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Contracts--Suit by Subcontractor on Contract Executed by Contractor with Owner

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continuing or recurring nuisance, however trivial, provided only it is sufficient to sustain an action at law for damages, will support an injunction.

In conclusion, as to the liability of a defendant in an action for damages for blasting, recovery may be had: (1) where dirt, stones and other debris are thrown by the blast upon adjoining property, irrespective of the question of negligence; (2) where the work of blasting is done in (a) a situation or location where it is necessarily dangerous to persons or property, the negligence arising in attempting to blast at all; and (b) in all other cases where the work itself has been negligently done.

JOHN A. EVANS.

CONTRACTS—SUIT BY SUBCONTRACTOR ON CONTRACT EXECUTED BY CONTRACTOR WITH OWNER.

The Jackson Lumber Company had a contract with the Board of Education of Lexington to construct a high school building. The lumber company sublet the steel work to the Huntington Iron Works Company and the Union Transfer Company transported certain materials for the Huntington Company. This action was brought by the lumber company against the school board to recover the balance due on the original contract. The defendant asked that other claimants be made parties to the action. The Transfer Company came in as one of such parties and claimed the fund on the ground that it was held by the school board in trust for their use. Held: For Transfer Company.

Quoting provisions from the contract in question, "Unless otherwise stipulated, the contractor shall provide and pay for materials, etc.—used in the execution of work.—The contractor to indemnify and save harmless the Board from all suits—and should guarantee the prompt payment of all persons furnishing material and labor to said contractor.—Final payment of the retained sum will not be made until the contractor should deliver to the Board a release of all liens arising out of the contract."

The court reasoned thus, "a contract may inure to the benefit of a third party depending upon whether the third person is a party to the consideration, or the contract was entered into for his benefit, or

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22 Loudon v. City of Cincinnati, note 16, supra.


2 Note 1, supra, at p. 664.
he has some legal or equitable interest in its performance." The court further said, "there are two distinct lines of decision in this class of contracts: those between the contractor and the owner, "If the bond, when read in connection with the contract, contains a provision obligating the contractor to pay for the material, or to compensate the laborers, it constitutes a provision for the benefit of the laborers and materialmen upon which they are entitled to maintain an action directly against the surety." On the other hand, when the bond is one solely to secure performance of the contract and contains no express provision for the benefit of third parties—an action thereon by a stranger to the contract cannot be maintained—hence the problem becomes the interpretation of the written instruments to ascertain whether they contain any provision for the benefit of the materialmen."

The court goes on to say that the terms of the contract are specific "and evidence an intention on the part of the contractor to see that all claims arising out of the building contract should be satisfied." The "two lines of decision" above referred to are represented by the Federal Surety Company v. Commonwealth, and other cases which allow an action, and by the case of Dayton Lumber and Manufacturing Company v. New Capital Hotel, and others which deny the right of action.

There seems to be little difficulty in supporting these latter decisions.

The Restatement of Contracts agrees and, in the following words, would allow an action: "When the performance of a promise in a contract will benefit a person other than the promisee, that is—a creditor beneficiary, if no purpose to make a gift appears in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary." After this definition, the Restatement gives such a beneficiary a right: of action in the following words, "a creditor beneficiary who has an enforceable claim against the promisee can get judgment against either promisee or promisor or against each of them." A further

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\[Footnotes:
\footnote{Quoting from \textit{National Surety Company v. Daviess County Planning Mills Company}, 213 Ky. 670, 281 S. W. 791 (1926).}
\footnote{Principal case at p. 655.}
\footnote{Principal case at p. 656.}
\footnote{\textit{Federal Union Surety Company v. Commonwealth}, 139 Ky. 92, 129 S. W. 335 (1910); \textit{Fidelity & Deposit Company of Maryland v. Charles Hegerwald Company}, 144 Ky. 790, 139 S. W. 975 (1911); \textit{Citizen Trust Company v. Peebles Paving Brick Company}, 174 Ky. 439, 192 S. W. 508 (1917); \textit{National Surety Company v. Daviess County Planning Mills Company}, supra, n. 3; \textit{Mid-Continent Petroleum Corporation v. Southern Surety Company}, 225 Ky. 501, 9 S. W. (2d) 229 (1928).}
\footnote{\textit{Dayton Lumber & Manufacturing Company v. New Capital Hotel}, 222 Ky. 29, 299 S. W. 1093 (1928); \textit{Kentucky Rock Asphalt Co. v. Fidelity & Casualty Co.}, 37 Fed. (2d) 279 (1930).}
\footnote{Sec. 133.}
\footnote{Sec. 141.}
statement says, "It is not essential to the creation of a right—that he be identified."" 10

A statement from Consolidated Realty Company v. Richmond Hotel & Building Company, 11 wherein the principal case is commented upon with approval, gives an example of how such a right has come to be looked upon, quoting: "the rule that a party for whose benefit a contract is made may sue thereon, in his own name, although the undertaking is not directly to or with him or in his own name, is too well recognized to need authority or reason to sustain it." (Ed. italics.) Again, in Blain & Franse Construction Company v. Allen, 12 we find this statement, "We have gone over this subject so many times that we will consume no time and space to further elaborate the proposition involved or the reasons supporting it." 13

Mr. Williston has this to say, "There seems no good reason why A should not be able, for a consideration received from B, to make an effective promise to C." 14

Some states deny the third party a right of action at law, but nevertheless they allow him a right of action in equity by way of subrogation. 15

