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NEW JERSEY
Court of Errors and Appeals.

CHARLES RUGARBER,
Plaintiff, Appellant,
vs.
ELLIS G. POTTER AND FREDERICK F. COLEMAN,
Defendants, Respondents.

NOTICE OF APPEAL.

(*Filed October 20, 1912.*)

To Charles E. Cook, Attorney of Defendant, Frederick F. Coleman:

Take notice, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The court granted a nonsuit holding that the contract sued on only incidentally benefited the plaintiff and was not made for his benefit, and therefore the plaintiff could not maintain an action thereon or recover thereunder; when the court should have held that the plaintiff could maintain the action on the contract sued on.

2. The court committed a reversible error in holding plaintiff's action could not be maintained under the contract sued on, for the reason that said contract was not made for the plaintiff's benefit but that any benefit of the plaintiff's thereunder was only incidental.

3. The trial court erred in holding that the contract itself was not such a contract as in law would enable the plaintiff to maintain his action thereon.

Dated May 8th, 1913.

DURAND, IVINS & CARTON,
Attorneys of Appellant.
FRANK DURAND,
Of Counsel with Appellant.

Charles Rugarber
vs.
Ellis G. Potter and Frederick F. Coleman.
} Judgment Record.

The defendants, Ellis G. Potter and Frederick F. Coleman were summoned to answer unto Charles Rugarber, the plaintiff therein, in action at law upon the following complaint:

MONMOUTH COUNTY CIRCUIT COURT.

Charles Rugarber,
Plaintiff,
vs.
Ellis G. Potter and Frederick F. Coleman,
Defendants.
} Action at Law. Complaint.

Plaintiff, residing at city of Asbury Park, Monmouth county, says that—

1. He sues for labor performed and materials furnished in alterations on the Criterion Theatre, on Ocean

avenue, between First and Second avenues, in the city of Asbury Park.

2. The defendant Ellis G. Potter is the person who contracted the said debt, for said labor and materials.

3. The defendant Frederick F. Coleman assumed the debt in writing signed by himself, agreeing to pay the same.

A copy of the bill of particulars of said labor and materials is attached hereto.

A copy of said agreement of assumption is attached hereto.

Plaintiff demands as damages $616.56 with interest thereon from May 29th, 1912.

DURAND, IVINS & CARTON,
Attorneys for Plaintiff.

BILL OF PARTICULARS.

The following is a copy of the bill of particulars mentioned in the within complaint:

E. G. POTTER (Criterion Theatre)
To Charles Rugarber, *Dr.*

Agreement on Criterion alterations, consisting of corrugated iron roofing and siding, metal ceiling and sidewalks, ...	$550 00
May 29th	
Night of May 29th, overtime from 6 P. M. to 6 A. M. for 7 men (12 hrs.), ...	52 50
Lining Orchestra pit with Galv. iron, 4½ sheets 36" Galv. iron, ...	7 56
Solder, ...	2 00
Labor, 1 man, ...	4 50
	$616 56

Judgment will be claimed for the sum of six hundred sixteen and 56/100 dollars with interest thereon from the twenty-ninth day of May A. D. 1912.

DURAND, IVINS & CARTON,
Plaintiff Attorneys.

COPY OF AGREEMENT OF ASSUMPTION.

Agreement made this eighth day of July, nineteen hundred and twelve, between F. F. Coleman of the City of Asbury Park, in the County of Monmouth and State of New Jersey party of the first part, and Ellis F. Potter of the City of New York, County of New York and State of New York party of the second part.

It is agreed between the parties hereto that said Potter will pay forthwith to the said F. F. Coleman the installment of five hundred dollars due July first, nineteen hundred and twelve for the Criterion Theatre Building in the City of Asbury Park, as mentioned in the Lease between the parties hereto.

In consideration of said Coleman assuming all legal enforceable and valid mechanics' liens for labor and materials used in the addition or alteration of the said theatre building now existing, the said Ellis G. Potter agrees as follows: first, the said Potter agrees to continue run and operate the said Criterion Theatre from this date and all the receipts therefrom are to be applied in the first instance to the actual expense of running said theatre but this is not to include any compensation to the said Ellis G. Potter who is to give his services gratis during the year nineteen hundred and twelve, as a consideration for the making of this agreement. All receipts above actual operating expenses are to be applied pro rata to the payment of the aforesaid mentioned lines and for all ground rent. The ground rent comprehended by this agreement are the payments due to Milan Ross, of one thousand dollars to Mrs. Wahle, of five hundred dollars, and these two items in addition

to the payment of five hundred dollars due under said lease July first nineteen hundred and twelve, are to be firstly paid and include all the rents under said lease for the year nineteen hundred and twelve due from the said Potter to the said Coleman. Should there be any deficiency in the payments of this rent for the year nineteen hundred and twelve as above set forth, said deficiency will be assumed by the said Potter and paid by him to said Coleman in the year nineteen hundred and thirteen under said lease pro rata with the other payments of rent in said lease provided said lease is renewed and continued by said Potter.

All payments herein specified that are to be paid as ground rent are to be considered as payments of rent due for the year nineteen hundred and twelve under the existing lease between the parties and are to be so applied.

Said F. F. Coleman shall handle all moneys and receipts from and including this date for the balance of the year nineteen hundred and twelve and the same shall be turned over to him nightly and shall be disbursed by him according to agreement.

Witness,

C. E. Cook.

F. F. Coleman,
E. G. Potter.

RETURN.

Duly and personally served on Frederick F. Coleman, August 28th, 1912, at his office, corner 4th Ave. and Kingsley St., in the city of Asbury Park, Monmouth County, N. J.

Wilbert A. Beecroft,
Sheriff.
Per Francis J. Clancy,
Special Deputy.

The defendant, Frederick F. Coleman, answered as follows:

MONMOUTH CIRCUIT COURT.

Charles Rugarber,
Plaintiff,
vs.
Ellis G. Potter and Frederick F. Coleman,
Defendants.

Action at Law.
Frederick F. Coleman.
Answer of Defendant,

Frederick F. Coleman, one of the defendants in the above-entitled cause, residing in the city of Asbury Park, Monmouth county, New Jersey, says: he denies the truth of the matters contained in the plaintiff's complaint.

Defense to first count: Defendant has no knowledge that plaintiff sues for labor performed or materials furnished in the alterations of the Criterion Theatre at Asbury Park, New Jersey, save that as he is informed in plaintiff's complaint; and he denies that he is in any way responsible for any labor performed or materials furnished by the plaintiff in this behalf.

