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**FURTHER ON THE RIGHTS OF THIRD PARTY
BENEFICIARIES UNDER A CONTRACT*****Marlboro Shirt Co., Inc. v. American
District Telegraph Co.*¹**

Plaintiff occupied under a lease the major portion of a building which was equipped with an automatic sprinkler system. Subsequently, plaintiff's lessor entered into a contract with defendant whereby defendant would install and maintain on the sprinkler system an automatic central station signalling device which would signal a flow of water in the sprinkler system to defendant's office. During the weekend of February 8-9, 1947, a leak occurred in the sprinkler system, causing water to discharge into the premises occupied by plaintiff. Defendant's alarm system failed to operate and the leakage was not discovered until plaintiff's employees reported for work on Monday morning. Plaintiff brought an action for damage to its goods, allegedly caused by failure of defendant to detect the leakage. From a judgment on demurrer for defendant, plaintiff appealed. *Held*, affirming the judgment below, that plaintiff was only an incidental beneficiary under the contract between its lessor and defendant, and cannot sue thereon as a third party beneficiary, nor was defendant responsible in an action for negligence, since the duty arising out of the contract was only to the one with whom the contract was made.²

The court recognized that the common law rule requiring privity between plaintiff and defendant in order to maintain a contract action, had been relaxed so that in Maryland a person for whose benefit a contract is made can sue on it, provided it is shown clearly that the contract was intended for his benefit. The court said, "It must clearly

¹ 77 A. 2d 776 (Md., 1951).

² *Ibid*, 778. Liability of defendant in tort for alleged negligent failure to perform its contract, causing injury to plaintiff, was denied without lengthy reasoning. Although beyond the scope of this note, brief reference is here made to the question. For authority, the court cited *East Coast Freight Lines, Inc. v. Consolidated Gas, Electric Light & Power Co.*, 187 Md. 385, 402, 50 A. 2d 246, 254 (1946), where the gas company had contracted with the City of Baltimore to provide a light pole on a busy street. It was asserted that the gas company failed to repair the light promptly when it went out, and in the resulting darkness plaintiff's truck struck the pole. *Held*, that the gas company is not charged with using its electric current in any dangerous manner, or by its use creating any dangerous condition, but with mere non-performance, for which the greater weight of authority is that it is liable only to the city and that it owes no duty to the general public for which it may be made responsible in an action of tort for negligence.

appear that the parties intend to recognize him as the primary party in interest and as privy to the promise", and concluded that one who benefits only incidentally from a contract acquires no rights against the parties thereto by virtue of the promise.³

In reaching this result and thus stating the law, the court quoted from and relied directly on the Restatement of Contracts⁴ and the court's earlier opinion in *Mackubin v. Curtiss-Wright Corp.*⁵ Both sources emphasize that a non-party creditor beneficiary or a non-party donee beneficiary to a contract may recover, but that a mere incidental beneficiary cannot.⁶ A study of the definitions assigned by the Restatement to these terms, however, and of the cases allowing third party beneficiaries to recover, shows that while these terms are convenient tools for classifying the decisions which permit or deny recovery to the alleged third party beneficiary, they do very little by way of affording concrete help in deciding how to draw the line between the intended creditor or donee beneficiary who may recover, and the "incidental" beneficiary who may not. This seems to be especially true of donee beneficiary situations such as in the instant case. Where the third party is a creditor, the authorities seem to allow recovery without regard to any specific intent to benefit him,⁷ although some suggest that there must be an intent of a different nature — that the promisor shall assume a direct obligation to the

³ *Supra*, n. 1, 777, 778.

⁴ RESTATEMENT, CONTRACTS (1932), Sec. 133.

⁵ 190 Md. 52, 57 A. 2d 318 (1948), noted in *Action at Law by a Creditor Beneficiary in Maryland*, 10 Md. L. Rev. 67 (1949).

⁶ RESTATEMENT, *loc. cit. supra*, n. 4, cited and followed in *Mackubin v. Curtiss-Wright Corp.*, *supra*, n. 5, 56:

"133. Definition of Donee Beneficiary, Creditor Beneficiary, Incidental Beneficiary. (1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3): (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary; (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise 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, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds; (c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist."

