CONTRACT BENEFICIARIES[1]

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It will be assumed in this paper that the reader is really learned and *inter alia* can distinguish a contract between A and B for the benefit of C from a contract in which A furnishes the consideration and B makes a promise directly to C.[2] It is assumed also that agreements making third parties *cestuis que trustent* of genuine trusts or otherwise creating or affecting property rights of third parties will not be confused with contracts for the benefit of third parties but involving no such property

[1] No attempt will be made to cite all the cases; they are numerous. The following references will lead one to most of the authorities: 2 A. L. R. 1193, note (concerning contracts to leave a beneficiary property at death, annotation to three cases preceding, *ibid.* 1150-1192); (1890) 29 AM. L. REG. (N. S.) 596, note (general); 39 Am. St. Rep. 531, note (general); 71 Am. St. Rep. 176, note (general); Bennett, *Considerations Moving from Third Persons* (1896) 9 HARV. L. REV. 233; NOTES (1880) 16 CAN. L. JOUR. (N. S.) 2 (English law); editorial, *The Right of a Stranger to Maintain an Action upon a Contract* (1880) 11 CENT. L. JOUR. 161; (1913) 77 CENT. L. JOUR. 355, note; Corbin in Anson, *Contract* (Corbin's ed. 1919) chs. 8 and 9 (based on article by Professor Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE LAW JOURNAL, 1008); Corbin, *Contracts for the Benefit of Third Persons in Connecticut* (1922) 31 YALE LAW JOURNAL, 489; NOTES & COMMENT (1919) 4 CORN. L. QUART. 53 (history of N. Y. law); 13 C. J. 703-713; 18 Fed. 523, note; Galt, in 4 CAN. L. REV. 364 (English and Canadian law); 7 Hals. Laws Eng. secs. 705-714 (general); Hening, *History of the Beneficiary's Action in Assumpsit* (1909) 3 Select Essays in Anglo-American Legal History, 339 (based on articles by Professor Hening in (1904) 52 AM. L. REG. 764, (1905) 53 AM. L. REG. 112, and (1908) 56 AM. L. REG. 73); Holloway, *Promises to One of Performance to Another* (1918) 24 CASE AND COMMENT, 134; Keasbey, *The Right of a Third Person to Sue upon a Contract Made for His Benefit* (1895) 8 HARV. L. REV. 93; Notes in 23 L. R. A. 146 (loss by fire due to lack of adequate water supply), 25 L. R. A. 257 (general), and 49 L. R. A. (N. S.) 1167 (right of citizen to enforce contract made for benefit of public); (1898) 105 LAW TIMES 485 (general); Lilienthal, *Privity of Contract* (1888) 1 HARV. L. REV. 226; Clark, *Real Party in Interest Statute in Missouri* (1914) 4 Mo. L. BULL. 3, 30-35; (1915) 8 Mo. L. BULL. 38 (Missouri law); 6 R. C. L. 882 *et seq.* (general); Tucker, *Personal Liability of One Assuming Payment of a Deed of Trust* (1917) 4 VA. L. REV. 464; (1916) 3 VA. L. REV. 464 (general); 1 Williston, *Contracts* (1920) ch. 13, "Contracts for the Benefit of Third Persons" [based on an article by Professor Williston in (1902) 15 HARV. L. REV. 767, reprinted in Pollock, *Principles of Contract* (Wald's and Williston's ed. 1906) 237]; Williston, *Contracts for the Benefit of a Third Person in the Civil Law* (1903) 16 HARV. L. REV. 43; (1916) 25 YALE LAW JOURNAL, 232 (general). Professor Williston's discussion is both the most detailed and the most enlightening.

[2] Anson, *Contract* (Corbin's ed. 1919) sec. 287; Williston, *Contracts* (1920) sec. 354; (1916) 25 YALE LAW JOURNAL, 232.

rights.[3] Cases where one of the nominal parties to the contract is in truth the agent of a principal, whether disclosed or not, are also not within the scope of this article.[4] Likewise cases where a third party acquires rights in connection with a contract by assignment or novation are outside the present discussion. These subsequently acquired rights are easily distinguished.[5]

From the mass of beneficiary cases two classes may be readily segregated. These are the creditor-beneficiary and the donee-beneficiary groups. In the creditor type of cases the promisee in the contract under consideration is under an obligation to the beneficiary and by the contract procures the promisor's agreement to discharge the promisee's liability to the beneficiary. In the donee type, on the other hand, there is no legal obligation from the promisee to the beneficiary and the promisee is in effect making a gift to the beneficiary by securing the promisor's agreement to transfer something to the beneficiary or otherwise to do or forbear to do something for his benefit. There is a third class of cases in which the third party's benefit is merely incidental: no performance is made to him and there is no purpose to affect his rights or benefit him. In this third class of cases it is conceded that the beneficiary acquires no

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[3] Anson, *op. cit.* sec. 285; 1 Williston, *op. cit.* secs. 348-351.

Here should be mentioned Professor Hening's sound exposition of the relation of the early law of debts and other actions to recovery by a beneficiary. *History of the Beneficiary's Action in Assumpsit* (1909) 3 Select Essays in Anglo-American Legal History, 339. Debt was a "real" action and the beneficiary recovered because he was conceived of as having a property right. There are later cases which rely upon the old ideas. *Ward v. Evans* (1704, Q. B.) 2 Ld. Raym. 928; *Tatlock v. Harris* (1789, K. B.) 3 T. R. 174; *Hill v. Royds* (1869) L. R. 8 Eq. 290 (*semble*); *Kreutz v. Livingston* (1860) 15 Cal. 345; *Fay v. Sanderson* (1882) 48 Mich. 259; *Weston v. Barker* (1815, N. Y.) 12 Johns. 276; *Ross v. Milne* (1841, Va.) 12 Leigh, 204, 225 (*semble*). *Contra: Williams v. Everett* (1811, K. B.) 14 East, 552; *Owings v. Owings* (1827, Md.) 1 H. & G. 484; *Butterfield v. Hartshorn* (1834) 7 N. H. 345. The so-called exception which permits the beneficiary to recover "where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that purpose" (see *Tasin v. Bastress* (1920) 268 Pa. 85, 90, 110 Atl. 744, 745-746, (*semble*); Anson, *op. cit. supra* note 2, sec. 286; 1 Williston, *op. cit. supra* note 2, sec. 370) is also probably a descendant of the debt and account cases. However, as Professor Williston suggests (*ibid.* sec. 348), it would be unfortunate to settle the beneficiary question today in accordance with this old procedural distinction. If the beneficiary is to recover at all, his rights should not depend on whether the consideration given by the promisee was such as to create a common law debt.

[4] See 1 Williston, *ibid.* sec. 352. Occasionally courts invent agencies to permit a beneficiary to recover: *Lilly v. Hays* (1836, K. B.) 5 Ad. & E. 548; *Lawrence v. Fox* (1859) 20 N. Y. 268 by two judges. If the apparent promisee is in truth merely an agent the apparent beneficiary is the true promisee and must sue. *Pigott v. Thompson* (1802, C. P.) 3 Bos. & Pul. 147.