Defense to second count: This defendant has no knowledge that Ellis G. Potter is the person who contracted any debt for labor or materials with the defendant on said building save as he is informed by his complaint.

Defense to third count: This defendant denies that he assumed plaintiff's debt in writing or agreed to pay the same.

Further defense: Defendant says that he made no contract with plaintiff whatsoever for any purpose; no contractual relations whatsoever with plaintiff and this defendant ever existed as stated in said complaint. That he did not agree to pay for any labor or materials used in the erection or alteration of the theatre building mentioned in plaintiff's complaint or assume to pay plaintiff anything therefor; that plaintiff never had nor has he now a lien against the building and lands mentioned in said complaint or against this defendant.

Further defense: Defendant says that the alleged agreement between one Potter and himself attached to plaintiff's complaint is not legally enforceable against this defendant; there is no privity of contract between plaintiff and defendant; that said alleged agreement was not made for the benefit of plaintiff; that whatever remedy plaintiff has, if any, lies solely between plaintiff and the person that contracted with this plaintiff for any labor or materials in this behalf.

Further defense: The alleged agreement on the part of this defendant and Ellis G. Potter by and under which plaintiff claims defendant assumed legal, enforceable and valid mechanics liens for labor and materials used in the alteration and construction of said theatre building, so far as the defendant is concerned is wholly without consideration and void in law.

Further defense: Plaintiff never had any legal, valid and enforceable mechanics' liens for labor and materials used in the addition or alteration of the theatre building mentioned in his complaint against this defendant.

Further defense: That the alleged agreement between one Potter and this defendant is void in that Potter failed to perform his agreement with defendant, and that said alleged agreement is void and of no legal effect whatsoever, and especially of no legal effect or benefit to the plaintiff.

Further defense: Plaintiff cannot maintain any action at law under said alleged agreement annexed to his complaint.

Further defense: Plaintiff in law cannot claim any benefit arising through said alleged agrement.

Further defense: The alleged agreement attached to plaintiff's declaration is not a correct copy of any agreement which the defendant signed.

Further defense: The alleged contract attached to plaintiff's declaration is not the contract of this defendant.

Further defense: Plaintiff has no legal right or

status under said agreement against this defendant either at law or in equity.

Further defense: Said alleged agreement was not designed or intended for the benefit of plaintiff, and plaintiff cannot maintain any action against this defendant thereunder.

CHARLES E. COOK,
Attorney for Defendant Frederick F. Coleman.

On February 6th, 1913, the case was tried before his Honor, Nelson Y. Dungan, Judge of Monmouth Circuit Court; at the close of plaintiff's case motion by Wilbur A. Heisley, attorney for the defendant, Frederick F. Coleman, for a judgment of nonsuit was granted.

MONMOUTH CIRCUIT COURT, January Term, 1913.

Charles Rugarber,
vs.
Frederick F. Coleman et al.,
7863—16—249

} Action at Law.
} Judgment of Nonsuit.

Judgment entered February 6th, 1913.
Cost, $36.50.
Charles E. Cook, Attorney.

Judgment in the above-entitled action was rendered on this sixth day of February, in the year of our Lord one thousand nine hundred and thirteen, in favor of the defendant, Frederick F. Coleman, and against the plaintiff, Charles Rugarber, on action at law. Judgment of nonsuit and for thirty-six dollars and fifty cents costs of suit.

Judgment entered and signed February 6th, 1913, 8 A. M.

State of New Jersey,
Monmouth County. } *ss.*

I, Joseph McDermott, Clerk of the said county, do hereby certify that the foregoing copy of Complaint,

etc., is true and correct as the same remain on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the official seal of said county this twenty-seventh day of September, A. D. 1913.

JOSEPH MCDERMOTT,
Clerk.

MONMOUTH COUNTY CIRCUIT COURT.

CHARLES RUGARBER,
Plaintiff,
vs.
ELLIS G. POTTER AND FREDERICK F. COLEMAN,
Defendants.
} Action at Law.

FREEHOLD, N. J., February 6th, 1913. 10

TESTIMONY.

Before Hon. Nelson Y. Dungan, Judge, and a jury.

Appearances—For plaintiff, Messrs. Durand, Ivins and Carton; for defendant, W. A. Heisley and Charles E. Cook, Esqs.

Mr. Ivins—I presume that the lease will be admitted in evidence?

Mr. Heisley—Yes.

Mr. Ivins—I offer it, also the agreement of July 8th. 20

Mr. Heisley—Well, let's see—the agreement of July 8th.

The Court—Yes, I admit the agreement.

(Lease and agreement marked *Exhibits P 1* and *P 2.*)

The Court—Do you say it is different?

Mr. Heisley—The point we make as to the difference between the agreement set up in the complaint and the

agreement actually executed is that the latter was executed under seal, it is a sealed instrument, while the copy of the agreement set up and attached to the complaint purports to be unsealed.

Charles Rugarber, sworn for plaintiff.

Direct examination, by Mr. Ivins:

Q. Where do you reside, Mr. Rugarber.

A. Asbury Park.

Q. How long have you lived there?

A. Sixteen years.

Q. What is your business, Mr. Rugarber?

A. Sheet metal worker.

Q. And how long has that been your business?

A. Going on nine years.

Q. Do you know the theatre called the Criterion Theatre, in Asbury Park?

A. I do.

Q. Did you do any work or furnish any materials for that theatre during May, of 1912?

A. I did.

Q. Can you tell about when it was in May that you did it?

A. Well, the contract was signed, the agreement was made, rather, about May 17th, somewhere along there.

Q. And when was the work finished, do you recall, how long after that?

A. Well, we went back to do little odds and ends and finished up I guess on up into the first part of June.

Q. Now, what was it that you did?

A. The alterations consisted of cutting the stage off and moving it back.

Q. Well, let me ask you briefly—you may be cross-examined on that point—what was the amount of your agreement?

Mr. Heisley—Pardon me, but I understand the agreement was in writing.

Mr. Ivins—No.

Q. You said you had simply a memorandum of it, didn't you?

A. Yes.

Q. What was the amount of the agreement?

Mr. Heisley—If there is a memorandum, if by that he means a writing, it seems to me we ought to have it.

The Court—Yes, if this is the result of any writing.