⁷ Note, *supra*, n. 5, 69; 2 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (1936), Sec. 356A, 1046, 1047.

third party.⁸ Nevertheless, intent to benefit the creditor beneficiary can normally be found by virtue of the debt owing to him from the promisee, and this may explain why the intent element has not troubled the courts in creditor cases. But where the third party is a mere donee, upon whom the promisee intends only to confer a gift, intent to benefit the third party is essential and often not so apparent, which causes the more troublesome cases to arise.

An examination of the history of the development of the rule from the early English cases which denied recovery,⁹ to the current English rule which permits it on a trust theory,¹⁰ through the leading decision of *Lawrence v. Fox*¹¹ in this country, into the many American cases which have permitted recovery and on which the Restatement purports to rest, makes evident the factual need for relief¹² and demonstrates the development of theories for granting it. The sundry grounds for relief¹³ which have been applied include trusts (the English rule), subrogation, agency, novation, blood relationship of promisee and beneficiary, quasi-contract, public policy, and the desirability of avoiding circuity of action and multiplicity of suits. But perhaps the most honest approach, and therefore the most satisfactory, has been taken by the Maryland court, that "the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded".¹⁴ Thus Maryland allows

⁸ *Ibid.*, 81 A. L. R. 1287. This is apparently the law of Connecticut in both creditor and donee beneficiary cases. See Note, 12 Pitt. L. Rev. 295, 297 (1951).

⁹ *Tweedle v. Atkinson*, 1 Best & S. 393, 121 Eng. Repr. 762 (1861). A complete history and discussion of the modern application of the third party beneficiary doctrines is found in 81 A. L. R. 1271, suppl. in 148 A. L. R. 359.

¹⁰ *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290, 21 Eng. Rul. Cas. 669 (1880).

¹¹ 20 N. Y. 268 (1859). The leading authority for allowing suit by creditor beneficiary.

¹² The rationale for allowing suit by a non-party beneficiary is summed up by Professor Williston:

"The technical difficulty of permitting a third person who was neither in privity with the promise, since he was not the promisee, nor in privity with the consideration, since that moved from the promisee, to enforce a promise made for his benefit was counterbalanced by the fact that since the promisee himself had no pecuniary interest in the performance of the contract, he could recover only nominal damages for its breach, thus defeating the purpose of the parties and the value of the promise. Whatever the apparent technical difficulties, it was obvious that justice required some remedy to be given the beneficiary. The original bargain was convenient and proper, and the law should find a means to enforce it according to its terms."

WILLISTON, *op. cit. supra*, n. 7, Sec. 357.

¹³ *Ibid.*; 12 Amer. Jur. 829, Contracts, Sec. 278; 81 A. L. R. 1283.

¹⁴ *MacKenzie v. Schorr*, 151 Md. 1, 9, 133 A. 821 (1926), citing *Brewer v. Dyer*, 61 Mass. 337, 340 (1851). To the same effect, see *Small v. Schaefer*,

recovery by third party beneficiaries generally, in an action at law,¹⁵ creating the duty at least in the donee beneficiary cases because the parties to the contract specifically intended the third party to be a beneficiary thereof, and in its latest decisions approving the Restatement classification that he may be either a "creditor" or a "donee" beneficiary. The touchstone of his right in the donee case, seems to lie in the intent of the parties that he shall *in fact* be a beneficiary,¹⁶ while in the creditor situation, his right seems to stem from the pre-existing obligation itself which, as has already been stated, normally implies a beneficial intent.

The earliest Maryland case recognizing the right of a stranger to a contract to sue thereon was *Owings' Executors v. Owings*.¹⁷ There A had agreed with B, that if A would allow B to take out letters of administration on an estate, B would pay the commissions to A. After B received the commissions, the parties made a new agreement whereby B would pay the commissions to C, a mere donee. C sued in his own name to recover this money from B. The court was "of opinion that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise",¹⁸ but here B

24 Md. 143, 159 (1866); Northern Central Railway Co. v. United Railways & Electric Co., 105 Md. 345, 363, 66 A. 444 (1907). That

"... the common law has given birth to a distinct, new principle of law which takes its own place in the family of legal principles, and gives not only to a donee beneficiary, but also to a creditor beneficiary, the right to enforce directly the promise from which he derives his interest," see WILLISTON, *loc. cit. supra*, n. 12, 1049.

