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CONTRACTS - RIGHT OF DONEE BENEFICIARY

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CONTRACTS — RIGHT OF DONEE BENEFICIARY — Defendant contractor was engaged by the city of Duluth to do sewer construction work contemplating excavation in solid rock with heavy charges of explosives. The contract made defendant "liable for any damage done to private property and injuries sus-

tained by persons" in the course of its work. Plaintiff's nearby land was damaged by defendant's blasting operations. *Held*, that plaintiff, a mere donee beneficiary, was entitled to recover, although he was not a party to the contract, had furnished no consideration, and was not identified at the time the contract was made. *La Mourea v. Rhude*, (Minn. 1940) 295 N. W. 304.

In almost every state, including Minnesota, third-party beneficiaries may enforce creditor-beneficiary contracts, in which the promisee owes some debt or duty to the third person to be benefited.[1] In the case of gift-beneficiary contracts, however, there is some uncertainty as to the rule in many states and a decidedly greater reluctance to allow such persons to recover. Nevertheless, except in Minnesota [2] and five other states,[3] gift beneficiaries have usually been permitted to recover at common law, in equity, or by statute.[4] The rule heretofore enforced in the six states denying recovery springs from the requirement of "privity" between the promisee and the beneficiary.[5] In the principal case, the first Minnesota case to abandon the privity requisite,[6] the court reasons that the privity test is circular in designating effect rather than cause, and that the willingness of the courts to enforce the contract in reality creates the privity. In short, to establish privity is to dispense with the need for it. But this is only a part of the true answer. Defining the word "privity" in terms of "duty" or "consideration" [7] has caused the real difficulty. Should we adopt the test of duty or obligation, obviously no donee-beneficiary contract could be enforced. And yet even the Minnesota court finds privity and enforces donee contracts where the promisee and beneficiary are close blood relatives.[8] The absurdity of the duty argument becomes apparent when we consider that in its simplest form it would

[1] Lovejoy v. Howe, 55 Minn. 353, 57 N. W. 57 (1893); Heins v. Byers, 174 Minn. 350, 219 N. W. 287 (1928). Only Massachusetts and Delaware still persistently deny recovery to creditor beneficiaries. See 2 WILLISTON, CONTRACTS, rev. ed., § 381 (1936).

[2] Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604 (1893); Witzman v. Sjoberg, 164 Minn. 411, 205 N. W. 257 (1925).

[3] Arkansas, Montana, Delaware, New Hampshire, and Massachusetts. See 2 WILLISTON, CONTRACTS, rev. ed., § 368 (1936).

[4] For cases, see 2 WILLISTON, CONTRACTS, rev. ed., § 368 (1936). Georgia and Vermont enforce only in equity, and South Dakota enforces only by statute. 1 S. D. Code (1939), § 10.0204.

[5] The privity requirement was first set forth in the leading case of Vrooman v. Turner, 69 N. Y. 280 (1877), thus restricting the so-called American rule of Lawrence v. Fox, 20 N. Y. 268 (1859), to cover creditor-beneficiary contracts only.

[6] But in a concurring opinion in Peterson v. Parviainen, 174 Minn. 297, 219 N. W. 180 (1928), a creditor case, Justice Stone, who rendered the opinion in the principal case, said that the privity test should be abandoned and all beneficiary contracts be enforced. Similarly in St. Paul Foundry Co. v. Evenson, 169 Minn. 485, 211 N. W. 834, 213 N. W. 352 (1927), plaintiff recovered although promisee no longer owed plaintiff a debt or duty at the time of suit, the court saying that it should be little disturbed by lack of privity.

[7] Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604 (1893); St. Louis to Use of Glencoe Lime & Cement Co. v. Von Phul, 133 Mo. 561, 34 S. W. 843 (1896).