Q. Do I understand you have simply the dates or a memorandum of the time or what?

A. Just make a note of different jobs I figured up and put down in a little book.

Q. Have you got all that you did? You did put it in that book?

A. Yes.

Q. Can you tell me without referring to your book the amount of that contract?

A. The amount of the contract?

Q. Yes.

A. $550.

Q. Was there anything else done there besides the work and materials included in the contract by you?

A. Why, after the building was about completed they were bothered by water where the orchestra pit was built, and in order—

Q. Just tell without saying why it was done whether you did so something else. That is all now.

A. Yes; we lined the pit with galvanized iron.

Q. And how much did the materials and labor for that come to? Can you tell without your memorandum?

A. No.

Q. You may consult your memorandum for that purpose, I think.

A. The time slips is all that I have.

Q. They are the originals, I suppose?

A. Yes, just as they are handed in.

Q. What does it show as to that?

Mr. Heisley—I object, that the time-slips turned in by the men are not sufficient evidence of the performance of the work in order to enforce a mechanics' lien. There must be strict proof.

The Court—This is not a mechanics' lien.

Mr. Heisley—Pardon me, sir. The lien which we assume must be a valid, legal and enforceable mechanics' lien.

The Court—I see the point, yes.

Mr. Ivins—Has your Honor ruled upon the question? Shall we have it repeated?

The Court—Yes, unless he knows about those, that he made those himself and that he knows the men did the work.

Q. Do you know about that?

A. I was there on the job.

Q. All the time?

A. Yes.

Q. During all the time the men were working there?

A. Worked all the morning to get ready for the evening performance, yes, sir.

Q. During all the time this work was going on that we are talking about now, you were present yourself?

A. Yes, sir.

Q. And knew about it?

Objected to as leading.

Q. Now, Mr. Rugarber, can you tell me what the amount was for that work that you have just been speaking about?

A. Well, it is here on the slip.

Q. Well, what is it?

A. The night of May 29th, overtime—

The Court—No, he is speaking now about the amount.

A. $14 or $15, somewhere along there, and here is the items.

Q. Is that all of it?

A. That is all of the extra work, yes, sir.

The Court—The extra work was how much?

Q. What did that extra work consist of that you are speaking of now, which you said amounted to $14 or $15?

A. Lining the orchestra pit.

Q. Lining the orchestra pit?

A. Yes, sir.

Q. Now was there other work done there besides that?

A. Only overtime.

Q. Well, what about that? I want the overtime as well as the undertime.

A. Well, Mr. Potter wanted to know if we couldn't get ready—

The Court—Not what he wanted to know; what was done?

A. Worked all night the night preceding Decoration Day.

Q. How many men?

A. Seven men.

Q. And yourself?

A. Yes, sir.

By Mr. Heisley:

Q. Doing what?

A. Putting on metal ceiling and side wall in the theatre.

By Mr. Ivins:

Q. Well, now, can you give me the amount?

A. That amounted to $52.50.

Q. Now that includes, does it not, all that you did here?

A. Yes, sir.

Q. Have you ever been paid for it?

A. No, sir.

Q. You have been in the business—I am not referring to the contract price now—were the other charges reasonable charges for what you did?

A. Yes, sir.

Q. Who ordered you to do this work?

A. Mr. Potter.

Q. Whom did you originally charge for doing the work?

A. I simply marked it "Potter, Criterion Theatre."

Q. Now do you know Dr. Coleman, Mr. Rugarber?

A. Very well.

Q. How long have you known him?

A. Nearly ever since I have been in Asbury Park.

By the Court:

Q. What was this contract for, Mr. Rugarber?

A. Metal ceiling and side wall roofing.

Q. At the Criterion Theatre?

A. Yes, sir.

By Mr. Ivins:

Q. Do you remember meeting Dr. Coleman in July, sometime last year?

A. Yes, sir.

Q. Where did you meet him, Mr. Rugarber?

A. In the Elks.

Q. And where is the Elks?

A. On Mattison avenue, Asbury Park.

Q. In the daytime or the evening?

A. I think it was one noon I happened to go up there. I think possibly on Saturday, Friday or Saturday, just about noon, I went up there and the doctor was up there.

Q. Did you have any conversation with him?

A. Yes, sir.

Q. What about, Mr. Rugarber?

A. Why, the question of the Criterion Theatre came up in some manner.

Q. Well, was it about your claim?

A. Well, my claim eventually came into it.

Q. Tell us about that conversation.

Mr. Heisley—I object. As I understand, this was when, Mr. Rugarber?

The Witness—The 10th or 11th day of July, somewhere along there.

Mr. Heisley—I object, your Honor, because the complaint is predicated upon a written instrument, whereby it is said that Dr. Coleman assumed the payment of bills of this character, of this bill. If that is so, the cause of action depends entirely upon that agreement. If the doctor did assume the payment of this bill in the manner and theory set out in the suit, he is liable, no matter what he said either for or against it. If he did not assume it, if he was not legally bound to pay a bill of this character of this bill, it makes no difference what construction the doctor put upon it. If he thought he was liable in the ignorance of law, when as a matter of law he was not liable under the agreement, the expression of his opinion did not make him liable, the work having all been done, and even if he made a promise to pay after the work had all been done, never having been bound before to pay it, if he made a promise a consideration for the promise would be entirely lacking. So, therefore, I submit that in no aspect of the case can this evidence be relevant. It may be exceeding prejudicial to the doctor, and I submit that inasmuch as they sue upon the agreement, the right of the plaintiff to maintain this action must be determined absolutely by the legal effect to be given the agreement.

Objection overruled.

Q. Tell us about that conversation.

A. Why, the doctor stated—

Mr. Heisley—If your Honor please, it is understood without my repeating my objection that this is taken subject to my objection?

The Court—Oh, yes.

A. —That he thought it was pretty smart, but he thought Potter had slipped one over on him. I asked him in what way and he says, "I made a damned fool of myself signing that paper." I says, "How is that?" and he says, "It makes me responsible for your bill and everybody else's that is not paid." I says, "I am damned glad to hear it, Doctor."

Q. What more was said then at that time about prosecuting your bill or anything?

A. Nothing more at that time. Some few days—oh, possibly a week or so after—he asked me not to do anything of that kind, and I told him no, I wasn't worrying about Potter any more.

