THE
AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA
DEPARTMENT OF LAW.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

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CONTRACT—VALIDITY—TRUST—TESTAMENTARY DISPOSITION. —*Sullivan* v. *Sullivan*, 56 N. E. (N. Y.) 116. February 6, 1900. On October 10, 1892, Catharine Sullivan deposited in the Chemung National Bank $2,000, and received the following certificate, in part: "Catharine Sullivan has deposited in this bank $2,000, payable one day after date to the order of herself, or in case of her death to her niece Catharine Sullivan, of Utica, upon return of this certificate." She retained this certificate, and on her death, which occurred shortly after, it was found among her papers. An action was brought by her administrator first against the bank, then against the beneficiary. The defendant Catharine based her claim, first, on the rule which in some cases gives a third party to a contract the right to enforce it; second, on the ground that a valid trust was declared in her favor. It was clearly shown in the trial court, that the depositor had no intention to create a trust during her life. She informed the

teller she wanted the sum fixed for herself during her life, and in case of her death to her niece, Catharine Sullivan of Utica.

On both principles the Court of Appeals discussed its own decisions alone, and decided in accord with the general current of authority. In regard to the argument that the defendant was entitled to the fund as the beneficiary of a contract between the depositor and the bank, the court said this case lacked both of the two elements which permitted such a claim to be sustained, under the New York rule. If there had been a near blood relationship, as of husband and wife, or parent and child, between the promisee and the beneficiary, or a pre-existing debt the claim would have been good.

In *Dutton* v. *Poole*, 2 Levinz 211, (1677), was first laid down this departure from the strict principles of contract. There A. made a promise to his father for the benefit of his sister. It was held the sister could recover. Though this decision was given by a divided court, and was definitely repudiated in *Tweedle* v. *Arkinson*, 1 B. & S. 393, (1865), the New York Court has extended it to other cases. Where A. owes B. $1,600, and C. borrows this money from A. promising to pay B., the latter can recover. *Lawrence* v. *Fox*, 20 N. Y. 268, (1859). This is the leading case in New York, and under its principle a recovery is allowed if there exists "first an intent by the promise to secure some benefit to the third party and secure some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally. A mere stranger cannot intervene and claim by action the benefit of a contract between the other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement." See Ashley "Cases on Contract."

Even this is a narrow statement of the general doctrine throughout the western states, and in the federal courts. It has been laid down in many cases that if there is a clear intention to benefit directly the third party, he can recover. Nothing is said about the necessity of a pre-existing debt. It is well to state, however, that this broad principle is with few exceptions applied to cases whose facts show the pre-existing debt and therefore come within the New York doctrine. See note page 280, Huffcuts Anson on Contracts; *Nat. Bank* v. *Grand Lodge*, 98 U. S. 123, (1878); *Hendrick* v. *Lindsay*, 93 U. S. 143, (1876). Some states give a statutory right of recovery, Stimson Amer. Stat. Law, §§. 4117, 4128. Massachusetts follows the rule which is now well settled in England under *Price* v. *Easton*, 4 B. & A. 433, (1833); see *Exchange Bank* v. *Rice*, 107 Mass. 37, (1871). Also see as to rule in Michigan, *Linneman* v. *Moross*, 98 Mich. 178, (1893).

The theory of *Dutton* v. *Poole* was supported in two late New York cases, one of which has given rise to harsh criticism, *i. e.*, the case of *Buchanan* v. *Tilden*, 158 N. Y. 109, (1899). In this case the judge thought the relationship of husband and wife sufficient ground to maintain the action. He took the strange ground that

such a relation made a good consideration for the promise, and that a husband was at all events bound to maintain his wife properly. A. agreed with B. to pay B.'s wife $50,000. *Held*, B.'s wife could recover, one ground being that B. ought to provide for his wife, thus giving her an equitable right to sue. See *Todd* v. *Weber*, 95 N. Y. 181, (1884).

In the present case the defendant's father was a nephew of the intestate, and had been given a home by her, and treated as a son, but never legally adopted. The intestate had always shown great affection for the defendant. In the eye of the court such relationship was not equivalent to that shown to exist in the preceding cases, and the defendant's contract right was denied.

The defendant argued next that the circumstances of the deposit were sufficient to make either the bank or the depositor a trustee, leaving to the donor a power of revocation. The court answered, conclusively, this contention by pointing out that the depositor only intended to establish a debtor and creditor relation. The terms of the certificate and the evidence in the trial court, proved that no right in *praesenti* was to pass to the defendant. The words of Jessel in *Richards* v. *Delbridge*, L. R. 18 Eq. 11, (1874), are in point: "The true distinction appears to me to be plain and beyond dispute; for a man to make himself a trustee there must be a clear expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another and not retain it in the donor's own hands for any purpose, fiduciary or otherwise." Hence this was no trust; it was no gift because it could not take effect until after death. Being a testamentary disposition it did not satisfy the provision of the statute and was, in that sense, also invalid. It must be noted that in this case no declaration of trust was made. If such had been the fact even without notice to the defendant a good trust would have been created. There is Massachusett's case to the contrary, *Clark* v. *Clark*, 108 Mass. 522, (1871). Here was a deposit accompanied by an express declaration of trust. The deposit book was retained by the depositor and no notice was given to the beneficiary. *Held*, no trust, the decision being based on *Brabrook* v. *Boston Bank*, 104 Mass. 228, (1870). But in this latter case and in other English and American cases of the same character, there was no intention to create a trust. The declaration of trust was made merely to evade bank laws limiting the amount of deposits to the credit of one person. The state of English law on this subject is well shown by *Field* v. *Lonsdale*, 13 Beav. 78, (1850). An act of parliament limited deposits. A. deposited in his own name, and afterward opened a new account in trust for his sister. The following argument was used by counsel and adopted by the court: "When he could no longer, under the act, deposit any further moneys in his own name, he opened a new account in the name of his sister, intending it no doubt for his own benefit. A resulting trust is always presumed in such cases."

The cases represented by *Clark* v. *Clark* are few in number, and lay down an unreasonable rule. The courts regard, fundamentally, the intention. When the intention to create the trust is clear, it will

be upheld, whether notice is given to the beneficiary or not. And once created it is complete and irrevocable.

As stated before it was argued by the defendant that this was a trust with a power of revocation. Such a trust was upheld in *Von Hesse* v. *Mackaye*, 136 N. Y. 114, (1892). Bonds were given in trust. The word "trust" was used, also "said bonds for and during the life of A. to be subject to his order." Several bonds were taken back by the donor. *Held*, a valid trust in the absence of creditor's claims. This power of revocation must be very clearly proved. It will not be implied without strong evidence. In Fellow's App., 93 Pa. 470, (1880), it was shown that the grantor of lands in trust, reserved an interest during life in the proceeds of the property and gave a benefit in future to others. No power of revocation was implied but the trust was deemed complete.