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Rights of Third Parties to Contracts in New Jersey

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Notes

RIGHTS OF THIRD PARTIES TO CONTRACTS IN NEW JERSEY

The rights of third parties to contracts is a moot question in many jurisdictions; especially so as to third party beneficiaries in Pennsylvania. It would perhaps be interesting to see how the problem has been handled in New Jersey, where the rules have been clarified to a considerable extent, both by statute and decision.

There are two classes of interested third parties—third party beneficiaries and assignees, and they will be treated in that order. Since the scope of the problem is very broad, and an intricate discussion would accomplish the purpose to no greater extent, only the basic questions will be considered.

Third party beneficiaries are of three classes—donee, creditor, and incidental. The right of the first two classes to sue is established by statute.

> "Any person for whose benefit a contract is made, whether such contract be under seal or not, may maintain an action thereon in any court and may use the same as a matter of defense in any action brought against him notwithstanding the consideration of such contract did not move from him."[1]

This statute is merely declaratory of the old rules, and the only vital change was in making these rules the same as to sealed as they were to unsealed contracts.[2] The reasoning back of the rule embodied in the statute is sound. Since the intention of the parties to the contract was to make the third party a real party in interest, such third party should be given the power and means to enforce and protect the interest intended for him. That the courts are quick to aid the third party may be found in the cases of

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[1]3CS 4059, 28.

[2]Holt v. Life Insurance Co., 76 N. J. L. 585.

Whitehall-Tatum Co. v. Vineland[3] and *Skillman v. Fidelity and Guaranty Trust Co.*[4]

As a matter of practice the statute has been held to be permissive only and not obligatory.[5] Thus the third party may sue in his own name or as use plaintiff, by the common law method.

That the benefits of this statute do not extend to incidental beneficiaries has been repeatedly held.[6] The mere fact that such person would be advantaged by the full performance of the contract is insufficient,[7] and New Jersey follows what may be called a universal rule in this regard. Since the incidental beneficiary cannot sue upon the contract, neither can he maintain an action of tort for a breach of the contractual duty. To maintain such an action "the plaintiff must have the same status under the contract as would entitle him to maintain an action upon contract for breach of its stipulations".[8]

It is well to note here that the right of a beneficiary to sue will be recognized though such party was not, or could not, be identified at the time the contract was made. As long as the party can "afterwards establish his claim to be the beneficiary of the promise of the right to recover upon it", he will be allowed the statutory right.[9]

Choses in action arising out of both contract and tort can be assigned. The questions involved in the former class are controlled in the main by the Practice Act of 1913.

> "****all choses in action arising on contract shall be assignable at law and the assignee may sue thereon in his own name, but in such action there shall be allowed all set-offs, discounts and defenses not only against the plaintiff but against the assignor before notice of such assignment shall be given to the defendant; the

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[3]102 N. J. L. 28.

[4]101 N. J. L. 511.

[5]Holt v. Life Insurance Co., 76 N. J. L. 585.

[6]Styles v. Long Co., 67 N. J. L. 413; aff. 70 N. J. L. 301; Knapp v. Lumber Co., 99 N. J. E. 381; Reilly v. Feldman, 103 N. J. L. 517.

[7]Styles v. Long Co., 67 N. J. L. 413.

[8]Styles v. Long Co., 67 N. J. L. 413.

[9]Whitehead v. Burgess, 61 N. J. L. 75.

assignment of a sealed instrument by writing not under seal shall be as valid as if under seal."[10]

Where there is any reference to "non-assignability" of such choses in action, it will be found that the parties to the contract have made the obligations personal, and in such case there can be no valid assignment without the consent of both original parties.[11]

The statute is not compulsory as to the method of assignment, and it is only permissive as to the manner of bringing an action. Thus, it has been held that parole assignments are valid,[12] and that the assignee may sue in his own name or in the name of the assignor.[13]

An assignment is not impaired as to the parties thereto by failure to give notice of the assignment to the debtor.[14] The assignee gets an immediate right to demand payment from the obligor although such obligor had no notice of the assignment at the time the demand was made.[15] The case of *Kafes v. McPherson*[16] goes a step further, and holds that a failure of notice does not give a judgment creditor of the assignor a right prior to the assignee. From the words of the statute it will be seen that the debtor has all defenses against the assignee that he had against the assignor until the time notice of the assignment is given. Thus, despite the assignment, the debtor may discharge his liability by payment to his original creditor, if the debtor has not been given notice of the assignment. In this regard, the statute is merely declaratory of the previous rules.[17]

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[10]3CS 4056, 19.