Cross-examination, by Mr. Heisley:

Q. When was this conversation, Mr. Rugarber?

A. It was on a Saturday, ten or eleven o'clock, somewhere along there.

Q. In the afternoon or evening?

A. About the noon hour.

Q. And where was this conversation had, at what place?

A. At the Elks' clubroom.

Q. How did you and the doctor happen to meet there at noon?

A. Well, it is a common occurrence.

Q. Go there to get a drink?

A. Yes, sir.

Q. Did you have several while you were there?

A. Oh, no.

Q. Why, Elks drink quite a good deal, don't they?

A. Who?

Q. Elks drink quite a good deal, don't they?

A. Well, so do Germans that are not Elks.

Q. Are you a German?

A. Yes, sir.

Q. And you are also an Elk?

A. Yes, sir.

Q. Then you have the combined ability of a German and an Elk to drink?

A. Right.

Q. How many drinks did you have there that noon?

A. One or two, possibly.

Q. What do you mean, one or two or one or two dozen?

A. No, I am not built for that.

Q. Well, did you get pretty well trimmed up?

A. No, sir; I didn't have time.

Q. Couldn't stay long enough, eh?

A. No.

Q. Who heard this conversation?

A. Who?

Q. That is what I asked you.

A. No one but the doctor and I.

Q. Just you and the doctor?

A. Yes.

Q. Now, this lining of the pit, where is this pit?

A. In front of the stage.

Q. Down where the seats are?

A. Down where the orchestra seats are.

Q. Or where the musicians sit?

A. Yes.

Q. That would be the space, Mr. Rugarber, between the stage and the place where the patrons sit, where the guests sit?

A. Between the stage and the first row of seats.

Q. That was lower than the floor on which the patrons were located, I suppose?

A. Yes.

Q. And you put galvanized iron on that?

A. Yes.

Q. What did you do that for?

A. So that the musicians would not have to wear boots.

Q. The galvanized iron took the place of boots, eh, is that the idea?

A. No, the pit was lower and there was water there, and formed a pan of galvanized iron.

Q. Then you didn't do it on account of the boots, you did on account of there being water there?

A. That is the idea, to keep the water out.

Q. You didn't build the pit?

A. No, sir.

Q. You simply repaired the pit; is that right?

A. No, sir; no repairing to it; it was a new job.

Q. Well, all you did, the pit was completed and it leaked; is that the idea?

A. Water came in; yes, sir.

Q. And Mr. Potter employed you to repair the leak, is that it, by putting galvanized iron in there?

A. Form a metal pan to keep the water out.

Q. Well, I say that was not in your original contract?

A. No, sir; it was extra work.

Q. It was extra work, but it was in the nature of a repair; that is to say, you were repairing the leak so that the water would not come into the pit; isn't that right?

A. It was to prevent the water from coming into the pit; yes, sir.

Q. Now, Mr. Rugarber, have you testified when this work was done?

A. Have I testified when it was done?

Q. Yes.

A. Why, the work was going on up until the night of May 29th and the morning of May 30th.

Q. When was the last work done?

A. Well, that I can't say. Sometime the first or second week in June. We had a lot of finishing up to do on the outside. We did the inside first, to make way for the performance.

Q. And were you on the work much yourself?

A. Yes, sir.

Q. How much of the time?

A. How much of the time?

Q. Yes.

A. Well, I missed very few days.

Q. Who kept the time of the men?

A. I.

Q. How did you keep it?

A. Why, I had no time to keep, with the exception of the one night overtime, because the rest of it was done at a lump sum.

Q. The rest of it was done at a lump sum? Not any writing?

A. I gave Mr. Potter a slip.

Q. A slip showing what?

A. What I would do the work for, $550.

Q. And furnish the material?

A. Yes, sir.

Q. And what was the work you were to do?

A. Well, as I started to say, the theatre was cut in half and I matched the old metal side walls and metal ceilings and made one room of it.

Q. It was altered from a 75-foot long building to 125 feet; is that right?

A. Yes, the new sandwich, as we called it, that we set in there was 51 or 52 feet long.

Q. And what else was there to be done in that alteration that was not included in your contract, what other kind of material?

A. That was not included in my contract?

Q. Yes.

A. Well, I don't know. I did nothing else.

Q. But there were other mechanics who worked there?

A. Oh, yes.

Q. And what was the other kind of material used in this alteration? I want to get an idea of the alteration.

A. Lumber, bricks, hollow tile, or cement block, rather.

Q. Where was that, on the floor?

A. No, the ordinance committee of council made

them build a fifty-foot piece of wall adjoining the Davenport Inn of cement block.

Q. Now, the wall of the building was of what, or the ceiling? Was it of clapboards?

A. On the inside?

Q. On the outside.

A. On the outside was of cement block on one side, and a brick wall adjoining the party wall on the other side.

Q. And there were no ends to this work that you were doing; I mean to say that it was simply cutting the building in two and moving the two ends away from each other fifty feet and filling it up with two side walls and floor and a roof; is that right?

A. Yes, sir.

Q. No plastering in the building?

A. No, sir.

Q. You have sued Mr. Potter in this suit?

A. Well, I have sued both.

Q. Have you taken judgment against Mr. Potter?

A. Not yet.

Q. Why not?

A. Well, I felt that after Dr. Coleman's conversation that he would take care of it.

Q. Did you sue the doctor before the conversation or after?

A. After the conversation.

Q. Well, if you thought the doctor would take care of it, why did you sue both of them then?

A. Well, because the thing kept getting thicker and thicker all the time and I thought I had better do something.

Q. So your desire in this suit is not to get a judgment against Mr. Potter, but to have one against Dr. Coleman alone; is that right?

A. Well, I want to get paid for my work, that is all. I don't care who pays it.

Q. Why haven't you taken judgment against Potter if he has not filed a plea?

A. If he hasn't done what?

Q. Filed a plea, if he has not contested the judgment. Why haven't you taken judgment against him?

A. Because Dr. Coleman assumed the bills.

Q. But you sued Potter as well as Coleman.

A. Well, my lawyers take care of that.

Q. Don't you want a judgment against Mr. Potter?

The Court—There appears to have been no service on Mr. Potter.

A Juror—Your Honor, can I ask a question?

The Court—Yes.

By a Juror:

Q. The overtime there, was that a part of the work in the contract that you took to do, the overtime? Did you work on the contract that night?

A. No. Mr. Potter asked me if I couldn't get my men to work that night, and I told him I did not like to do that, because all overtime we have to pay double time for.

Q. But it was the same work that your contract was to do, wasn't it, that night?

A. Yes; but instead of charging double time I assumed one-half of the night and charged the other half.

Mr. Ivins—If your Honor please, I feel that I have established a *prima facie* case.

The Court—The plaintiff rests?

Mr. Ivins—Yes, sir.