¹⁵ A third party may also obtain relief in equity. See, *e.g.*, *McNamee v. Withers*, 37 Md. 171 (1872), where B, who had married C, A's daughter, agreed to share jointly with A the expense of building a home on A's lot in consideration that A would convey the property to C. *Held*, that the agreement between A and B may be specifically enforced by C. See also *Stokes v. Detrick*, 75 Md. 256, 23 A. 846 (1892), where in consideration of A's conveyance of real property to B, B covenanted to assume A's mortgage debt to C, and C was allowed to sue on this covenant in equity. In *Anderson v. Truitt*, 158 Md. 193, 148 A. 223 (1930), in consideration of A's buying out B's interest in a business, B covenanted not to compete with C. The court recognized the right of C, only, to enforce the covenant in equity, since A had no interest in the covenant.

¹⁶ *Supra*, n. 1, 778.

¹⁷ 1 H. & G. 484 (1827).

¹⁸ *Ibid.*, 488, citing *Schemerhorn v. Vanderheyden*, 1 Johns Rep. 139 (N.Y., 1806), *Dutton v. Pool*, 1 Vent. 318, 86 Eng. Rep. 205 (1726), (also notes thereto in 3 Bos. & Pull. 149), *Pigot v. Thompson*, 3 Bos. & Pull. 147, 127 Eng. Rep. 80 (1802), and *Martyn v. Hind*, 98 Eng. Rep. 1174, 2 Cowper's Rep. 437 (1776). In *Pigot v. Thompson* at p. 81, *dicta*, that there is little doubt that if A let land to B, in consideration of which B promises to pay rent to C, C may sue on that promise. In *Dutton v. Pool*, A, being plaintiff's father, owned a wood which he intended to sell to raise fortunes for his younger children. B, being A's heir, in consideration that A would not sell the wood, promised to pay to C, daughter of A and wife of plaintiff, 1000 pounds. Plaintiff was allowed to sue on behalf of his wife, the donee bene-

already had in his hands money due A, and then promised to give it to C, which was a mere assignment of a debt and not sufficient to give C a right of action in his own name. Further, there was no new consideration for B's promise to pay the commissions to C, but only a promise to pay a preexisting debt due A, to C. The court said, however, if B had promised A to pay the money to C before the money B owed A came into B's hands, then B's promise would have inured to C's benefit.¹⁹ In *Small v. Schaefer*²⁰ B agreed to pay A's debt to C on a bad check if A would give B certain bonds, and C was allowed to sue in his own name on this agreement. Although the case involved a creditor beneficiary situation, it was decided on what is now considered the donee beneficiary doctrine.²¹

In the cases discussed above, the Maryland court did not distinguish between the creditor and donee type beneficiary, but seemed to recognize a right of recovery to both on the same grounds. As we have seen, intent to benefit the third party is probably not necessary in the creditor case.²² On the other hand, the fact that one benefits incidentally from a contract, where it was not the purpose of the parties to confer such a benefit upon him and he is not a creditor beneficiary, will not create a right to sue thereon. Such a person, neither creditor nor donee, is only

fiary. Some stress was laid here upon the nearness of relationship between the beneficiary and the promisee.

¹⁹ *Supra*, n. 17, 491.

²⁰ 24 Md. 143 (1866); Note, *supra*, n. 5, 69.

²¹ *Ibid.*, 158; Note, *supra*, n. 5, 69: ". . . when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement," citing *Carnegie v. Morrison*, 2 Met. 402 (Mass.). For other Maryland cases generally in accord, see *Seigman v. Hoffacker*, 57 Md. 321, 325 (1881), *dicta*, "In a matter of simple contract, a promise to one for the benefit of another, may be enforced by the person for whose benefit the promise was made; . . ." But here suit was on a sealed instrument to which the equitable plaintiff was not a party. See also *Coates v. Pennsylvania Fire Insurance Co.*, 58 Md. 172 (1882), where A owed a mortgage debt to C, and B for consideration moving from A to B, issued a policy of fire insurance payable to C, and following a loss A sued in his own name. *Dicta*, at p. 178:

"It is true, that by reason of this provision (loss payable to C), the mortgagee (C) acquired such an interest under it, that suit could have been brought by it, had it so elected. 'If . . . one person makes a promise to another for the benefit of a third, that third may maintain an action upon it.'" (Parenthetical material added.)

