

of law and its bases, we must realize that flexibility can logically be asserted only of that which is solidly and firmly foundationed on the unchangeable. No single factor should over-balance or out-weigh the essential and basic and applicable contract law.

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CONTRACTS—THIRD PARTY BENEFICIARY—TIME OF ACQUISITION OF INDEFEASIBLE RIGHT.—When a court of last resort in all causes emphatically states that a certain approach to the solution of a legal problem is “not the view in our State” it is, perhaps, a barren endeavor to champion ardently such an approach. And this, even though the court concedes that “there is weighty authority in support of the view” which the court rejects.<sup>1</sup> However, the endeavor will be made.

That a third party beneficiary obtains a right from a contract upon which he can sue the promisor in his own name has been established in a long line of cases in New Jersey as well as in other jurisdictions. <sup>2</sup>The confusion and conflict arises when it is sought to ascertain at what point the right becomes indefeasible in the third party beneficiary so that the conduct of promisor and promisee cannot destroy it. In spite of the recent decision referred to <sup>3</sup>the New Jersey cases present no well settled disposition of the problem.

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1. *Dufford v. Nowakoski*, 125 N. J. Eq. 262, 9 A 2d 302 (E. & A., 1939) in which the approach or view rejected is that a donee beneficiary acquires an indefeasible right immediately upon the making of the contract for his benefit.

2. As to simple contracts see *Joslin v. N. J. Car Spring Co.*, 36 N. J. L. 141 (S.C., 1873). As to contracts under seal see R S. 2:26-3.6.

3. *Dufford v. Nowakoski*, supra note 1.

4. *Crowell v. Currier*, 27 N. J. Eq. 152 (Ch., 1876), affirmed in *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650 (E. & A., 1876). The affirming opinion indicates an exception to the rule in the case of general assignments for benefit of creditors. In that case the creditors get a right of which no power of the debtor's could divest them. For the exception see also *Scull v. Reeves*, 3 N. J. Eq. 131 (Ch., 1834); *Alpaugh v. Robertson*, 27 N. J. Eq. 96 (Ch., 1876).

An early and widely cited case took the position that unless the parties to a contract knowingly allowed the beneficiary to rely on the contract and to put himself into a position from which he could not retreat without a loss in case the contract was not performed they could at their pleasure abandon the contract and mutually release each other. Even this right of the beneficiary did not arise out of the rescinded contract but is based on a new and independent equity springing from the conduct of the parties and his action induced by it. The conclusion was distinctly obiter dictum (a fact which seems to have been overlooked in later cases) since the action was on a bill for deficiency in equity against the assuming grantee. The liability of an assuming grantee to the mortgagee has until recently "in New Jersey been based on the doctrine of equitable subrogation in which case the beneficiary's right to relief is obviously purely derivative and he stands in the shoes of his debtor."<sup>5</sup>

Another New Jersey case, this involving a donee beneficiary, held that any time before performance by the parties the contract could be rescinded.<sup>7</sup> Again, however, the case is not squarely in point as it involved the revocation of an offer rather than the rescission of a contract. Acceptance by the beneficiary was held the pivotal point in the only case in this jurisdiction entirely germane.<sup>8</sup>

If one is unwilling to accept the theory that the right of the beneficiary vests when the contract for his benefit is made, he is obligated to search for some other determining factor. One approach refuses to consider the right vested until the third party acts to his

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5. *Herbert v. Corby*, 11 A 2d 240 (S. C., 1940) in which the law court for the first time allowed recovery against an assuming grantee on the theory of third party beneficiary.

6. This doctrine of equitable subrogation was adopted by the United States Supreme Court in *Keller v. Ashford*, 113 U. S. 610, 10 S. Ct. 494, 33 L. Ed. 667 (1889). See also *Knapp v. Conn. Mutual Life Ins. Co.*, 85 F. 329 (C. Ct., 1898); *Klapworth v. Dressler*, 13 N. J. Eq. 62 (Ch., 1860).

7. *Peoples' Bank and Trust Co. v. Weidinger*, 73 N. J. L. 433, 64 A. 179 (S. C., 1906).

8. *Jordan v. Laverty*, 53 N. J. L. 15, 20 A. 832 (S. C., 1890). See obiter in decision of Federal District Court of New Jersey, *In re Halstead & Co.* 204 F. 115 (1913).

detriment in reliance on the contract.<sup>9</sup> This view seems to ignore the contract entirely as the source of the beneficiary's interest and seems to rely on the principle of equitable estoppel. It cannot be justified in the light of the law evolved since *Lawrence v. Fox* 20 N. Y. 268 (1859). If the third party is to be deemed to have a contractual right, such right should be independent of any subsequent conduct of the third party.