Mr. Heisley—If your Honor please, we move for a non-suit upon several grounds. First, that conceding the instrument of July 8th to be a binding contract upon Dr. Coleman to assume the payment of these bills, the contract could not be enforced unless the plaintiff shows a performance by the other party of the conditions agreed to be performed by this other party in that agreement of July 8th. There is no presumption of

the law, I respectfully submit, that presumes that Potter performed the covenants entered into by him on July 8th, and this plaintiff may not hold the doctor liable unless he shows performance of those conditions, because they were the consideration of the promise, of the assumption; my thought being that where a person makes an agreement of assumption specified in the agreement where it is evident that the consideration of the agreement and the assumption is the doing of certain things by the other party to the agreement, that if those things are not done there is a failure of consideration, and if there is a failure of consideration the party to the agreement cannot enforce it, nor can any one claiming under it have any greater right than the party to the agreement,

My second ground is that the bills assumed to be paid by the doctor, if they were assumed at all, were all valid, legal and enforceable mechanics' liens, evidently referring to liens created by the statute of New Jersey; and that, therefore, in order to justify a recovery by the plaintiff Rugarber, he must show that all requisites of a mechanics' lien exist and that the claim is such a claim that it could be enforced. There is nothing in this case showing that at the time of the alleged assumption there was any lienable estate in Potter in this land. He must have some estate or some interest in the land which may be attached or to which may attach a mechanics' lien.

The Court—He has a leasehold interest. The lease is in evidence.

Mr. Heisley—There is no evidence that that leasehold interest was in force or in effect. It seems to me they are obliged to show not simply that a lease had been made, but it was still continuing and was in effect; because if this tenant had violated his lease in any way, giving the landlord the right to re-enter, there was no estate in the tenant which could be enforced by a mechanics' lien.

The Court—Well, don't you think that the agreement of July 8th, which was executed after the performance of this work, was an acknowledgment by both parties of the continuance of the leasehold interest of the defendant?

Mr. Heisley—No, sir; I don't. I don't think that is the legal effect of it. I think the legal effect of the agreement was merely that whatever valid, legal and enforceable mechanics' liens there might be, if there were such, should be assumed by the doctor. These bills were not enumerated, they were not specified; it was a grab-bag performance. If there were any such enforceable liens the doctor was to assume them, but I do not think there was any admission that there were enforceable liens, and there was certainly no admission that this man, this plaintiff, had an enforceable lien.

My further point is that this agreement of assumption was made under seal, and it has been expressly held that the statute which is found in 1898, and which reads as follows (page 481): "It shall be lawful for any person or persons for whose benefit any contract may have been made or may hereafter be made, and whether such contract be under seal or not, to maintain an action thereon in his, its or their own name, and to use the same by way of and as a matter of defense to any action in his, its or their own name at law or in equity, notwithstanding the consideration of such contract did not move from such person or persons," does not control this case, because that act was repealed in 1904, on page 251; and it puts the case back to the old common law principle that such contracts can only be enforced when they are under seal. And as an authority upon that point I refer your Honor to the case of *Styles* v. *Long Company, 38 Vroom 413,* where that distinction is expressly laid down and made, namely, that upon a sealed instrument the third party supposed to be benefited may not bring a suit at the common law, but a third party may only sue when the

promise for his benefit has been manifested by an upnsealed instrument. It is one of the common-law principles.

I also move to non-suit him upon the ground that even if this last point is overruled—but I do not relinquish it, because I think that is the law of the land to-day on account of this repealer—

The Court—How was it repealed, specifically?

Mr. Heisley—Specifically; yes, sir; by reference to the act itself.

The Court—Not by implication.

Mr. Heisley—Not by implication; no, sir.

I move to nonsuit him upon the ground that if the court was inclined to think that a person benefited by a contract may recover regardless of whether the contract is a sealed instrument or unsealed, that by the plain reading of his contract it does not appear that the contract of assumption, agreement of assumption, was made for the benefit of Rugarber. My point is that the only rational construction to be placed upon this agreement of assumption is that the person to be benefited by it is Potter and not Rugarber.

(Mr. Heisley continues argument. Mr. Ivins replies.)

The Court—Justice Swayze, in the case of *Styles* v. *Long*, very correctly says that where in any particular case a right of action in favor of a third person exists it is a question of difficulty; and he further adds upon it, "The cases are hard to reconcile upon general principles; the general principle being that stated in the statute, because this contract, being under seal, would not be enforceable by a third person except for the statute of 1903; and that statute specifically providing, as, indeed, it was the rule under the common law, that a third person could not maintain such action, must be a person for whose benefit the contract was made."

Now, Justice Swayze says in the case of *Styles* v *Long*, "It is not sufficient that the party be merely bene-

fited by the performance of the contract, but that in order that one not a party to the contract can maintain an action thereon, it must appear that the contract was made for him."

There is, in this case, a contract of leasing, made on May 10, 1912, and the contract in question is made on the 8th of July, 1912, and provides: "that in consideration of Coleman assuming all legal, enforceable and valid mechanics' liens for labor and material used in the addition or alteration of said theatre building," Potter agrees to do certain things. In reading this agreement it appears that by the assumption of these debts Potter is relieved from the further payment of rent. It appears that Dr. Coleman, the defendant, is to receive all the moneys, handle all the moneys and receipts, and that he is to disburse them, the contract saying that the first receipts are to go to the running of the theatre and that the next receipts are to go for the payment of certain ground rent for the ground upon which the building is erected, and which are Dr. Coleman's obligations. And by a very careful reading of the opinion and by a reference to such cases as I have been able to examine during the progress of this case, I am unable to avoid the conclusion that this agreement was made for the benefit of the parties to it, Mr. Potter and Dr. Coleman. The fact that incidentally the plaintiff in this case may have been benefited by its performance is not alone sufficient to entitle him to maintain this action. In this connection I have not lost sight of the effect of the case to which the plaintiff's attorney has referred me, *Joslin* v. *New Jersey Car Spring Company,* in which, upon an assignment of a sale of the business and assets of Fields and King to the defendant, the defendant agreed to assume all liabilities of Fields and King, and among those liabilities was a debt due to Joslin, the plaintiff, for salary as factory foreman. But it appears by a careful reading of that case that Joslin was really a party to that transaction; that he was one

of the directors, and as one of the directors he took part in the negotiations. In other words, as was stated at the bottom of page 44, "the plaintiff had knowledge and gave assent at the time to this arrangement, for he was present and acted upon it as one of the directors of the company. He assented to the transfer of those liabilities over from Fields and King and took them as his debtors."