[8] Clark v. Clark, 164 Minn. 201, 204 N. W. 936 (1925).

hold all gifts void unless the donor had a legal duty to make them,[9] in which case they would be, of course, not gifts. Should we adopt the consideration test instead, we should be confronted with the argument that all courts except those of England and Massachusetts admit that it is not necessary for the promisee or plaintiff to furnish the consideration for defendant's promise.[10] That privity cannot properly be associated with consideration is evident also from the fact that equity is more anxious to enforce beneficiary contracts than law; [11] and yet equity, even in the case of sealed promises, is far more strict than law in its requirement of consideration. It has been suggested that the real explanation of cases in which no privity is found is that the promise was not intended for plaintff's benefit or to cover his claim, that he is a mere incidental beneficiary, or that the promise is only one to indemnify the promisee. But to think of privity in terms of intent as well as consideration or duty is often said to give rise to a dilemma, since the promisor in a creditor-beneficiary contract intends only to pay the debt, not to benefit the creditor.[12] It has been further suggested that even in donee cases and cases of moral obligation there is no intent to benefit plaintiff but only to clear the promisee's conscience. This argument, however, confuses intent with motive or purpose, and overlooks the fact that an intent of the promisor to assume a direct obligation to the beneficiary is sufficient.[13] In any event, this reasoning fails to cover cases like the case at bar, where a "conscienceless" municipal corporation is the promisee. While English courts have steadfastly refused to enforce any beneficiary contracts,[14] American courts have adopted many rather tenuous theories [15] to circumvent the privity obstacle and allow recovery. Of these the most satisfactory and rational is that of an assumpsit or implied promise,[16] which in effect dispenses entirely with the need of privity. How far reaching the principal case will be in setting a new Minnesota rule is questionable. Condemnation of the privity concept removes the foundation of the old rule and indicates that donee beneficiaries can always recover.[17] The court, however, felt insecure enough to offer the added argument that if privity is needed, it is here present in the form of the moral obligation

[9] 2 WILLISTON, CONTRACTS, rev. ed., § 368 (1936).

[10] Id., § 354.

[11] See note 4, supra.

[12] See annotation, 81 A. L. R. 1271 at 1291 (1932).

[13] Ochs v. M. J. Carnahan Co., 42 Ind. App. 157, 76 N. E. 788, 80 N. E. 163 (1906); Byram Lumber & Supply Co. v. Page, 109 Conn. 256, 146 A. 293 (1929).

[14] But they relieve hard cases by enforcing on a theory of trust. Tomlinson v. Gill, Amb. 330, 27 Eng. Rep. 221 (1756).

[15] Such as agency, subrogation, trust, avoidance of multiplicity of suits against promisor, avoidance of circuity of action, blood relationship, adoption, direct promise to beneficiary, escrow delivery, quasi-contract, real party in interest statutes, novation, and ordinary "reasonableness." For cases, see 81 A. L. R. 1271 at 1284 (1932).

[16] That is, a duty created by operation of law on the act of the parties. Lawrence v. Fox, 20 N. Y. 268 (1859); Brewer v. Dyer, 61 Mass. 337 (1851).

[17] But the court is careful not to overrule Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604 (1893), expressly, saying that it is merely "restating" the doctrine of that case.

of a municipal corporation to safeguard the welfare of its residents. Thus the Minnesota court may in the future take the position that, as in the cases of blood relationship, there is another exception to the general rule in cases of contracts with municipal corporations, where plaintiff has suffered a detriment and there is strong moral obligation.[18] From the standpoint of hardship, there would appear to be even more reason to enforce donee- than creditor-beneficiary contracts, for a donee beneficiary is in the helpless position of being unable to sue the promisee, even though the latter has already recovered from the promisor.[19] But, on the other hand, the donee beneficiary will seldom rely on the contract to his detriment, and further, the need for a direct recovery in order to avoid circuity of action is not present in the donee case. Finally, under facts like those of the principal case, there is always the alternative possibility of plaintiff's recovering in tort if defendant is negligent or if the absolute liability doctrine of *Rylands v. Fletcher* [20] is deemed applicable.

[18] Certainly the moral obligation here is at least as great as the duty of aunt to niece, which was held a sufficient moral duty to establish privity in Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 639 (1918). Recovery in donee-beneficiary contracts where a municipal corporation is promisee is approved in 1 CONTRACTS RESTATEMENT, § 145 (1932). Even Massachusetts enforced such a contract in Phinney v. Boston Elevated Ry., 201 Mass. 286, 87 N. E. 490 (1909), but there, as in most similar cases, defendant had to be negligent to permit a recovery.

[19] And since the promisee has lost nothing, he can recover only nominal damages from the promisor. 2 WILLISTON, CONTRACTS, rev. ed., § 360 (1936); For Use of Greene County v. Southern Surety Co., 292 Pa. 304, 141 A. 27 (1928).

[20] L. R. 3 Eng. & Ir. App. 330 (1868).