<sup>136</sup>Restatement of Contracts, Sec. 143.

<sup>137</sup>(1890) 45 Minn. 150, at 151, 47 N. W. 448, 10 L.R.A. 606.

<sup>138</sup>(1895) 61 Minn. 88, 63 N. W. 266; compare *Becker v. Nelson*, (1925) 164 Minn. 367, 205 N. W. 262, in which the court pointed out that B had not altered his position by reason of R's acts.

<sup>139</sup>See also the Restatement of Contracts, Minnesota Annotations, Sec. 143.

<sup>140</sup>Williston on Contracts, Sec. 369, page 1079.

<sup>141</sup>(U. S. Dist. Ct. for Minn., 1943) 53 Fed. Supp. 534.

similar to (if not identical with) Minnesota's. Judge Nordbye reasoned the problem and held in that case, at pages 545 and 546, as follows:

"But plaintiff argues that, in any event, he should be a donee beneficiary and that his rights as a donee beneficiary could not be extinguished without his consent. See Restatement of Contracts, Section 142. While it must be recognized that the Restatement assumes to lay down the broad rule that a third party donee beneficiary contract cannot be rescinded without the donee's consent, this rule is not followed by the majority of courts. 2 Williston on Contracts, Sec. 396; 13 C. J. 602; 17 C.J.S., Contracts, No. 390; note, 53 A.L.R. 178. The only condition laid down by the majority of the courts with reference to the rescission of a donee beneficiary contract is that there must be an absence of reliance on the contract by the third party beneficiary.

"Although New York does not seem to have considered expressly whether this majority rule, or any other rule, is applicable to donee beneficiary contracts, it has applied the majority rule consistently to creditor beneficiaries; (citing cases) and there seems little doubt that, as Professor Williston concludes, New York also will apply the majority rule to donee beneficiary contracts.

"In *Gifford v. Corrigan*, *supra*, Justice Finch declared that the rules governing the rescission of a third party beneficiary contract must be framed in the light of the theory upon which they are enforced. New York enforces donee and creditor beneficiary contracts upon the same theory, i.e., intent to benefit the third party by the contract. See *Seaver v. Ransom*, *supra*, in which Justice Pound states the rule as applicable to all the classes of third party beneficiaries, including creditor beneficiaries, which are recognized in New York; see also *Lawrence v. Fox*, *supra*, *Graybar Elec. Co., v. Seaboard Surety Co.*, *supra*, *Wilson v. Costich Co.*, *supra*, and *Fosmire v. Natl. Surety Co.*, *supra*. Therefore, since no distinguishing factors which require a different result are apparent, it seems to follow that the majority rule which New York applies to creditor beneficiary contracts must also be applied to donee beneficiary contracts.

"The main arguments advanced in favor of the rule advocated by the plaintiff with reference to donee beneficiary contracts are that a beneficiary in a life insurance policy cannot be changed without the consent of the existing beneficiary, and that, where there is a gift, it cannot be revoked without the donee's consent. But it will be seen that neither of these situations is analagous to the donee's rights under a third party beneficiary contract. First, it may be observed that insurance law is peculiar to itself. There has grown up in that field principles of law which are not applicable elsewhere. Public policy and the relationship between the parties largely have influenced the rule with reference to the change of beneficiaries in a life insurance contract. Therein, because of the