I cannot see that the statement made some time after the making of this contract by Dr. Coleman to Mr. Rugarber alters the situation, but that after all we are left to the contract itself to determine whether or not this is such a contract as was made as not only incidentally it benefits the plaintiff, but as was made for his benefit. My view is that it was not, and holding that view I must grant the motion of the defense and grant the nonsuit asked for.

The other questions raised by Judge Heisley are not necessarily decided.

The Court—Justice Swayze, in the case of *Styles* v. *Long, 41 Vroom, 301*, very correctly says that "Whether in any particular case a right of action in favor of a third person exists is a question of difficulty." This contract, being under seal, would not be enforceable by a third person except for the statute of 1903; that statute specifically providing, as indeed it was the rule under the decided cases in this State with reference to contracts not under seal, that a third person could not maintain such action, unless it be a person for whose benefit the contract was made.

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The other questions raised by Judge Heisley are not necessarily decided.

EXHIBIT P. 1.

THIS AGREEMENT, made the tenth day of May, Nineteen Hundred and Twelve,

Between Frederick F. Coleman, of the City of Asbury Park, New Jersey, party of the first part, and Robert E. Erwin, Manager, of the City of New York, New York, party of the second part.

Witnesseth, that the said party of the first part has let and rented to the party of the second part and the said party of the second part has hereby hired and taken from the said party of the first part,

All that certain building situate on the west side of Ocean Avenue, between First and Second Avenues, in the City of Asbury Park, New Jersey, and known as the Criterion Theatre, together with the land on which the same is erected, the same being fifty feet in width on Ocean Avenue, and extending in depth one hundred and fifty feet, together with the furniture contained therein, as per inventory attached, for the term of one Season beginning the tenth day of May, Nineteen Hundred and Twelve, and ending October fifteenth in the same year, at the rental of thirty-five hundred dollars, payable as follows:

$500. on signing this lease.
$500. June 1, 1912.
$500. June 15, 1912.
$500. July 1, 1912.
$500. July 15, 1912.
$500. August 1, 1912.
$500. August 15, 1912.

And it is further agreed that the said party of the second part shall have the option of extending this lease for a further term of three years at the yearly rental of thirty-eight hundred dollars, payable as follows:

$1000. January 1, in each and every year.
$700. June 1, " " " " "
$700. July 1, " " " " "
$70. July 15, " " " " "
$700. August 1, " " " " "

Provided, however, that in case the said party of the second part shall desire to exercise said option of renewal, he shall on or before October 15, 1912, notify the said party of the first part in writing of his desire to exercise said option as aforesaid, and should the said lessor obtain a further option on said leased ground the said lessee shall have the right to a further lease as last above stated, plus the increased cost, if any, of the said leased lot.

Said lessee agrees to install one hundred chairs which are the property of the said lessor.

And it is further agreed that said premises are leased subject to all and singular the covenants, conditions and restrictions contained in a deed for said premises from James A. Bradley and wife to one John L. Schneider, dated September 8, 1874, and recorded in the Monmouth County Clerk's Office in Book 264 of Deeds, on pages 368 &c.

And it is agreed that said premises shall not be occupied for any purpose excepting for high class amusements.

And it is also agreed that the said party of the second part will not do or suffer to be done in or upon the said premises any act or thing which shall or may be a nuisance, annoyance or damage to the Hotel adjoining on the north of said leased premises or her tenants, and that he will not permit any barking or soliciting of business in front of said premises, nor any place or play any phonograph in or about the front of said premises so that the same may be heard on the sidewalk adjoining same.

And it is further agreed that the said party of the second part shall use and occupy said premises so as to

conform to any ordinances that are now in force or may hereafter be adopted by the City of Asbury Park.

And the said party of the second part agrees to promptly pay when due all charges against premises for water and light.

The party of the second part has the privilege of increasing the size of building to the full size of lot, but shall not make it any higher, also has the privilege of moving back the stage, and is to supply any additional chairs, said improvements to remain the property of the party of the first part at expiration of lease.

And it is further agreed that the said party of the first part shall have the privilege of entering said premises at any time during the above term for the purpose of inspecting said premises or for making any repairs to the same, or for the purpose of making a distress for rent in case there should be default in any of the foregoing payments.

And it is agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises by force or otherwise, and remove all persons therefrom.

And at the expiration of the said term, or the termination of this lease, the said party of the second part will quit and surrender the premises hereby mentioned, in as good a state and condition as reasonable use and wear thereof shall permit, damages by the elements excepted.

And the said party of the first part covenants that the said party of the second part on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

F. F. Coleman,
Robert E. Irwin, *M'g'r.*

W. P. Sherman, Witness as to all.

In consideration of One Dollar the receipt of which is hereby acknowledged I hereby assign this lease to ELLIS G. POTTER, of New York.

ROBERT E. IRWIN, *M'g'r.*

I consent to the above assignment.

F. F. COLEMAN.

W. P. SHERMAN, Witness as to all.

EXHIBIT P. 2.

AGREEMENT made this eighth day of July, Nineteen Hundred and Twelve, between F. F. Coleman of the City of Asbury Park, in the County of Monmouth and State of New Jersey, party of the first part, and Ellis G. Potter, of the City of New York, County of New York and State of New York, party of the second part.

It is agreed between the parties hereto that said Potter will pay forthwith to the said F. F. Coleman the installment of Five Hundred Dollars due July first, Nineteen Hundred and Twelve, for the Criterion Theatre building in the City of Asbury Park as mentioned in the lease between the parties hereto.

In consideration of said Coleman assuming all legal, enforceable and mechanics' liens for labor and materials used in the addition or alteration of the said theatre building now existing, the said Ellis G. Potter agrees as follows: First, the said Potter agrees to continue run and operate the said Criterion Theatre from this date and all the receipts therefrom are to be applied in the first instance to the actual expense of running said theatre, but this is not to include any compensation to the said Ellis G. Potter who is to give his services gratus during the year Nineteen Hundred and Twelve, as a consideration for the making of this agreement. All receipts above actual operating expenses are to be

applied pro rata to the payment of the aforesaid mentioned liens and for all ground rent. The ground rent comprehended by this agreement are the payments due to Milan Ross, of One Thousand Dollars and to Mrs. Wahle of Five Hundred Dollars, and these two items in addition to the payment of Five Hundred Dollars due under said lease July first, Nineteen Hundred and Twelve, are to be firstly paid, and including all the rents under said lease for the year Nineteen Hundred and Twelve due from the said Potter to the said Coleman. Should there be any deficiency in the payments of the rent for the year Nineteen Hundred and Twelve as above set forth, said deficiency will be assumed by the said Potter and paid by him to said Coleman in the year Nineteen Hundred and Thirteen under said lease pro rata with the other payments of rent in said lease, provided said lease is renewed and continued by said Potter.