In *Price v. Mutual Reserve Life Insurance Co.*, 102 Md. 683, 62 A. 1040 (1906), C was the named beneficiary under a policy of insurance issued by B on the life of A. *Dicta*, that C might sue on the contract for the proceeds, but not for alleged breach of contract by B while A was still alive.

²² *Supra*, n. 7.

an "incidental" or consequential beneficiary and has no rights under the contract.²³

The difficult question then arises whether under any particular set of facts a third party who is not a creditor is a donee or only an incidental beneficiary. In *Northern Central Railway Co. v. United Railways and Electric Co.*,²⁴ for consideration moving from A (Baltimore City) to B, the streetcar company, B agreed to keep in repair those parts of a bridge built by A which were covered by B's tracks. This same bridge crossed C's railroad tracks and C, under a similar contract with A, was also bound to keep it in repair. B failed to make the repairs and when C made them, as required under its contract with A, C sued B for the proportion of the cost for which B was liable to the city. The court held that B's contract with the city inured to the benefit of C and that C could recover. Although recovery was permitted on the theory that the railroad company had been forced to pay an obligation that was owing by the streetcar company under its contract with the city, the court stated:²⁵

"It is not necessary, as contended by appellee (the defendant), that the contract must have been entered into at the time for the benefit of some *particular* third person. 'If the person for whose benefit a contract is made has either a legal or equitable interest in the *performance* of the contract, he need not necessarily be privy to the consideration.' 9 *Cyc.* 381."

But in *Sterback v. Robinson*²⁶ the court stated that a "third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance. Nor does the fact that he is injured by the breach of the contract entitle him to maintain an action therefor." A contracted to sell his tomato crop to B, a canner. C, who was A's landlord, consented to this arrangement, and when A left the farm, C replaced him and raised the tomato crop. C decided not to sell the tomatoes to B because the market price was higher than the contract price, and B sued to enjoin C from selling to other than B, and for specific performance of the contract between A and B. The court held that the landlord, C, was only in-

²³ Amer. Jur., *supra*, n. 13, Sec. 280 *et seq.*; 81 A. L. R. 1236; WILLISTON, *op. cit. supra*, n. 7, Sec. 356, 1042.

²⁴ 105 Md. 345, 66 A. 444 (1907).

²⁵ *Ibid.*, 364.

²⁶ 148 Md. 24, 31, 128 A. 894 (1925).

cientally benefited under the original contract and could not have enforced it against B. Although C "might have been benefited by its performance or injured by its non-performance", there was no mutuality of remedy on the part of C, and specific performance was denied. In *Hartford Accident and Indemnity Co. v. Knox Net & Twine Co.*,²⁷ B, surety of a construction company, executed a bond to A, owner, to secure completion of the work and "payment of all persons who have contracts directly with the principal for labor and materials". C, who provided labor and material to the contractor, remained unpaid at the termination of the contract, and A sought to recover on the bond, to C's use. The court held that the contractor's bond is given not only for the protection of the owner, but also for the protection of laborers and materialmen, who have a right of action irrespective of whether they are expressly named in the bond.²⁸ *Mackenzie v. Schorr*²⁹ involved a contract made by the owners of all the stock of a corporation (A) with B to buy stock of the corporation, and upon B's election as secretary-treasurer, he was to loan a sum of money to the corporation as would be convenient. B made some advances, but when he failed to make further loans, C, the receiver of the now insolvent corporation, sued on the contract, which by *dicta* was held to be for the benefit of the corporation.

"Ordinarily it is sufficient if the contract is evidently made for the benefit of the third person. The question of whether a contract was so intended is one of construction. That intention must be gathered, just as in the case of any other contract, from reading the contract as a whole in the light of the circumstances under which it was entered into."³⁰

Again, in *Sterling v. Cushwa & Sons, Inc.*,³¹ where numerous persons pledged various sums to a guaranty fund for a bank in financial straits, the receiver of the bank was allowed to sue on the agreement as one for whose benefit the contract had been made, the bank having been specifically mentioned in the undertaking sued on.

²⁷ 150 Md. 40, 132 A. 261 (1926).

²⁸ *Ibid.*, 44, 45.

²⁹ 151 Md. 1, 133 A. 821 (1926).

³⁰ *Ibid.*, 8, citing 6 R. C. L. 887. But the court held for the defendant in that he had already advanced sufficient funds to satisfy the contract.