[5] It is not always simple. See *Walker v. Rostron* (1842, Exch.) 9 M. & W. 411; *Hamilton v. Spottiswoode* (1849) 4 Exch. 200; *Noble v. Company* (1860, Exch.) 5 Hurl. & Nor. 225; *Griffin v. Weatherby* (1868) L. R. 3 Q. B. 753.

rights.[6] Other cases arise which are not easily placed in any of these groups: some of these will be considered later.

Perhaps the orthodox common-law view is that a beneficiary, not being a party to the contract, cannot enforce it. This simple solution of the problem, however, has been so widely departed from everywhere, even in England[7] where it is supposed to be settled law, that the chances are it is an incorrect answer. The first part of this paper attempts to state the reason why on sound legal principles some beneficiaries should be permitted to enforce the contract.

I

The underlying principle on which a beneficiary should be allowed to recover comes out most clearly in the donee-beneficiary type of cases. That class of cases will therefore first be given our entire attention.

Under the supposedly orthodox principle that no one but a party can sue on a contract, the donee-beneficiary obviously could not maintain either a legal or an equitable action. This leaves the promisee as the only party that can enforce the contract. A legal action by the promisee for his own benefit should lie according to this view. Recovery, however, should be limited to nominal damages because it is plain that the promisee is not personally damaged at all except by the frustration of his desire to make a gift to the beneficiary. Recovery for this latter disappointment would be outside the type of damages allowed for breach of contract. It is true that some cases allow the promisee to recover the damages which the beneficiary suffers. That, however, is on the fictitious theory that the promisee is a trustee for him. In such cases

[6] Anson, *op. cit. supra* note 2, sec. 291; 1 Williston, *op. cit. supra* note 2, secs. 402, 403.

[7] It is common knowledge that in England no beneficiary has a direct action on the contract whether (a) at law: *Wharton v. Walker* (1825, K. B.) 4 Barn. & Cress. 163 (creditor-beneficiary); *Melhado v. Ry.* (1874) L. R. 9 C. P. 503 (donee-beneficiary) or (b) in equity: *Re Engineering Company* (1880) L. R. 16 Ch. Div. 125 (creditor-beneficiary); *Hohler v. Aston* [1920] 2 Ch. 420 (donee-beneficiary). But in many cases the English courts have allowed donee-beneficiaries to recover under the pretense of a trust in which the promisee is thought to be a trustee of the contract with the beneficiary as *cestui*. *Tomlinson v. Gill* (1756, Ch.) Ambler, 330; *Touche v. Metropolitan Company* (1871) L. R. 6 Ch. App. 671; *In re Flavell* (1883) L R. 25 Ch. Div. 89; *Kelly v. Larkin* [1910, Ir. K. B.] 2 Ir. 550; *Walford v. Les Affréteurs* [1918, C. A.] 2 K. B. 498; *Les Affréteurs v. Walford* [1919, H. L.] A. C. 801 (affirming the preceding case). To create a fictitious trust with the promisor as trustee is an even greater departure from the facts: but this has also been done in British jurisdictions. *Moore v. Darton* (1851, Ch.) 4 De G. & Sm. 517; *Mulholland v. Merriam* (1872, Ont.) 19 Grant Ch. 288. Even in a creditor-beneficiary case the promisee has been said to be a trustee and thus the beneficiary given rights. *Gregory v. Williams* (1817, Ch.) 3 Mer. 582. The courts are not always particular that in proceedings to enforce these fictitious trusts the alleged trustee should be joined. *Kelly v. Larkin, supra; Mulholland v. Merriam, supra.*

the promisee holds the damages recovered, like any trustee, for the benefit of the beneficiary.[8]

However, the promisee, though he cannot on orthodox principles recover substantial damages for a breach by the promisor in failing to pay the beneficiary, probably could rescind the contract for the breach and recover back the consideration.[9] But this remedy is extremely unsatisfactory as a sole remedy.[10] If the contract proves advantageous to the promisor he will perform it; but if it proves to be disadvantageous he will break it and let the promisee recover his consideration. The promisor may gain by the contract but need never lose: the promisee may lose by the contract but cannot enforce a gain. A remedy which makes such a result possible will not alone meet the situation.

Granting that no adequate remedy exists at law, is there a basis for relief in equity? May the promisee obtain specific performance of the contract? In jurisdictions holding (fictitiously) that he is a trustee for the beneficiary he may, no doubt, have specific performance in a case otherwise proper for that remedy.[11] If he is not held to be a trustee then the grounds for giving him equitable relief are slight indeed. He

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[8] For the view that the promisee can recover nominal damages in donee-beneficiary cases there is almost no authority. See, however, *Watson v. Randall* (1838, N. Y.) 20 Wend. 201; *Muncie Gas Co. v. City* (1902) 160 Ind. 97, 110, 66 N. E. 436, 441 (*semble*). If the donee-beneficiary is allowed to sue, an action by the promisee is generally forbidden. *Levet v. Hawes* (1599, Q. B.) Cro. Eliz. 619, 652; *Rippon v. Norton* (1602, Q. B.) Cro. Eliz. 849; *Winterhalter v. Fund Ass'n* (1888) 75 Calif. 245, 248, 17 Pac. 1, 2 (*semble;* but see Calif. C. C. P. 1872, sec. 369); *Martin v. Insurance Co.* (1881) 73 Me. 25; *Ricker v. Insurance Co.* (1880) 27 Minn. 193 (*semble*); *Signaigo v. Signaigo* (1918, Mo.) 205 S. W. 23 (promisee a competent witness against estate); *Evans v. Supreme Council* (1918) 223 N. Y. 497, 120 N. E. 93; *Edmundson v. Penny* (1845) 1 Pa. 334; *In re Edmundson's Estate* (1918) 259 Pa. 429, 103 Atl. 277; *Adams v. Union Ry.* (1899) 21 R. I. 134, 42 Atl. 515 (*semble*). It has occasionally been held that the promisee cannot sue even though the same court holds that the beneficiary cannot. *West v. Houghton* (1879) L. R. 4 C. P. Div. 197; *Ferris v. Water Co.* (1881) 14 Nev. 44. These cases then deny the promisee's right even to nominal damages. In England now the promisee recovers full damages as trustee for the beneficiary. See below. A couple of cases say that the promisee can recover full damages for his own use. *Lunn v. Payne* (1815, C. P.) 6 Taunt. 140 (could recover penalty of bond conditioned for payment to wife); *Ebel v. Piehl* (1903) 134 Mich. 64, 95 N. W. 1004 (but promisee had assigned to beneficiary and so in effect beneficiary recovered). These cases cannot be supported on principle and are opposed by *City of New Haven v. New Haven & D. Ry.* (1892) 62 Conn. 252, 25 Atl. 316. Where the English trust notions prevail the promisee recovers full damages as trustee for the beneficiary. *Lloyd's v. Harper* (1880, C. A.) L. R. 16 Ch. Div. 290; *In re Flavell* (1883, C. A.) L. R. 25 Ch. Div. 89; *Ex parte Dever* (1887, C. A.) L. R. 18 Q. B. Div. 660; *Cleaver v. Association* [1892, C. A.] 1 Q. B. 147; *People v. Slocum* (1866) 1 Idaho, 62.

[9] 1 Williston, *op. cit. supra* note 2, ch. 40; *Spalding v. Henshaw* (1882) 80 Ky. 55 (*semble*); *Adams v. Union Ry., supra* note 8 (*semble*).