All payments herein specified that are to be paid as ground rent are to be considered as payments of rent due for the year Nineteen Hundred and Twelve under the existing lease between the parties and are to be so applied.

Said F. F. Coleman shall handle all moneys and receipts from and including this date for the balance of the year Nineteen Hundred and Twelve, and the same shall be turned over to him nightly and shall be disbursed by him according to this agreement.

F. F. COLEMAN, [L. S.]
E. F. POTTER, [L. S.]

Witness,
C. E. COOK.

New Jersey
Court of Errors and Appeals

CHARLES RUGARBER,
Plaintiff-Appellant,
vs.
ELLIS G. POTTER and
FREDERICK F. COLEMAN,
Defendant-Respondents.

On Appeal from
Monmouth Circuit.

Brief and Points of Plaintiff-Appellant.

The appeal in this case challenges the judgment of nonsuit rendered by the trial Judge at the Monmouth Circuit.

The judgment of nonsuit is predicated exclusively upon the insufficiency of the agreement to support the action based upon it.

The trial Judge held as a question of law that the plaintiff did not have a suable interest in the agreement by reason of its phraseology and terms.

Plaintiff's other reasons why the action for nonsuit should prevail were neither considered nor decided by the trial Judge.

The only question to be discussed therefore is, whether the trial Judge erred in construing the agreement to exclude the plaintiff from maintaining an action at law upon it for the recovery of his claim.

The agreement discloses that one Ellis G. Potter was in possession of the Criterion Theatre in Asbury Park under a lease from the defendant—the owner; that as lessee Potter had made extensive improvements to the theatre building by way of enlargement, alterations, etc., that for reasons not mentioned in the agreement Potter and Coleman concluded to change the relationship of landlord and tenant then existing between them.

They came to a mutual understanding and consummated the new arrangement by the agreement in question. It is, of course, quite unimportant what the reasons were which led up to the situation created by the agreement.

The plaintiff had furnished labor and materials for the alteration and enlargement of the theatre building and had a lawful and enforceable claim under the Mechanics' Lien Law prior to the making of the agreement.

The defendant had knowledge of plaintiff's claim, and knew that the claim was enforceable under the Mechanics' Lien Law. Defendant knew that if the claim was enforced its enforcement would interfere with and perhaps terminate the operation of the agreement.

Potter did not exact that the claim should be paid before the agreement went into effect. The method of payment was a matter that concerned Coleman only. Potter wanted the claim taken care of and assumed by Coleman. Under the agreement Potter was relinquishing his control of and interest in the proceeds from the operation of the theatre. No proceeds or profits thereafter, not even compensation for his services, would accrue to him under the agreement. Whether success or failure resulted from the agreement he made sure that the indebtedness incurred by him in respect to the improvements to the defendant's theatre building should be recognized and assumed by the defendant.

It seems to us that it was clearly the intention of both Coleman and Potter that Coleman, not Potter, should thereafter deal with the plaintiff and that in contemplation of the parties to it the agreement was made for the benefit of the plaintiff.

This does not seem to be a case where the plaintiff simply might be incidentally benefited by the performance of the contract. On the contrary, the assumption of the claim was not made to depend upon the performance of the agreement, but was a leading inducement to the making of it, and became, we think, an irrevocable obligation of the defendant when the agreement went into effect.

The situation here presented would seem to come directly within the scope of the Act of 1898. The language is: "It shall be lawful for any person or persons for whose benefit any

contract may be made, or may hereafter be made, and whether said contract be under seal or not, to maintain an action thereon in his, its or their own name, etc."

The trial Judge held that the decision of the Supreme Court in Styles v. Long, 38 Vroom, 413, affirmed by this Court, 41 Vroom, 301, applied to the present case and was dispository of the question here involved. We think that there is a wide distinction between Styles v. Long, and the case at bar. In Styles v. Long the action was in tort for damages arising from an alleged violation of duty in the performance of a contract with a third party. It was held in Styles v. Long, that, "The general rule that one who is not a party to a contract cannot maintain an action of tort in respect to the breach of a duty arising solely out of the contract, applies to stipulations imposing a continuous obligation." It was also held by this court in that case that the right of the plaintiff could not be maintained upon the Act of 1898, for the reason that the Act provided only for actions upon the contract, and gives no action in tort.

It seems to us that Styles v. Long simply decides that one who is not a party to a contract cannot maintain an action of tort in respect of the breach of a duty arising solely out of the contract. We cannot see any similarity between the case at bar and Styles v. Long.

It is the settled law in this State that privity of contract is not requisite in order to maintain the action, and that the consideration need not move from the person for whom the contract is made. Styles v. Long, supra.

The learned trial Judge says that his construction and interpretation of the agreement is that it was made for the benefit of the parties to it—Potter and Coleman. Our view is that the assumption contract under discussion if not made for the benefit of the plaintiff would seem to be without purpose and a definite object. It certainly was not made for the benefit of Potter, for he surrendered all the interest he had in the premises, and did even more than that,—he obligated himself to render his services to Coleman without compensation in consideration of the assumption of plaintiff's claim by Coleman. How can it be held that the agreement benefited Potter in any other way than the payment of plaintiff's claim by Coleman? And it is clear that whatever benefit Coleman might derive

from the agreement was subordinated to the payment of plaintiff's claim.

Potter had a valid interest in the property to surrender to Coleman, and this consideration which so passed to Coleman supported his promise to pay plaintiff's claim and raised a privity betwen Coleman and plaintiff. Collier v. DeBrigard, 51 Vroom, 94. There was a special, substantial consideration moving to the defendant as the inducing cause of his promise.

We have been unable to find any authority for the proposition that a third party is without remedy to enforce a contract made for his benefit unless he was present at the making of the contract and consented thereto. The learned trial Judge seems to hold that Joslyn v. Car Spring Company, 7 Vroom 141, does not apply to the case at bar for the reason that "Joslin was really a party to that transaction; that he was one of the directors, and as one of the directors he took part in the negotiations. In other words, as stated at the bottom of page 44, the plaintiff had knowledge and gave assent at the time to the arrangement, for he was present and acted upon it as one of the directors of the company. He assented to the transfer of those liabilities over from Fields and King and took them as his debtors."