peculiarity of the law, a beneficiary has a vested interest in absence of the right to change beneficiaries. Nor is the rule regarding revocation of gifts helpful, or persuasive in determining the rule as to the rescission of a third party beneficiary contract. Where a gift is executed, the donee accepts the gift from the donor and usually possession then rests in the donee. There is the element of delivery and the element of reliance by the donee on that which was done. In the instant situation, the only so-called gift created was the right of exchange of Fives for Fours which was never relied upon and which was never accepted by the donees prior to rescission. The mere execution of a contract creating third party beneficiary rights does not necessarily create a valid gift to a third party. The contracts are not analagous. Compare *Deyo v. Adams*, 178 Misc. 859, 36 N.Y.S. 2d 734, with *Warren v. United States*, 1929, 68 Ct. Cl. 634, certiorari denied 1930, 281 U. S. 739, 50 S. Ct. 346, 74 L. Ed. 1154, and *Franklin Washington Trust Co. v. Beltram*, 1943, 133 N. J. Eq. 11, 29 A. 2d 854. In any event, New York enforces third party beneficiary contracts because it is 'just and practical' to do so (*Seaver v. Ransome*, supra [224 N. Y. 233, 120 N. E. 640, 2 A.L.R. 1187])—not because of any technical rules of legalism. Consequently, analogies to insurance and property law seem to be of little help. That the majority rule satisfies the equitable principles of the theory adopted by New York courts and is entirely practical seems free from doubt. No one has suggested any cogent reason why the rights of a donee beneficiary should be any more sacrosanct than the rights of a creditor beneficiary, and there is nothing to indicate that the New York courts would make any distinction in their rights when a rescission has taken place."

These exact arguments also are applicable in Minnesota as shown by authority already cited throughout this article. Moreover, if donee beneficiary contract situations are so similar to creditor beneficiary situations that in many instances they can be defined by the same rule (as Minnesota Supreme Court necessarily recognized when it permitted donee beneficiary contracts to be enforced upon the theory that they were within the creditor beneficiary rules of *Jefferson v. Asch*) then it seems necessarily to follow that they are so factually similar that they must be terminable also according to the same rules unless they are obviously inapplicable (as is Section 142 (b) of the Restatement because a donee beneficiary situation excludes creditors from its scope). The rule that Minnesota has adopted in creditor beneficiary situations is clearly applicable. Such a rule also is in accord with the reluctance shown by the Minnesota court in granting all donee beneficiaries the right to enforce the contract. For it grants greater freedom of action to R

and E and restricts the rights of the donee beneficiary more than does the rule of the Restatement. If the rule of the Restatement is adopted, then (ironically) the donee beneficiary whom the courts have been reluctant to recognize will find himself in a better position than the creditor beneficiary whom the court has favored from the beginning. The court seems neither to have said anything nor done anything which shows a switch of its affection to the donee beneficiary now that he is recognized in Minnesota. It is submitted that in view of the history of the donee beneficiary in Minnesota and sound reason, the rule applicable to creditor beneficiary cases also should be applied to donee beneficiary situations.

### *Conclusion*

In summary, therefore, the following general conclusions seem warranted:

1. Minnesota recognizes that both the donee beneficiary contract and the creditor beneficiary contract can be enforced unless a valid defense exists thereto.

2. Minnesota recognizes that a donee beneficiary contract and a creditor beneficiary contract exist only when an intent to benefit the third party is shown. If no intent to benefit is shown, the third party who seeks to enforce the contract is only an incidental beneficiary.

3. Minnesota permits a creditor beneficiary contract to be rescinded by the promisee's and promisor's action if the beneficiary has not brought action upon the contract prior to rescission or changed his position in reliance upon the contract before he learns of the rescission. Although Minnesota never has met the problem of rescission with respect to a donee beneficiary contract, the history of Minnesota cases and sound reason seem to justify a rule like the one applied in creditor beneficiary cases.

These rules, apparently firmly rooted in Minnesota jurisprudence, are still young as compared to many legal principles. They have developed in spite of the common law. They have developed because, as Professor Corbin has said,

"Law is not a complete and perfect system of unchangeable rules, handed down on some Sinai in the dark infinity of the past. Instead it is an ever changing and developing system of rules, every judicial decision as well as every legislative act being a part of the never ending process of creation."<sup>142</sup>

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<sup>142</sup>Corbin, *Contracts for the Benefit of Third Persons*, 46 *Law Quart. Rev.* 12, 44.

Resorting merely to the old common law and its corollaries for the determination of questions involved under the doctrine of third party beneficiary contracts will not necessarily solve all the problems. The old common law did not recognize the doctrine. The principles must be developed with a view to their own American history and to equity—their reason for existing.