[10] Discussed in *Adams v. Union Ry., supra* note 8.

[11] *Hohler v. Aston* [1920] 2 Ch. 420.

has no beneficial interest to be vindicated.[12] He may be considered as having a dry legal title. But can an assignor of a chose in action where the assignment is total sue in equity? The donor of a charitable trust, once the trust is fully created, cannot maintain a bill to enforce the trust[13] yet his sentimental interest is equal to that of our promisee. In any event, however, there would be cases where the remedy in equity would be inapplicable. Suppose the promisor agreed to build a house or to work a year for the beneficiary. Relief in equity by way of specific performance would be an anomaly. To permit the promisor to recover damages in equity would be at least as great a violation of principle as to allow such an action at law.

Professor Williston has suggested[14] that a bill filed against the promisor with the promisee and the beneficiary as co-plaintiffs, or by either of them as plaintiff with the other as a co-defendant, should be sustained. The thought seems to be that by uniting the bare legal title of the promisee and the financial interest of the beneficiary a sufficient basis for equitable relief may be obtained. There is almost no authority for such a suit.[15] It is certainly cumbersome as compared with the relief presently to be suggested. The objection that cases might arise entirely outside the limits of equitable jurisdiction would still hold. Finally the numerous cases permitting donee-beneficiaries to proceed alone at law are not explained or justified by it.

It may be said then that unless the donee-beneficiary is conceded a direct action upon the contract the law would fail to provide any entirely adequate means for its enforcement.[16]

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[12] In *Mt. Vernon v. Water Co.* (1906) 115 App. Div. 658, 101 N. Y. Supp. 232 it was held that the promisee could not proceed in equity for enforcement of the contract, the beneficiary in New York having, in the sort of case in hand, a right to sue. But in other cases, where a municipality had made a contract with a public service company for the benefit of numerous users of the service, it has been held that, to avoid a multiplicity of suits and because the city is a sort of trustee for and represents the public, it may enforce the contract in equity. *Muncie Gas Co. v. City* (1902) 160 Ind. 97, 105, 66 N. E. 436, 439-440; *City of Red Wing v. Power Co.* (1918) 139 Minn. 240, 166 N. W. 175; *St. Marys v. Gas Co.* (1912) 71 W. Va. 76, 76 S. E. 841. Since a suit by one consumer would practically settle the rights of all, since one or a few consumers might sue for all in like position, since most courts do not make the promisee a trustee for the beneficiary, and since the city represents its inhabitants as to public rights rather than private rights, however numerous, it would seem that these cases might be seriously questioned. They, however, reach a convenient result.

[13] *Sanderson v. White* (1836, Mass.) 18 Pick. 328; *Women's Christian Ass'n. v. Kansas City* (1898) 147 Mo. 103, 125, 48 S. W. 960, 966 (*semble*); *Clark v. Oliver* (1895) 91 Va. 421, 22 S. E. 175; *Strong v. Doty* (1873) 32 Wis. 381. *Contra: Mills v. Davison* (1896) 54 N. J. Eq. 659, 667, 35 Atl. 1072, 1075 (no discussion or citations).

[14] 1 Williston, *op. cit. supra* note 2, secs. 358, 359.

[15] Professor Williston cites *Peel v. Peel* (1869, Ch.) 17 Weekly R. 586. The case is entirely in point. However it is but the decision of a Vice-Chancellor and does not seem to have been acted on in other cases.

[16] See *Gorrell v. Water Co.* (1899) 124 N. C. 328, 32 S. E. 720.

On what ground can the donee-beneficiary be permitted to bring an action at law? On the very simple ground that the making of the contract for his benefit amounts to the present complete execution of a gift in his favor. The performance which he is ultimately to receive is of course not given to him when the contract is made: it is not a gift of the performance. The consideration which the promisee furnishes to the promisor is not given to the beneficiary: it ordinarily never reaches him at all. The rights of the promisee on the contract are not given to the beneficiary: the promisee's rights, if the above analysis of them is correct, are so slight that to transfer them to the beneficiary would aid him but little. He does not want nominal damages or rescission. The gift consists in creating new contract rights in his favor, rights which the promisee never had. The promisee, for the consideration he gave the promisor, could have required payment to himself. He then would have had perfect rights on the contract. These rights he could give to a third party by an assignment of them to him. Is it impossible for him to take the short cut of lodging such rights in the beneficiary in the first place by the contract itself? The decisions certainly permit this to be done.[17] It is submitted that they are sound on common-law principles. What may be said in support of them?

Gifts of chattels or choses in action require some formality for their validity.[18] The formality may be delivery of the thing given: it may be a deed of conveyance: it may be a nominal consideration, the transaction taking the form of a sale but remaining substantially a gift. Indorsement of certain kinds of choses may accomplish a gift. In the many forms of modern business transactions other methods of transferring the gift may be valid. But the fundamental principle at the bottom of them all is that there must be some formality which at once shows a clear intention of the donor to make the gift and serves to

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[17] The numerous cases permitting a donee-beneficiary to sue at law may be explained best in this way. They are collected in 1 Williston, *op. cit. supra* note 2, secs. 368, 369. In the following cases the courts with more or less clarity expressly adopt the view that it is an executed gift: *Weston v. Richardson* (1882. Ch.) 47 L. T. (N. S.) 514; *In re Dobbel* (1894) 104 Calif. 432, 38 Pac. 87; *Crowe v. Dobbel* (1895) 105 Calif. 350, 38 Pac. 957; *Chapin v. Fellowes* (1869) 36 Conn. 132; *Harley v. Heist* (1882) 86 Ind. 196; *Pruitt v. Pruitt* (1883) 91 Ind. 595; *Ricker v. Insurance Co.* (1880) 27 Minn. 193; *Seaver v. Ransom* (1918) 224 N. Y. 233, 241, 120 N. E. 639, 641-642; *In re Schmoll's Estate* (1919, Surro.) 108 Misc. 492, 177 N. Y. Supp. 670; but see s. c. in (1920) 191 App. Div. 435, 181 N. Y. Supp. 542; *Blymire v. Boistle* (1837, Pa.) 6 Watts, 182. *Contra: Ross v. Milne* (1841, Va.) 12 Leigh, 204. See also a note in (1919) 32 HARV. L. REV. 289. Some of these cases are based on life insurance contracts. Professor Williston suggests that they may be treated as mercantile specialties. The writer has no quarrel with this idea. The insurance cases cited still show that one may effectually give rights on a contract to a beneficiary by making the contract for his benefit.