[11]Hanlin v. Keller, 95 N. J. E. 466, 123 Atl. 299; aff. 96 N. J. E. 672, 126 Atl. 925.

[12]Jemison v. Tidall, 89 N. J. L. 429.

[13]Elsberg v. Houeck, 76 N. J. L. 181 (citing Sullivan v. Visconti, 68 N. J. L. 543).

[14]Kafes v. McPherson, 32 Atl. 710; Cogan v. Conover Co., 69 N. J. E. 809, 64 Atl. 973.

[15]Board of Education v. Duparquet, 50 N. J. E. 534.

[16]32 Atl. 710.

[17]Miller v. Stockton, 64 N. J. L. 614, 46 Atl. 619.

Partial assignments are not recognized at law,[18] but are enforced in the courts of equity.[19] An able discussion of the rules and reasons is found in the case of *Otis v. Adams*.[20]

> "In courts of equity, where all interested may be included in one action and their respective rights and equities settled by one decree, rights growing out of a partial assignment of a chose in action, contract, etc., may be recognized and enforced without injury to the other contracting party. But when such partial assignments of liabilities give rise to separate actions at law, it is obviously unjust to recognize and protect rights so acquired without the consent of the contracting party who would be subjected to such additional actions."

If the debtor has been given notice of the partial assignment, he may be held accountable in equity for any subsequent payments he may make to the assignor in disregard of the rights of the assignee.[21] Under a provision in the Practice Act of 1912,[22] the difficulties arising out of this matter of partial assignment may be overcome by the assignor and assignee joining as plaintiffs and bringing the action at law.

It was the rule at common law that choses in action arising out of tort were not assignable if the right of action were one which abated with the death of the person sustaining the injury. This rule was recognized in the case of *Weller v. Jersey City Street R. R. Co.*,[23] in holding that a chose in action arising out of personal injuries could not be assigned before the same was reduced to judgment.

> "The rule is nearly universal that tortious acts of a party causing damages to another create a right of action which abates with the death of the person sustaining the injury, and therefore cannot be trans-

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[18]Steinberg v. Lehigh Valley R. R., 78 N. J. L. 277.
[19]Todd v. Meding, 56 N. J. E. 83.
[20]56 N. J. L. 38.
[21]Todd v. Meding, 56 N. J. E. 83.
[22]Rule 9; 1 Cum. Supp. CS 1212, 142.
[23]68 N. J. E. 659, 61 Atl. 459.

> ferred so as to confer upon the assignee authority to maintain a suit for the wrong inflicted."

Thus, citing the above case, it was held that no right of action was assignable that did not directly involve a right of property.[24] It would seem from a consideration of these cases, therefore, that only choses in action arising out of torts to property are assignable, and that the rule is contra as to those arising out of torts to the person.

The question as to whether an assignee of a chose in action on tort may bring an action in his own name is answered by statute.

> "The assignee for valuable consideration of any chose in action, if the assignor be dead, may sue for and recover the same in his own name; and the defendant in any such action may set up any defense thereto arising before he shall have received notice of such assignment in the same manner and with like effect as if the assignor had been living and the action had been brought in his name."[25]

This statute is a re-enactment of the act of 1890. Under this prior statute, it was held that the provisions as to the manner of bringing the action were obligatory. Thus, the assignee may sue in his own name only when the assignor is dead, and prior to his death the suit must be brought in the assignor's name.[26]

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INHERITANCE TAXES—REPORTS OF DEATH BY BANKS

The Act of June 22, 1931, P.L. 690 is substantially a re-enactment of the Act of June 20, 1919, P.L. 521 as last amended by the Acts of March 28, 1929, P.L. 118 and May 16, 1929, P.L. 1795. The title of the act has been changed by inserting therein "defining and taxing transfers made

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[24]Baker v. Dieterich, 118 Atl. 745.

[25]3CS 4057; Practice Act 1903.

[26]Gaskill v. Barbour, 62 N. J. L. 530, 41 Atl. 700.