³¹ 170 Md. 226, 183 A. 593 (1936).

It was not until *Mackubin v. Curtiss-Wright Corp.*³² that the Maryland law of third party beneficiaries received detailed analysis. There the corporation in its listing agreement with the New York Stock Exchange was bound to publish promptly to stockholders any action respecting dividends on stock so listed. Because the corporation delayed in publishing a decision of directors not to pay the annual dividend, the plaintiff, who was already a stockholder in the corporation, purchased additional stock, and suffered a loss when that stock dropped sharply in value following publication of the dividend action a day late. Plaintiff was not allowed to recover under the listing agreement as a creditor beneficiary, since she was owed nothing by the stock exchange as to the stock which she had not yet bought. Nor could she recover as donee beneficiary, since the contract between the Stock Exchange and the corporation was not intended to benefit her directly, and she was only an incidental beneficiary.³³ However, some argument may be raised that plaintiff should have been allowed to claim as donee beneficiary. ". . . It seems reasonable to assume that the New York Stock Exchange would desire, as a matter of sound business practice, to protect prospective purchasers as well as actual purchasers from any dilatory tactics on the part of officers of corporations whose securities are listed on the 'Big Board'."³⁴

With *Mackubin* behind it, the Maryland court was quick to decide the *Marlboro* case along similar lines, and indeed based its holding on the following succinct statement of the law of the prior case:³⁵

"In order to recover it is essential that the beneficiary shall be the real promisee; *i.e.*, that the promise

³² 190 Md. 52, 57 A. 2d 318 (1948).

³³ *Ibid.*, 57, 58:

"Even in those states which are most liberal in extending to third-party beneficiaries the right to sue on contracts made by others, the courts recognize the right as an exception to the original rule of the common law, which arose from the natural presumption that a contract is intended only for the benefit of those who enter into it. Thus, it is generally accepted that before a stranger to a contract can avail himself of the exceptional privilege of suing for a breach thereof, he must at least show that it was intended for his direct benefit."

³⁴ Note, *supra*, n. 5, 67, 68.

³⁵ 77 A. 2d 776, 777 (Md., 1951), *Mackubin v. Curtiss-Wright Corp.*, *supra*, n. 32, 58, citing *In Re Gubelman*, 13 F. 2d 730 (2nd Cir., 1926). The federal rule stated in that case is that a third person can enforce the promisor's obligation only when he is the sole beneficiary and when the parties intended him as primary party in interest. The Maryland court has not stated that one must be the "sole beneficiary" in order to recover, and probably did not intend to go so far.

shall be made to him in fact, though not in form. It is not enough that the contract may operate to his benefit. It must clearly appear that the parties intend to recognize him as the primary party in interest and as privy to the promise'."

Nevertheless, the facts which make it "clearly appear" under the Maryland rule are not certain. There is some authority that it is sufficient if the contract "evidently" is made for the benefit of the third party,⁸⁶ but it is more often stated that "... such a beneficiary must be a third person whom the contracting parties 'intend' shall receive a 'direct benefit' from the promise",⁸⁷ whatever that may mean. Whether this intent must be mutual between the parties to the contract is not certain, although according to Professor Williston, the authorities seem to require such intent only

⁸⁶ *Supra*, n. 30; Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ken. 340, 12 S. W. 554 (1890), noted in 36 Ken. L. J. 347 (1948). There defendant water company contracted with the city to provide fire hydrants and water for fire protection, and because of failure of water pressure at such a hydrant, plaintiff's property was burned. *Held*, (at p. 555) that:

"... a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him, ..."

That this case represents a minority view as to liability of water companies to citizens, see the casenote, which approves the rule and hints that the objection of most courts is on grounds of public policy rather than the law of contracts. See also *supra*, n. 24, 364, citing *Little v. Banks*, 85 N. Y. 258 (1881), that:

"... contractors with the State who assume for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance."

Statutes in many states provide certain third parties with a right to sue on performance bonds.