[18] A valuable statement of the law concerning gifts of choses in action with some references to gifts of chattels is found in 1 Williston, *op. cit. supra* note 2, secs. 439, 440.

prevent the setting up, by word of mouth, of alleged gifts never in fact made. This latter result is accomplished by requiring some outward act, not so easily proven by false testimony as mere words would be. It is believed that the making of a contract by the promisee (the intended donor) with the promisor for the benefit of the beneficiary (the intended donee) serves all the purposes of the formalities hitherto held requisite to complete a gift. The donor's intention is evinced in the most perfect way: the introduction of the promisor into the case makes the substantiating of fraudulent claims of gifts difficult. If the gift is an important one the statute of frauds as to sales of goods or land may apply and require a writing. Delivery of the thing given does not so clearly show intention to give or so adequately prevent fictitious claims. It would be a slavish adherence to the accidental limits of past precedents and an unwise refusal to apply the life-giving principle underlying those precedents, to hold that this contractual form of gift is impossible. Fortunately the cases in which donee-beneficiaries have recovered at law are numerous and some of them substantially place his right to recover on the ground that a complete gift has been effected.[19]

The adoption of the above theory solves many of the problems that have troubled the courts in the past. If the gift is complete the promisee has no rights at all on the contract legal or equitable.[20] He cannot recover even nominal damages.[21] The power of enforcement is in the beneficiary alone.[22] The gift vests in the beneficiary the moment the contract is made.[23] No doubt, as with any other gift made without the

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[19] See note 17, *supra.*

[20] The following cases explicitly take this view: *In re Dobbel, supra* note 17; *Martin v. Insurance Co., supra* note 8; *Ricker v. Insurance Co., supra* note 17; *Signaigo v. Signaigo, supra* note 8; *In re Edmondson's Estate, supra* note 8.

[21] See note 8, *supra.* Professor Corbin's objection to the cases on this point (Anson, *op. cit. supra* note 2, sec. 296) is therefore unjustified.

[22] See notes 8-16, *supra.* The beneficiary may have equitable relief to enforce his rights whenever an equitable remedy is the appropriate one. *Wachenhut v. Gas Co.* (1917, Sup. Ct.) 166 N. Y. Supp. 29; Williston, *op. cit. supra* note 2, sec. 379. In *Walters v. Walters* (1890) 132 Ill. 467, 23 N. E. 1120, the contract was for the promisee's benefit as well as for that of several beneficiaries. The promisee alone sued in equity. It was held that the beneficiaries were necessary parties and must be joined.

[23] 1 Williston, *op. cit. supra* note 2, sec. 396. It is believed that in the majority of donee-beneficiary cases this accords with the intention of the promisee. The insurance cases are generally the same way. See Vance, *The Beneficiary's Interest in a Life Insurance Policy* (1922) 31 YALE LAW JOURNAL, 343. Professor Vance suggests that in view of the growing custom to reserve the right to change the beneficiary in life policies, it is probable that giving the beneficiary the title to the policy at once was a mistaken interpretation of the insured's intent. Whether this is so or whether when the consequences became apparent, the ordinary intention about control of the policy changed, the outcome is convenient. An absolute gift may be made or by reserving the right to change the beneficiary, the control and, according to the majority of courts, the title to the policy may be retained by the insured.

assent of the donee,[24] he may reject it if he wishes. If he does reject it the contract should be considered as thereby annulled and the promisee allowed to recover back all or part of his consideration on principles similar to those applying to contracts the performance of which has become impossible.[25]

According to this view a simple efficient remedy exists in the hands of the person who has the real interest in using a remedy. The intentions of the parties are fully effectuated. No straining of legal principles or creation of fictitious relationships is involved. The legal intuition of the judges who have permitted recovery by the donee-beneficiary is justified. The unfortunate plight of those courts who have refused recovery except by means of asserting an agency that never existed[26] or by twisting the facts into a direct promise to the beneficiary,[27] is made apparent. The great weight of authority on the question is found to be in accord with sound common-law doctrine.

II

We may consider next the creditor-beneficiary cases. Can recovery in a case like *Lawrence v. Fox*[28] be supported on the same line of reasoning that we have just suggested as applicable to the donee-beneficiary cases? It must be conceded that there may be cases where the promisee desires and intends to confer new rights on his creditor. But in the great majority of the cases the reasonable conclusion seems to be that the promisee in making the new contract is simply bargaining in his own interest.[29] It is true that he procures the agreement of the promisor to pay the creditor-beneficiary: but he does this to secure ultimate freedom from his own obligation to the beneficiary. Giving the beneficiary anything is outside his purpose.[30] He does not intend to give the beneficiary even new security. Without an intention to give, either

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[24] *Cf.* 1 Williston, *op. cit. supra* note 2, sec. 213; 28 C. J. 644, note 89.

[25] Probably inasmuch as the promisee selects the donee-beneficiary and perhaps by implication represents that he will accept the proposed gift, the promisee should recover his consideration only after deducting from it a sum which will reimburse the promisor for the loss of the contract.

[26] *Gardner v. Denison* (1914) 217 Mass. 492, 105 N. E. 359; *Jentzen v. Pruter* (1921) 148 Minn. 8, 180 N. W. 1004. *Cf.* 1 Williston, *op. cit. supra* note 2, sec. 352.

[27] *American Can Co. v. Garnett* (1922, C. C. A. 9th) 279 Fed. 722; *Bassett v. Society* (1921) 215 Mich. 126, 183 N. W. 747.

[28] *Supra* note 4.

[29] See 1 Williston, *op. cit. supra* note 2, sec. 380.

[30] Professor Corbin, in Anson, *op. cit. supra* note 2, sec. 290, after stating that some cases refuse the creditor-beneficiary recovery because there is no intent to give him any new rights, says: "But it is believed that where the promisor has received consideration for a promise the fulfilment of which necessarily requires him to pay money directly to a mortgagee or other third person, it would seem not unreasonable to draw an invariable inference that such third person was con-

actual or carelessly permitted to appear actual, no gift is made.[31] Many cases have recognized that recovery by the beneficiary on the contract should depend on an intent by the promisee to give him new rights and have refused recovery because they found no such intent.[32] In other cases an intent to confer a benefit on the beneficiary was present and recovery allowed.[33] The unfortunate thing is that in most of the creditor-beneficiary cases this question has been ignored or slighted.

Whenever the promisee desires to give to the creditor-beneficiary new

templated as a beneficiary and as the holder of a new and additional right of action."

To say that we must draw an invariable inference means that we must treat the actual fact in each case as immaterial; in other words, we are to give the creditor-beneficiary rights though in truth there was no intent to give him any. This is strong doctrine for the twentieth century. If there is no sound reason for the *Lawrence v. Fox* doctrine, it does not assist us much to tell us that we must assume the facts to be such as to make it sound.

[31] 28 C. J. 627.

[32] In all these cases the court emphasized the necessity of intent to confer benefits on the beneficiary. In the following, there was an obligation owing to the beneficiary: *National Bank v. Grand Lodge* (1878) 98 U. S. 123; *Austin v. Seligman* (1883, C. C. S. D. N. Y.) 18 Fed. 519; *Uhrich v. Globe Surety Co.* [1914, Kan. City (Mo.) Ct. App.] 166 S. W. 845; *Merrill v. Green* (1873) 55 N. Y. 270; *Pardee v. Treat* (1880) 82. N. Y. 385; *Cleveland Metal Co. v. Gaspard* (1914) 89 Ohio St. 185, 106 N. E. 9; *King v. Scott* (1915) 76 W. Va. 58, 84 S. E. 954. See also Holloway, *Promises to One of Performance to Another* (1917) 24 CASE AND COMMENT 134, 140. In the following cases there was no obligation from the promise to the beneficiary but they were hardly the ordinary donee-beneficiary type of cases: *Eureka Stone Co. v. First Christian Church* (1908) 86 Ark. 212, 110 S. W. 1042; *Dickinson v. McCoppin* (1915) 121 Ark. 414, 181 S. W. 151; *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.* (1905) 113 La. 1091, 37 So. 980; *St. Louis v. Wright Contracting Co.* (1907) 202 Mo. 451, 101 S. W. 6; *Brower Co. v. Miller* (1896) 28 Or. 565, 43 Pac. 659; *Fry v. Ausman* (1912) 29 S. D. 30, 135 N. W. 708. In the following cases there was no obligation from the promisee to the beneficiary and, further, the performance did not go directly to the beneficiary: *Sayward v. Dexter, Horton & Co.* (1896, C. C. A. 9th) 72 Fed. 758; *Klingler v. Wick* (1920) 266 Pa. 1, 109 Atl. 542.