The theory behind allowing this action by the third party is hard to classify and rationalize. The courts have not bothered to name the theory, but one Code state 16 has expressly declared the obligee a trustee for the benefit of the third party. (Ed. italics.) However, the theory

10 Sec. 139.
11 253 Ky. 463, 69 S. W. (2d) 97 (1934).
12 251 Ky. 366, 65 S. W. (2d) 78 (1933).
13 Potts v. Gadsden First National Bank, 102 Ala. 268, 14 So. 633 (1894); Talbot v. Wilkins, 31 Ark. 599 (1876); Tyler v. Mayer, 95 Cal. 85, 30 Pac. 195 (1892); Grimes v. Baundollar, 58 Colo. 421, 148 Pac. 256 (1897); Crocker v. Higgins, 7 Conn. 344 (1829); Hunter v. Wilson, 21 Fla. 250 (1825); Searles v. Flora, 225 Ill. 167, 80 N. E. 769 (1907); Randell v. Moore, 153 Ind. 393, 55 N. E. 180 (1899); Laney v. Mead, 60 Iowa 468, 16 N. W. 280 (1889); Strong v. Marcy, 33 Kan. 109, 5 Pac. 365 (1885); Millauon v. Allard, 2 La. 547 (1893); Coffin v. Bradbury, 39 Me. 476, 36 Atl. 983 (1897); Small v. Schaefer, 24 Md. 143 (1868); Lovejoy v. House, 55 Minn. 852, 57 N. W. 57 (1897); Moore v. Kirkland, 112 Miss. 55, 72 So. 855 (1916); Collier v. De Brigard, 80 N. J. L. 94, 77 Atl. 513 (1910); Clark v. Howard, 160 N. Y. 232, 44 N. E. 695 (1896); Faust v. Faust, 144 N. C. 383, 57 S. E. 22 (1907); McDonald v. Finseth, 32 N. D. 400, 155 N. W. 863 (1915); Emmitt v. Brody, 42 Oh. St. 82 (1884); Stevens Carriage Co. v. Jones, 32 Okla. 713, 123 Pac. 148 (1912); Baker v. Elgin, 11 Ore. 333, 8 Pac. 288 (1886); Waterhouse v. Waterhouse, 29 R. I. 495, 72 Atl. 642 (1903); Timmons v. Boyd, 89 S. C. 11, 73 S. E. 289 (1912); Ruohs v. Traders Ins. Co., 111 Tenn. 465, 28 S. W. 55 (1904); Mathison v. Scott, 87 Tex. 395, 23 S. W. 1063 (1895); Smith v. Bowman, 32 Utah 33, 55 Pac. 687 (1907); Coleman v. Whitney, 52 Vt. 123, 20 Atl. 322 (1891); Casselman v. Gordon, 118 Va. 553, 88 S. E. 58 (1916); Hart v. Bogle, 88 Wash. 125, 152 Pac. 1010 (1915); Nutter v. Syndenstriker, 11 W. Va. 535 (1877); Sedgwick v. Blanchard, 164 Wis. 421, 160 N. W. 267 (1897).
14 Selections from Williston's Treatise on Contracts, Sec. 354.
16 Missouri Revised Statutes, Sec. 1990 (1891).
of a trust seems hard to substantiate when one tries to point out the trust res, except in some cases where the money is paid into the court as in the principal case. We venture to submit that the practice be called: a rule of convenience to avoid circuity of action. One court has had this to say, "by following it (referring to allowing the third party to sue) one action often effects the same result that two would be required to accomplish without it." But most courts are content to consider the right as a matter of fact and let it go at that.

In conclusion, we submit that, generally speaking, the law is settled that a creditor beneficiary for whose implied benefit a contract is made may sue thereon in his own name, and that the question has ceased to be a question of law but merely a matter of construing the agreement of the parties.

    FOREST J. NEEL.

INFANTS—RIGHT TO CUSTODY AND CONTROL OF INFANT.

The matter of custody of an infant child has long been a problem to the courts. This is true, not because of a great discrepancy in prior decisions upon the subject, but because succeeding generations have recognized the weaknesses prevalent in the old system of laws on infants and have sought to better them. Courts have, as always, hesitated to branch out upon a new line of thought. They have clung tenaciously to the idea that the family, being the foundation of civilization, should never be disturbed, and that the parent is the supreme ruler of the destinies of his children. The courts at early common law, failed to recognize a right of control in the mother, but placed the entire matter in the hands of the father. It has been quite a struggle for the courts even with the aid of statutes to avoid following this rule. In the early cases, even where the father was leading a life of open-profligacy, he was given custody of his children. Gradually considering the statutes and the discretionary power of the courts, it has come to be the rule that the welfare of the infant is the chief consideration in controversies of this kind and courts will give the custody of the child to either father or mother and sometimes will deny to both of them the custody of their children. Neither father nor mother has any right that can be allowed to seriously militate against the welfare of the child. If the father be unfit to have the custody of his child the courts will promptly declare his rights for-

2 Ellis v. Harrison, 104 Mo. 279, at p. 671, 16 S. W. 198, at p. 199 (1891).
1 People v. Mercein, 3 Hill (N. Y.) 399 (1842).
2 Ball v. Ball, 2 Sim. (N. S.) 54 (1851).

2 Pryse v. Thayer, 85 Kan. 566, 118 Pac. 56 (1911); Chance v. Pigneguy, 212 Ky. 430, 279 S. W. 640 (1926); Moore v. Smith, 228 Ky. 286, 14 S. W. (2d) 1072 (1929).