The great bulk of the cases require that the beneficiary accept the contract made for his benefit.<sup>10</sup> As to what constitutes acceptance there is much diversity of opinion. Where there is no knowledge of the contract there can be no acceptance.<sup>11</sup> Suit brought upon the agreement is an act of acceptance.<sup>12</sup> A demand of the third person that the promisor pay the debt in cash which he refused to do was held not to be evidence of an acceptance.<sup>13</sup> However, what of the legal presumption that one is deemed to have accepted something beneficial to him until his dissent is shown.<sup>14</sup> Especially is this true

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9. *Crowell v. Hospital of St. Barnabas*, supra note 4; *Morales v. Joanou*, 146 Misc. 515, 262 N. Y. S. 468 (1933) applied to creditor beneficiaries only; *Baringer v. Fidelity & Deposit Co. of Md.*, 161 S. C. 4, 159 S. E. 373 (1931).

10. *Jordan v. Lavery*, supra note 8; *In re Halstead & Co.*, supra note 8; *Wheat v. Rice*, 97 N. Y. 296 (1884); *Pacific American Gasoline Co. of Texas v. Miller*, 76 S. W. (2d) 833 (Texas 1934); *Waggoner v. Herring-Showers Lumber Co.*, 120 Tex. 605, 40 S. W. (2d) 1 (1931); *Blake v. Atlantic Nat. Bank*, 33 R. I. 464, 82 A. 225 (1912); *Davis v. Calloway*, 30 Ind. 112 (1868). *Amonett v. Montague*, 75 Mo. 43 (1881) where Louisiana law was applied to a Louisiana contract and *Mitchell v. Cooley*, 5 Rob. 243 was followed to the effect that consent by beneficiary to avail himself of contract is an acceptance; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. (1889).

11. *In re Halstead & Co.*, supra Note 8.

12. *Blake v. Atlantic Nat. Bank*, supra note 10. But see *Gifford v. Corrigan*, supra note 10 that the bringing of the action does not create the right but merely indicates knowledge and acceptance.

13. *Wood v. Moriarty*, 16 R. I. 201, 14 A. 855 (1888). In this case, the court held that there was no undertaking to commit the third person to the agreement or to accept the promisor in place of the promisee as debtor. The third person still could have sued the promisee. Query: Is the court not confusing a third party beneficiary contract with a novation?

14. *Douglass v. Wells*, 18 Hun 88 (N. Y., 1879); *Ellis v. Kristofersen*, 129 Misc. 443, 222 N. Y. S. 370 (1927).

where the third person has knowledge of the contract for his benefit.<sup>15</sup>

We submit that the better view is that the beneficiary's right is irrevocable as soon as the contract for his benefit is made.<sup>16</sup> If the essential of privity between the promisor and the third person necessary for binding contractual relations between them is ever present, it must arise at the moment of the inception of the contract when the exchange of promises between the immediate parties is made. It is impossible to hold that the element of privity is present in a contract involving a third person, and then allow the immediate parties by their conduct to destroy the right of the beneficiary.

This approach is equally applicable to either the donee or creditor beneficiary situation although there is eminent authority to the contrary.<sup>17</sup> The distinction is rested on the theory that the creditor beneficiary's right is purely derivative while that of the donee is not. Since both rights spring out of privity of contract it is difficult to see why the fact that the promisee was in one case motivated by the desire to shift his obligation and in the other case by the desire to tender a gift should be given any weight. The motive behind the act in a contract is not of legal significance. Perhaps, the courts are reluctant to allow the donee beneficiary to go without a remedy because then the promisor stands free as the promisee can hold him to only nominal damages. Whatever the basis the distinction seems ill-taken.

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15. *Bassett v. Hughes*, 43 Wis. 319 (1877); *Rogers v. Gosnell*, 58 Mo. 589 (1875).

16. *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440 (1903). followed in *Fanning v. Murphy*, 126 Wis. 538, 105 N. W. 1056 (1906).

17. See 1 Williston on Contracts, secs. 396, 397. *Morales v. Joanou*, supra note 9; *Knowles v. Erwin*, 43 Hun 150 (1887) aff. 124 N. Y. 633, 26 N. E. 759 (1891) which applied the proper reasoning to donee beneficiary situation.