[33] *Gooch v. Buford* (1920, C. C. A. 6th) 262 Fed. 894 (husband contracted with hospital to care for wife; husband intends to benefit both wife and himself; she therefore rightly recovered: is donee-beneficiary of part of contract); *Bothe v. Noack* (1921) 149 Ark. 297, 232 S. W. 606 (if vendee defaulted the plaintiff was to have the right to substitute himself as vendee); *Ochs v. Carnahan Co.* (1907) 42 Ind. App. 157, 76 N. E. 788, 80 N. E. 163 (contractor's bond to pay laborers and material-men; public building and no lien); *National Surety Co. v. Foster Lumber Co.* (1908) 42 Ind. App. 671, 85 N. E. 489 (same); *Lewis v. Home Insurance Co.* (1920, Sup. Ct.) 110 Misc. 592, 181 N. Y. Supp. 839 (warehouseman took out insurance payable to owner of goods probably under contract to do so); *Jenkins v. C. & O. Ry.* (1907) 61 W. Va. 597, 57 S. E. 48 (county court and railroad agreed to establish hospital to meet an epidemic and transport the ill to it: plaintiff was carelessly treated in transportation); *Grant v. Diebold Safe & Lock Co.* (1890) 77 Wis. 72, 45 N. W. 951 (express agreement that beneficiary would surrender rights against promisee for rights against promisor). Of the above, the Arkansas, New York, and Wisconsin cases are substantially creditor-beneficiary cases; the others resemble donee-beneficiary cases.

rights, the writer believes the beneficiary should be allowed to recover on the contract. It is true that even then the argument is not as strong as in the donee-beneficiary case. No complete gift of the contract is intended. The promisee has rights of his own on the contract. The transfer to the beneficiary is of a limited interest in the contract. But such a transfer seems possible and the formality requisite to make the gift effectual, namely, the making of a contract with a third party with express stipulations showing intent to have performance go to the beneficiary, is present.

However, the ordinary case of creditor-beneficiary, where no intent to give the beneficiary new rights can be found, is entirely distinguishable from the donee-beneficiary cases. Further, as a practical matter, it is much better that the creditor-beneficiary should have no direct rights on the contract for the following reasons:

(a) The promisee in this case may himself adequately enforce the contract. Breach of the contract by the promisor causes the promisee not nominal but very substantial damages in that his original liability to the beneficiary has not been discharged as promised.[34] Though the beneficiary be given no rights on the contract the promisor will not be able to avoid liability if his contract turns out to be disadvantageous as he might in the donee-beneficiary cases. Recovery by the beneficiary, therefore, is not essential to provide a proper remedy for breach by the promisor.

(b) Under the doctrine of *Lawrence v. Fox* the contract, though created by promisor and promisee without participation by the beneficiary or the giving of any consideration by him, nevertheless cannot be rescinded or modified without his consent. True it is generally held that he must know of the contract before he gets rights on it and also some vague requirement of assent is made.[35] But this knowledge and assent imposes no duties upon him. The interest in the contract which he acquires under *Lawrence v. Fox* comes to him as a pure gratuity and as an unintended gratuity. At the same time the parties to the contract, who made it and furnished the considerations which gave it life, have had taken from them the power to control it. Either or both of them may find it advantageous to make some change in their relations under the contract. The promisor may wish relief from the obligation he has undertaken: the promisee may find it better to pay the beneficiary himself. They may wish to rescind the contract or to alter it. Why should the law mortgage that contract to the beneficiary, a volunteer? It would seem the most elementary justice to give to the parties to it the right to control it even if we are to be permanently saddled with the doctrine of *Lawrence v. Fox*. This has

[34] That the promisee can recover substantial damages is conceded. 1 Williston, *op. cit. supra* note 2, sec. 392; Anson, *op. cit. supra* note 2, sec. 296.

[35] 1 Williston, *op. cit. supra* note 2, sec. 396b and note; Anson, *op. cit. supra* note 2, sec. 297.

been done by statute in California and a few other states.[36] Of course in the donee-beneficiary case, where a gift of the contract to the beneficiary was intended and is complete, no such power should rest with promisor and promisee. It is unfortunate that the statutes just mentioned have not exempted donee-beneficiary contracts from their operation. If the rescission of the contract by the parties who made it would be a disposal of property in fraud of creditors it is clear that the creditor-beneficiary as well as any other creditor should have a right to object to it effectually.[37]

(c) Though there appears to be little or no authority on the point, it seems clear that under the doctrine of *Lawrence v. Fox* the beneficiary would gain an unfair advantage in case of the bankruptcy of the promisee. On principle the beneficiary should be paid *pro rata* with the other creditors of the promisee. The only right he has ever gained by contract is that of a creditor of the promisee.[38] No one has intended to give him any greater rights.[39] He has gained no higher position by diligence: attachment, judgment, or similar action. There is no sound reason for preferring him over the other creditors of the promisee. If it is thought that the promisee cannot compel the promisor to pay anyone other than the creditor-beneficiary because that would be altering the promisor's contract,[40] still the beneficiary could be compelled to turn over to the trustees in bankruptcy of the promisee the excess over that amount which equality among creditors would permit him to retain.[41] If the promisor fails to pay the beneficiary, then, as we have

[36] Anson, *op. cit. supra* note 2, sec. 301, note 3.

[37] See 1 Williston, *op. cit. supra* note 2, sec. 397.

[38] In *Walton Co. v. Runyan* (1920, C. C. A. 5th) 269 Fed. 130, the creditor-beneficiary and promisee agreed that promisee would take out insurance as to $4000 for the creditor-beneficiary and as to any amount over $4000 for the promisee's own benefit. It was rightly held that the beneficiary was entitled to the $4000 as against other creditors of the insolvent promisee. In this case the beneficiary had contracted for just that advantage. The remainder of the proceeds of the policy went to the trustees in bankruptcy. This also was settled by the contract.

[39] *In re Newland* (1873, S. D. N. Y.) Fed. Case No. 10,171, was a case in which it appeared that the promisee took out insurance payable to the creditor-beneficiary. Probably this was done under an agreement with the beneficiary to protect her in this way. If so, the case is on all fours with the one commented on in the preceding note. But, in any event, there was an obvious intention that the beneficiary should have this protection. That being so, the case is entirely supportable on the principle on which this article has supported recovery by a donee-beneficiary.

[40] When we recall that obligations are now quite freely assignable, it would seem entirely possible to permit the promisee to change the person to whom the promisor must pay, assuming that no change of place of payment, increasing the promisor's burden, be made. See editorial, *The Right of a Stranger to Maintain an Action upon a Contract* (1880) 11 Cent. L. Jour. 161, 166.