⁸⁷ WILLISTON, *loc. cit. supra*, n. 7, 1945. In Sec. 402 at p. 1158, Professor Williston comments on a situation similar to the principal case, that: "Promises made to a landlord incidentally conferring a benefit on a tenant, or a third party, cannot be enforced by such an incidental beneficiary." But since the issue is whether the tenant is only incidentally benefited, Professor Williston succeeds only in begging the question. That "... the contract must have been entered into for his (the third person's) benefit, or at least such benefit must be the *direct result of performance* and within the contemplation of the parties," see *supra*, n. 24, 364. See also *Scott & Co. v. Parrett*, 346 Ill. 252, 178 N. E. 498, 501, 81 A. L. R. 1262 (1931) that:

"The rule is that the right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed. The liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability."

on the part of the promisee, who pays for the promise.³⁸ Nor is it essential that the third party know of the contract for his benefit at the time it was made,³⁹ but the fact that the third party was named in the contract is undoubtedly strong evidence in favor of his right to sue insofar as it evidences a specific intent to benefit him.

In the principal case, the lessor had rented the major part of its building to the plaintiff and probably intended directly to protect plaintiff from the potential danger of leaking water, as well as to benefit itself by obtaining prompt notification of flow of the sprinkler system due to fire. Notwithstanding this interest on the part of the lessor to protect its own building, if the alarm system were to be of any real value, it must operate for the benefit of the occupant of the premises, as well. Should mechanical failure cause leakage in the sprinkler system although there were no fire, as was apparently the situation here, the lessor out of possession could not suffer a substantial loss, and would therefore have no rights against the defendant for breach of its contract. Under such circumstances, defendant would be absolved from liability for damages, no matter how reprehensible the breach. Although plaintiff here probably was intended to receive as direct a benefit under the contract as was the lessor, plaintiff was held only an incidental beneficiary in law, and barred from recovery for its direct loss. It would seem that the true intent of the parties to the contract was to benefit plaintiff as well as the lessor, which would be sufficient to confer upon both rights under the contract, since the intent need not be to benefit the donee beneficiary exclusively.⁴⁰ Although plaintiff and its lessor were in the eyes of the law separate legal entities, being corporations, inquiry reveals that both in fact are actually controlled by the same interests, which reinforces the argument that the contract was probably intended for the benefit of both. While the decision may be in

³⁸ WILLISTON, *ibid.*, 1046 :

"In the donee beneficiary type, the conclusion reached seems accurate. The promisee usually does wish to make a gift of the benefit of the promise to the third person; . . ."

³⁹ Amer. Jur., *supra*, n. 13, Sec. 288.

⁴⁰ *Supra*, n. 29, where stockholders contracted to obtain loans for the benefit of both themselves and the corporation, *dicta* only, that the corporation was a donee beneficiary. See also *Jenkins v. Chesapeake & Ohio Ry. Co.*, 61 W. Va. 597, 57 S. E. 48 (1907), where the railroad contracted with the county court to carry patients to the county pest house. *Held*, the contract might be enforced by one who was to be transported to the pest house, since the contract was for the benefit of the class of persons of which he was a member, as well as the county court.

accord with prior statement of the law in Maryland, there seems little basis in principle for denying relief on this set of facts⁴¹ merely for lack of some technical evidence of a specific intent to benefit the plaintiff.

⁴¹ See A. L. R., *supra*, n. 8, that :

"It is not always quite clear what is meant when the courts say that the 'intention' of the parties is controlling. There does not seem to be any basis for holding that, although a performance of the contract will necessarily and directly benefit the third person, his remedy depends upon an intention on the part of the parties to the contract that he shall have the right to sue thereon. While the intention of the parties controls in the creation of rights under the contract, and in determining the things required by the contract to be done by the parties, it would seem that, once the right is created or the duty is imposed in favor of the third person, the law furnishes the remedy, regardless of the intention of the parties in respect thereof."

The principal case is cited with apparent approval in *Acme Brick Co. v. Hamilton*, 238 S. W. 2d 658, 660 (Ark., 1951). There the A construction company contracted with the B brick company, A to buy and B to sell certain bricks required by A to build homes. A was building a home for C, and told C to visit B's showroom and pick out the type brick which C wanted used in the home. C did this, but B delivered the wrong color brick, which was placed in the house by A. In a suit by C against both A and B, B defended on the basis of the *Marlboro* case, that C was not in privity of contract with B, and was only an incidental beneficiary under B's contract with A. The court distinguished this case from the Maryland one, holding that reliance by C here on the contract between A and B was more than incidental, and that C could recover.