
Fall 1945

Third Party Beneficiary Contracts

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Recommended Citation

(1945) "Third Party Beneficiary Contracts," *Indiana Law Journal*: Vol. 21 : Iss. 1 , Article 4.

Available at: <https://www.repository.law.indiana.edu/ilj/vol21/iss1/4>

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NOTES AND COMMENTS

CONTRACTS

THIRD PARTY BENEFICIARY CONTRACTS

The City of Fort Wayne and appellee contracted for the construction of a sewer beneath the surface of a paved street upon which appellant's lot abutted. Damages were sought for the injury to appellant's frame building, caused by tunneling. The complaint averred that the city and appellee knew the nature of the soil and that appellant's property would be deprived of lateral support. The contract stipulated that the contractor (appellee) would pay all damages arising from the work whether initiated by negligence or not. Appellant contended that the contract is in the nature of insurance against incidental or consequential damages for which otherwise appellant would have no remedy. Appellee demurred. When the demurrer was sustained, the appellant refused to plead over. Held, Reversed. Where the sewer contractor agreed to pay all claims for damages for injury to property, owner of the building could recover as a third party beneficiary if owner could prove causal connection. *Freigy v. Gargaro Co.*, — Ind. —, 60 N.E. (2d) 288 (1945).

This case supports the modern doctrine that a third party beneficiary, not a party to the contract, can sue upon the contract.¹ The doctrine holds that where one person agrees with another on a sufficient consideration, to do a thing for the benefit of a third person, the latter may enforce the contract.² Ability of the third party beneficiary to sue, even though not privy to the contract, has been supported in most of the American states, including Indiana, although it is not the majority rule in England today.³

The theory upon which the court proceeded was that the right of the third party beneficiary rests on the liability of the promisor, and this liability must affirmatively appear from the language of the contract when properly construed.⁴ The liability so appearing cannot be extended or enlarged merely on the ground that the situation and cir-

1. *Carson Pirie Scott & Company v. W. J. Parrett et al.*, 346 Ill. 252, 178 N.E. 498, 81 A.L.R. 1262, 1271 (1931); *Hendrick v. Lindsay*, 93 U.S. 143 (1876); *Bird v. Lanius*, 7 Ind. 615 (1856); *Harper v. Ragan*, 2 Blackf. 39 (Ind. 1837); *Corbin*, "Contracts for the Benefit of Third Persons in the Federal Courts," (1930) 39 Yale L. J. 601.
2. *Day v. Patterson*, 18 Ind. 114 (1862); *Ferris v. Am. Brewing Company*, 155 Ind. 539, 58 N.E. 701, 52 L.R.A. 305 (1900); *Miller v. Farr*, 178 Ind. 36, 98 N.E. 805 (1912).
3. *McCoy v. McCoy*, 32 Ind. App. 38, 69 N.E. 193 (1903); *Edwards v. Van Cleave*, 47 Ind. App. 347, 94 N.E. 596 (1903); *Reed v. Adams Steel & Wire Works*, 57 Ind. App. 259, 106 N.E. 885 (1914); *Nash Engineering Co. v. Marcy Realty Corp., Inc. et al.*, 222 Ind. 396, 54 N.E. (2d) 263 (1944); *Knight-Jillison v. Castle*, 172 Ind. 97, 87 N.E. 976 (1909); *La Mourea v. Rhude*, 209 Minn. 53, 295 N.W. 304 (1940); *Tweddle v. Atkinson*, 1 Best & S. 393, 121 Eng. Reprint, 762 (1861); 9 Am. Jur., Building and Construction Contracts, §94 ff.
4. *Carson Pirie Scott & Company v. W. J. Parrett et al.*, 346 Ill. 252, 178 N.E. 498, 81 A.L.R. 1260, 1271 (1931); *Anson*, "Contracts" (1930), §295. A number of theories have been offered as rationales

circumstances of the parties justify or demand further or other liability.⁵ If a contract be entered into for a direct benefit of a third person, not a party thereto, such third person may sue for breach thereof.⁶ The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract.⁷ If direct, he may sue on the contract; if incidental, he has no right of recovery.⁸

In an indemnity contract, the damages necessary for recovery need not be restricted to damages awarded by a court for liability or damages incurred by the violations of a legal right in property.⁹ Here, apparently, there was no negligence or other breach of duty by the city or appellee as against the appellant. It is not essential to the right of creditor or donee beneficiary of a contract to recover thereon that he be identified when the contract containing the promise is made.¹⁰

The instant case, allowing the parties to a contract the capacity to bestow a right on a third person, is in accordance with the weight of authority.¹¹

CONTRACTS

MEANING OF "PROFITS"

Appellant suited for retirement benefits under the respondent corporation's pension plan which provided that, "No pension or gratuity

of the third party beneficiary doctrine. (1) The agency theory makes the promisee the agent of the beneficiary, but this is fictional since the beneficiary does not make the promisee his agent. *Gardner v. Denison*, 217 Mass. 492, 105 N.E. 359, 51 L.R.A. (N.S.) 1108 (1914); *Williston, Contracts* (1920), §352; *Anson, Contracts* (1930), §277, 283. (2) Another theory finds a trust in a third party beneficiary contract; but this is weak, since there is no holding of legal title by a trustee. *Seaver v. Ransom et al.*, 224 N.Y. 233, 120 N.E. 639 (1918); *O'Hara et al. v. Dudley et al.*, 95 N.Y. 403 (1884); *Anson, Contracts* (1930), §277, 283a, 285. (3) Another theory allows the third party to recover on the basis of quasi-contract, but this theory breaks down because there is no unjust enrichment. *Anson, Contracts* (1930), 295. (4) The equitable asset theory holds that the promisee is the debtor of the beneficiary and hence makes a contract for his benefit, and this becomes an equitable asset of the beneficiary; however, this could apply only in the case of a third party creditor beneficiary and not in the case of a donee beneficiary. *National Bank v. Grand Lodge*, 98 U.S. 123 (1878); *Hall v. Marston*, 17 Mass. 575 (1822); *Anson Contracts*, §286. (5) One theory speaks of the third party's recovery as an equitable remedy, but this does not explain antecedent rights and duties. *Smith et al. v. Thompson et al.*, 250 Mich. 302, 230 N.W. 156, 73 A.L.R. 1389, 1395 (1930). The theory of the instant case is immune from all of the above-mentioned objections.

5. *Hageman v. Holmes*, 179 Ill. 275, 53 N.E. 739 (1899).
6. *Kinnan v. Hurst Co.*, 317 Ill. 251, 148 N.E. 12 (1925).
7. *Vial v. Norwich Union Fire Ins. Society*, 257 Ill. 355, 100 N.E. 929, 44 L.R.A. (N.S.) 317 (1913).
8. *Searles v. City of Flora*, 225 Ill. 167, 80 N.E. 98 (1906).
9. 27 Am. Jur., *Indemnity*, sec 20.
10. *La Mourea v. Rhude*, 209 Minn. 53, 259 N.W. 304, 306 (1940).
11. *Carson Pirie Scott & Company v. W. J. Parrett et al.*, 346 Ill. 252, 178 N.E. 498, 81 A.L.R. 1262, 1271 (1931).