[41] It has been held that if the contract for the creditor's benefit is made within four months of the promisee's bankruptcy and performed, it is a preference which may be avoided by the trustees. *Rogers v. Fidelity Sav. Bk. & Loan Co.* (1909, W. D. Ark.) 172 Fed. 735; *Wickwire v. Webster City Sav. Bk.* (1911) 153 Iowa, 225, 133 N. W. 100. Assuming that the writer's contention, that the making of

seen, the promisee may recover full damages from the promisor, which should be held equally for all creditors of the insolvent promisee. Instead of this equal and therefore just distribution of the assets of the promisee among his creditors, the doctrine of *Lawrence v. Fox,* no doubt, secures to the beneficiary the entire amount of his claim.[42] This results from fictitiously treating the contract for performance to a creditor-beneficiary as if it were intended to convey to the beneficiary new rights and so amounted to an executed transfer to him of those rights.[43]

(d) Another unfortunate result of *Lawrence v. Fox* is the generally accepted conclusion that the beneficiary may recover against the promisor when he could not have recovered against the promisee.[44] The cases obviously involve mistake on the part of the promisee. If

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the contract in favor of the creditor-beneficiary should give him no direct right on it, is correct, it is clear that the preference comes when he is paid by the promisee and that if that is within four months of the promisee's bankruptcy it ought to be recoverable by the trustees.

[42] See Anson, *op. cit. supra* note 2, sec. 295 at p. 350. The nearest approach to this question by actual decisions is seen in the cases holding that due to the *Lawrence v. Fox* doctrine no creditor except the beneficiary-creditor can garnishee the rights of the promisee against the promisor. See 1 Williston, *op. cit. supra* note 2, sec. 362. Professor Williston appears to think that on principle no creditor other than the beneficiary-creditor can garnishee, at least prior to payment of the beneficiary by the promisee. The writer does not see the need of conceding so much. See *infra* note 66.

[43] American courts usually have made what, it is submitted, is a similar error in cases where a creditor is held to be subrogated to the rights of a surety in securities placed in the latter's hands by the principal debtor. The securities are given to the surety to secure him and not for the creditor's benefit. Nevertheless, it is commonly held that in such cases the security is irrevocably dedicated to the satisfaction of the debt and that therefore it is proper to give the creditor an equitable interest in the securities which enables him to pay himself out of them to the exclusion of other creditors of the surety or of the principal debtor. See Brandt, *Suretyship and Guaranty* (3d ed. 1905) sec. 357; Stearns, *Suretyship* (3d ed. 1922) 459; 21 R. C. L. 1094, note 12; and *infra* note 60. This totally indefensible result is not arrived at, apparently, in England or Canada. See *Ex parte Waring* (1815, Ch.) 2 Glyn & J. 404; *Smith v. Fralick* (1856, Upper Can.) 5 Grant Ch. 612; *Commercial Bank v. Poore* (1858, Upper Can.) 6 Grant Ch. 514. The law should not prefer one creditor over others in case of bankruptcy, unless that creditor has by contract, gift, or diligence obtained for himself a protected position.

[44] See 1 Williston, *op. cit. supra* note 2, secs. 386, 399; Anson, *op. cit. supra* note 2, sec. 298. Professor Williston in sec. 386 concludes that if the promisee was under no color of liability, the beneficiary should not be allowed to sue, apparently agreeing with the arguments here presented. On the other hand, in sec. 399, where he is discussing cases involving some insufficient ground for the promisee supposing himself liable to the beneficiary, he states that often the beneficiary should be allowed to recover. These latter cases involve promises from the promisee to the beneficiary defective because of usury, coverture, informality of execution, lack of record, and even insufficient payment. It is hard to see any substantial distinction between cases where the promisee thought he was liable because he had bought land subject to a mortgage though he had not assumed the mortgage and cases where he believed himself liable because he had promised

the promisee knew he owed the beneficiary nothing, or even doubted his liability, and nevertheless made the contract, he clearly would be intending to make a certain or possible gift to the beneficiary and the latter could recover as belonging to the donee group already discussed. But in the class of cases now under consideration the promisee mistakenly supposes that he owes the beneficiary and accordingly makes the contract for his payment. No gift is intended. The donee-beneficiary cases do not apply.[45] Since there is in reality no obligation from the promisee to the beneficiary, it is not a case of creditor-beneficiary and *Lawrence v. Fox* cannot be relied on.[46] No recovery by the beneficiary should be allowed, even assuming the correctness of *Lawrence v. Fox*. Why then blame *Lawrence v. Fox* for this group of cases? The answer is that but for the notion that the creditor-beneficiary gets a direct right against the promisor the present erroneous result could not have been reached. But for the *Lawrence v. Fox* doctrine the creditor-beneficiary would have to work his rights out through the promisee and his first step would necessarily consist in establishing an enforceable claim against him.[47]

Various suggestions have been made to justify the cases now under discussion. It is quite often said that it is none of the promisor's

to pay and did not know of the defense of usury, lack of proper execution, or the like. In both cases he thinks himself liable: in both he is not liable: in both he is attempting to protect his own interests: in neither is he desiring to make a gift to the beneficiary.

Cases in which the defense of the promisee against the beneficiary is the statute of limitations, like *Daniels v. Johnson* (1900) 129 Calif. 415, 61 Pac. 1107 and *Davis v. Davis* (1912) 19 Calif. App. 797, 127 Pac. 1051, may well be supported on the ground that the new contract amounts to an acknowledgment of the debt and waives the defense of the statute. It is possible that some other cases could be concurred in on similar grounds.

[45] The case of *Casselman's Adm'x. v. Gordon & Lightfoot* (1916) 118 Va. 553, 88 S. E. 58, is therefore an unfortunate one. The statute of Virginia permits a sole beneficiary to recover (Va. Code, 1887, sec. 2415). The *Casselman* case holds that where the promisee is not liable to the beneficiary he has no interest in the performance of the contract; so far it is correct. It then holds that the beneficiary is solely interested; also correct. But "sole" beneficiary had been quite commonly used as the equivalent of donee-beneficiary. Was it not so used in the statute? This question the court did not deal with.

[46] Some of the earlier cases in New York accordingly did not allow a recovery. See 1 Williston, *op. cit. supra* note 2, sec. 386, notes.

[47] In California, for example, in cases where the grantee of mortgaged property assumes the mortgage which the grantor for some reason was not personally bound to pay, such grantee is not liable to the mortgagee. *Ward v. De Oca* (1898) 120 Calif. 102, 52 Pac. 130; *Andrews v. Robertson* (1918) 177 Calif. 434, 170 Pac. 1129, *semble*. This is because in mortgage-assumption cases in California the doctrine of subrogation (subsequently explained in this article) is applied. In other creditor-beneficiary situations *Lawrence v. Fox* is applied in California. The Supreme Court held in *Washer v. Independent Min. Co.* (1904) 142 Calif. 702, 76 Pac. 654, which was not a mortgage case, that the beneficiary could recover though there was no obligation from the promisee to the beneficiary. When *Lawrence v. Fox* was considered applicable the erroneous result was reached: when it was not applied the right result followed even in the same state.

business whether the promisee owes the beneficiary or not, that he, the promisor, has agreed to pay him and must.[48] But the reason for relieving the promisor from liability is not that there are equities in his favor. It is rather that the beneficiary has no standing to enforce the contract. Being neither a donee- nor a creditor-beneficiary, having paid nothing, having been given nothing, what right has the beneficiary to sue? To allow him to recover would permit him to take advantage of a mistake of the promisee in a case where there is not even a technical legal right vested in him upon which to base an action.

Another argument has been that, if it happens that the promisor's obligation reads that he will pay the beneficiary so much money, rather than that amount which the promisee owes the beneficiary, then the promise is not impossible of performance and so may be enforced.[49] The answer is twofold. First, the argument takes the rather fortuitous wording of the contract too seriously. Whatever its form, its purpose and intent is to obtain the payment of the promisee's debt to the beneficiary. Secondly, this suggestion also looks exclusively at the possible equities of the promisor and fails to notice that, regardless of any question of so-called impossibility, the beneficiary for reasons just stated is not in a position to enforce the contract.

Probably on sound principles the contract should be discharged because based on the assumption of a valid debt to the beneficiary which assumption proved false.[50] The promisee could then on quasi-contractual principles recover the consideration given to the promisor for his promise.

It has often been urged against the beneficiary doctrine that it subjects the promisor to two suits.[51] Naturally this argument failed to carry conviction. Where it was chiefly relied upon by counsel, the mere putting forward of such a man of straw may have induced the court to react in favor of *Lawrence v. Fox*. The promisor under modern procedure could readily interplead the two plaintiffs and relieve himself from embarrassment.[52]

It has also been thought that the beneficiary should not have a double right and that therefore he must elect which obligor, the promisee or the promisor, he will hold. But if he has bargained for or been given an extra right there is no objection to his having two. On the other hand if he is not entitled to a right against the promisor he cannot by surrendering his proper claim against the promisee gain the new obligation.[53]

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[48] See the argument in *Washer v. Independent Min. Co., supra* note 47.

[49] This seems to be substantially Professor Williston's position. See 1 Williston, *op. cit. supra* note 2, sec. 399.

[50] This would surely be within the principle of *Krell v. Henry* [1903, C. A.] 2 K. B. 740 and *Marks Co. v. Hotel Co.* (1915) 170 App. Div. 484, 156 N. Y. Supp. 179.

[51] See *Meech v. Ensign* (1881) 49 Conn. 191, 205; 1 Williston, *op. cit. supra* note 2, sec. 390.

[52] See Anson, *op. cit. supra* note 2, sec. 295.

[53] See 1 Williston, *op. cit. supra* note 2, sec. 393; Anson, *op. cit. supra* note 2, sec. 294.

It may be urged that to any suit on the contract the promisee should be a necessary party (a) to enable him to protect his own interests,[54] (b) to protect the promisor from a suit by the promisee after the former has paid the beneficiary,[54] (c) to enable the beneficiary to settle once for all all facts which are common to actions against the promisee or the promisor.[55] It may be replied, in answer to (a) above, that the promisee may intervene, in answer to (b), that the promisor may interplead the beneficiary and the promisee, in answer to (c), that generally at common law obligors liable severally must be sued separately though there were one or more facts common to the causes of action against them.[56] That it would be convenient to permit the beneficiary to sue the promisee and promisor together is clear. Statutes are not uncommon allowing a single action against persons severally liable on a single instrument.[57] Probably such joinder is not compulsory anywhere. *Lawrence v. Fox,* then, cannot be blamed for not requiring the joining of both.

However, the fact that some of the arguments advanced against *Lawrence v. Fox* are easily disposed of should not blind us to the real difficulties arising from that case which have been outlined above.

As an affirmative ground for sustaining the creditor-beneficiary's recovery, it may be said that it saves a suit. Instead of two actions, one by the beneficiary against the promisee and one by the promisee against the promisor, the single proceeding by the beneficiary against the promisor suffices. In the first place, this advantage is slight when compared with the substantial objections. In the second place, this advantage can be secured in other ways involving no such objections. Many cases have sustained a suit by the beneficiary against the promisee and promisor as defendants. The doctrine usually put forward is subrogation.[58] It is said that the beneficiary is subrogated to the rights of the promisee against the promisor just as a creditor generally is subrogated to the rights of a surety against his principal, the promisee, after the promisor has undertaken to pay the debt, being in effect a surety. Then it is held in some cases that, inasmuch as the promisee's interest in the suit is not very great if his obligation is satisfied by the

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[54] 1 Williston, *op. cit. supra* note 2, sec. 385.

[55] 1 Williston, *op. cit. supra* note 2, sec. 400.

[56] 9 Cyc. 652-653.

[57] 9 Cyc. 653; 15 Enc. Pl. & Pr. 745; 1 Williston, *op. cit. supra* note 2, sec. 336; Calif. C. C. P. 1872, sec. 383, as amended by Sts. 1903, ch. 181.

[58] Many citations are found in Williston, *op. cit. supra* note 2, secs. 381, 384. The cases generally involve the liability to the mortgagee of a grantee of mortgaged premises who has assumed the payment of the debt. *Keller v. Ashford* (1890) 133 U. S. 610, 10 Sup. Ct. 494 is the leading case of this kind. There are, however, creditor-beneficiary cases not involving mortgages in which the doctrine of subrogation has been applied. *Mercantile Co. v. Balt. & Ohio Ry.* (1899, C. C. S. D. Ohio) 94 Fed. 722; *Philadelphia Rubber Co. v. United States Rubber Works* (1920, W. D. N. Y.) 276 Fed. 613; *Green v. McDonald* (1902) 75 Vt. 93, 53 Atl. 332; *Petty v. Warren* (1922) 90 W. Va. 397, 110 S. E. 826.

beneficiary compelling performance by the promisor, the promisee need not be joined unless the promisor objects to his absence.[59]

If the doctrine of subrogation can be applied here without the unfortunate implications which have been found in it by American courts in the creditor-surety-principal debtor cases, it would solve the present situation perfectly.[60] It should be held that subrogation here is a remedy and not an alteration of rights. The beneficiary should be allowed to proceed in equity, joining both promisee and promisor, and thus save one suit. Until the remedy is actually invoked by the beneficiary and thus a *lis pendens* concerning the contract established,[61] the promisee and promisor should be allowed to deal with the contract in any way they see fit, saving only the exception that there must be no release of the promisor which will be substantially a fraud on creditors.[62] In case the promisee becomes insolvent subrogation should not give the beneficiary any preference over other creditors of the promisee. The promisor's obligation should then be considered an asset of the promisee to be used for the equal benefit of all his creditors. The beneficiary of course must be given no subrogation unless he has an enforceable claim against the promisee.

Professor Williston suggests[63] that a better view upon which to sustain such a suit as is indicated above is that of a proceeding in equity to obtain execution against an asset of the promisee which the creditor

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[59] See Williston, *op. cit. supra* note 2, sec. 385.

[60] The difficulty in using the subrogation doctrine is that most American courts treat subrogation as a principle of substantive law rather than a remedy. They hold that the creditor gets an equitable interest in securities given the surety by the principal as soon as their transfer to the surety is made. It follows that the surety cannot release them without the consent of the creditor and that in case of the bankruptcy of the surety this creditor is preferred to other creditors of the surety as to these securities. *Boyd v. Parker & Co.* (1875) 43 Md. 182, 199; *Eastman v. Foster* (1844, Mass.) 8 Metc. 19; *Rice v. Dewey* (1859, Mass.) 13 Gray, 47; *Harlan County v. Whitney* (1902) 65 Neb. 105, 90 N. W. 993; *Keene Sav. Bk. v. Herrick* (1882) 62 N. H. 174; *Vail v. Foster* (1850) 4 N. Y. 312; *Ijames v. Gaither* (1885) 93 N. C. 358; *Blanton v. Bostic* (1900) 126 N. C. 418, 35 S. E. 1035; *Morrill v. Morrill* (1880) 53 Vt. 74. In some cases it is held that the creditor may proceed against such securities even when the surety could not. *Harlan County v. Whitney, supra; Ijames v. Gaither, supra; Morrill v. Morrill, supra. Contra: Henderson Co. v. Shillito Co.* (1901) 64 Ohio St. 236, 60 N. E. 295. In England, Canada, and to some extent in Missouri subrogation is considered as purely a remedy. The creditor can proceed against the securities merely as a convenient way of avoiding two suits (one by the creditor against the surety the other by the surety against the principal to foreclose on the securities) and settling the entire matter. *Ex parte Waring, supra* note 43; *Smith v. Fralick, supra* note 43; *Commercial Bank v. Poore, supra* note 43; *Logan v. Mitchell* (1878) 67 Mo. 524. If subrogation is adopted as the solution of creditor-beneficiary cases it is this British view which should be taken.

[61] See *Biddel v. Brizzolara* (1883) 64 Calif. 354, 361, 30 Pac. 609, 612; *Trustees v. Anderson* (1879) 30 N. J. Eq. 366, 369.

[62] See *Trustees v. Anderson, supra* note 61.

[63] 1 Williston, *op. cit. supra* note 2, sec. 384.

cannot reach at law. Inasmuch as subrogation has received an unfortunate interpretation in the class of cases bearing the closest analogy to the present problem, there is much to be said for his suggestion. On the other hand subrogation has been many times relied on by the courts in these cases and thus far without the extensions it has received in the suretyship cases and which would make it fail to serve well the present purposes. Cases applying any notion of equitable execution to our present problem are certainly rare.[64] Whatever the theory adopted, the beneficiary should be able in some way to join both promisee and promisor in one suit and thus save expense.

III

This article is already more extended than I could wish. There are, however, two other types of cases that should be mentioned.

If a municipality or other governmental body makes a contract with a corporation or other person under which the latter is to furnish the inhabitants of the municipality with some utility, can an inhabitant who has been denied the benefit of the contract sue the utility corporation?[65] Probably there would never have been any doubt of an affirmative answer but for the fact that most of the cases in which the question first came up were contracts to furnish water to put out fires. The courts seem to have been so impressed with the large damages the public utility would have to pay if held liable for all buildings burned because of its neglect, that recovery was denied. That individual owners perhaps lost their all because of the company's negligence did not seem to impress the courts forcibly.

But on what theory could an inhabitant sue? Clearly on the ground that he is one of the intended donee-beneficiaries of the contract. There is no legal obligation owing from the municipality to its inhabitants to put out fires. It cannot therefore be a case of creditor-beneficiary. The intent to give this benefit to the inhabitants is clearly present. The city cannot recover substantial damages because an inhabitant loses his house. So far as the contract also protects the city's own property of course it may sue. Only a limited interest in the contract is given to each inhabitant. Fortunately in cases other than the fire cases, where the liability of the utility would not be so onerous, recovery is generally allowed.[66]

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[64] *Forbes v. Thorpe* (1911) 209 Mass. 570, 95 N. E. 955, seems to go on this ground. The court says at page 582, 95 N. E. at 959: "This is a property right not subject to attachment which can be reached in equity and made available for the benefit of the creditor."

[65] The cases may readily be found by the following references: Anson, *op. cit. supra* note 2, sec. 292 at p. 346; (1916) 16 Col. L. Rev. 250; Notes and Comment (1920) 6 Corn. L. Quart. 100; (1917) 2 Minn. L. Rev. 58; 23 L. R. A. 146, note; 49 L. R. A. (n. s.) 1166, note; 1 Williston, *op. cit. supra* note 2, secs. 372a, 373, 374.

[66] Professor Williston, in the sections cited in the last note, undertakes to distinguish the fire cases from the others. He says that in the street car fare,

Another considerable group of cases arises out of contractors' bonds.[67] If by the contract in chief or the accompanying bond the contractor, his sureties, or both agree to pay all laborers and material-men, may one of these beneficiaries sue on the contract? It is of course a question of fact whether the owner made that contract with an intent to confer a benefit on the laborers and material-men. Generally the owner is not personally responsible to such persons. Mechanics' lien laws, however, make the owner's property liable. Even this is not true generally where the owner is a municipality or other governmental body. Since the municipality has no interest of its own to protect, the inference that it was gratuitously protecting laborers and material-men is strong. On the other hand it has been urged that all concerned will act more efficiently and that better laborers and material-men will be procurable and so a benefit will be derived by the city if all are assured of payment and that therefore the city is acting entirely for its own advantage. The argument that private owners are acting purely in their own interest, that is, to prevent liens, is stronger still. The cases are in conflict. Statutes have often given the laborers and material-men the right to enforce the contract. The most interesting thing is that the courts commonly make the result turn on whether there was a real intent to give the beneficiary rights. This class of cases therefore strongly supports our main contention that only persons upon whom the promisee intended to confer all or part of the benefits of the contract, these being usually donee-beneficiaries, should be permitted to recover on the contract.

There are many other interesting situations that merit discussion. The purpose of this paper, however, was to point out a tenable theory for permitting recovery at law and on the contract in the donee-beneficiary cases and others similar in principle, and to suggest the real disadvantages of allowing recovery in the ordinary creditor-beneficiary cases. It is hoped that this purpose has been accomplished.

water rate, and like cases, there is a common-law duty owing by the utility to each member of the public to serve that member for a reasonable compensation, that the contract between the city and the utility simply fixes what is a reasonable compensation, that the utility's liability is therefore in tort, that the doctrine of contract beneficiaries accordingly is not involved. It is submitted that the same line of reasoning is possible in the fire cases. A public utility given a franchise on its promise to provide fire hydrants and supply water to them, having entered upon the business and induced all to rely on it for fire protection, certainly seems on principle to be under a common-law duty not to disappoint those who have relied upon its undertaking. The contract with the city fixes the terms of the undertaking. The failure to carry out the undertaking may well be considered a tort. If this reasoning is sound the alleged distinction vanishes. So far as there remains in the municipality a right to alter the rates or requirements that may rest on a power to vary the terms of the contract actually reserved or created by law in order that public utilities may at all times be permitted and compelled to serve the public most efficiently.

[67] The cases are collected in the following references: NOTES (1914) 14 COL. L. REV. 669; 49 L. R. A. (N. S.) 1167, note; Williston, *op. cit. supra* note 2, sec. 372; COMMENTS (1920) 29 YALE LAW JOURNAL, 914.