We think the learned trial judge misconceived the legal import of the language he quoted from Joslin v. Car Spring Company, by giving to it the effect of settling the law in New Jersey that a person for whose benefit a contract is made cannot maintain an action upon the contract unless he was present when the contract was made and assented thereto.

Our view is that the present case is somewhat analagous with Joslin v. Car Spring Company, Collier v. DeBrigard, and that line of cases. In those cases assumption of claims of third persons by contract in writing to which said third persons were not parties was enforced by actions at law upon the contracts.

We certainly agree with and fully appreciate Justice Swayze's remarks in Styles v. Long that "Whether in any particular case a right of action in favor of third persons exists is a question of difficulty, upon which the cases are hard to reconcile upon general principles."

In every case, nevertheless, the intention of the parties to

the agreement must be ascertained, if possible, and given effect. When there is doubt as to the intention of the parties to the agreement, the question of intention, we think, should be submitted to the jury.

In the case at bar some light is thrown upon the understanding of Coleman as to the effect of the agreement in relation to the plaintiff. The testimony we refer to is on page 16 of the case. But the trial Judge held that any expressions of the parties to the agreement after it was made could not be given consideration.

As before observed we have not attempted to discuss any other question raised by defendants' counsel. Whether the judgment of nonsuit is justifiable on other grounds and sustainable for any other reason is not fatal to the defendants' right of action. Mistakes made in the presentation of plaintiff's case are remediable by another trial. The all important question is as to the right of the plaintiff to maintain an action upon the agreement.

Plaintiff appeals to this court to settle the question of his rights in that regard.

Respectfully submitted,

DURAND, IVINS & CARTON,

Counsel for Plaintiff-Appellant.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

CHARLES RUGARBER, *Plaintiff-Appellant,* *vs.* ELLIS G. POTTER and FREDERICK F. COLEMAN, *Defendants-Appellees.*	*On Appeal from Monmouth Circuit.*

Brief for Defendant Coleman.

This suit was brought by the plaintiff claiming to be the beneficiary referred to, in a written agreement between the two defendants, in which Coleman assumed the payment of a bill which the defendant, Potter, owed Rugarber.

The action is predicated upon Section 28 of the Practice Act of 1903, page 541, reading: "Any person for whose benefit a contract is made * * * may maintain an action thereon * * *."

The plaintiff was non-suited on the ground that he was not the "person for whose benefit the contract was made," and we submit that the ruling of the court was correct.

Before considering the facts, let us consider the law.

The statute allows a person to recover on a *contract*, and manifestly there may be only one recovery, because when the defendant satisfies the contract, he is discharged. Therefore, the pertinent query always must be, not who is benefited by the contract, but "FOR whose benefit was the contract made"?

A contract may be made for the benefit of A., and incidentally benefit many others, but A. is the only one who may sue, because it was made for *his* benefit.

See *Styles* vs. *Long Co.*, 38 Vr., 418, and on appeal, 41 Vr., page 301, and particularly page 305, where the court says, "It is not enough that the plaintiff may be benefited by the performance of the contract; he can only maintain an action when the contract is made for him." See also, concluding lines of that opinion.

The question to be answered, therefore, is FOR whose benefit was the contract between Potter and Coleman made? We answer, clearly for Potter.

By reading the copy of agreement on page 4 of the printed case, we readily see that there was an outstanding lease between Coleman, as landlord, and Potter, as lessee, and upon which Potter had defaulted in several ways, including his failure to pay $500 July 1st; that while in possession of Coleman's property, Potter had built upon it; had failed to pay these bills for material and labor, and under the Seventh Section of the Mechanics' Lien Law, Potter's estate as tenant, was liable to mechanics' liens.

By this agreement, Coleman assumed the payment of all "legal, enforceable and valid mechanics' liens for labor and material." It will be observed that Coleman's interest in the real estate was not in jeopardy, because the statute says that "only the estate of the tenant could be liened."

We respectfully submit that the following are convincing reasons, to show that this agreement was made for the benefit of Potter, and not Rugarber.

1st. Potter wanted to preserve and continue his lease, and the first thing he does is to agree to pay Coleman the $500 due on the first of July, "as mentioned in the lease between the parties thereto." This was not $500 simply to get Coleman to assume Potter's debts, but it was a payment of *rent* to continue the lease and preserve Potter's leasehold interest.

2nd. Coleman did not assume the *personal* debts of Potter. On the contrary, he assumed only such debts of Potter's, as were "legal, enforceable and valid

mechanics' liens," on Potter's estate in the leasehold premises. Potter was anxious, and only concerned in having his leasehold interest preserved, and this could only be done by having Coleman pay such claims which, *if left unpaid, would extinguish Potter's interest.*

3rd. So anxious was Potter to have his leasehold interest preserved, that he agreed to run and operate the theatre without any compensation, provided that "all receipts over actual operating expenses, are to be applied *pro rata* to the payment of the aforesaid mentioned liens, and to all ground rent." In other words, only by the payment of mechanics' liens and rent, could Potter's estate be preserved.

4. If there remained any surplus after paying these liens and the ground rent to Milan Ross and Mrs. Wahle, then the balance was to apply on account of the *rent for 1912, due Coleman.* "Should there be any deficiency in the payment of this rent, said deficiency will be assumed by Potter, and paid to Coleman in 1913." By this promise to Coleman, Potter secured the benefits of a continuation of his lease, and put Coleman in a position where he could not enforce payment until the following year, viz—1913.

5th. If any of the above objects had not been covered by this agreement, Potter would have forfeited his estate, and *lost the money which he had expended in the building upon it.* Each of these conditions protected, and were meant to protect Potter's interest.

6th. Was Rugarber benefited? Yes, but only incidentally. He already had the personal liability of Potter, and also security by reason of his having "an enforceable and valid mechanics' lien." In all probability, he needed no other security. That his security was ample, is evident by Potter's anxiety not to have his estate extinguished by Rugarber filing a mechanics' lien.

In the ordinary case of a simple debt, a debtor has more interest in having his claim paid by a third person, than the creditor has in having such third person

pay it. A debtor, whether he be financially responsible or not, is *necessarily* benefited by the promise of a third person to pay his debt. The creditor *may* be benefited by such promise, but is not *necessarily* benefited, because if his debtor is solvent, he can recover from the debtor as well as he could from the independent promisor.

Therefore, we earnestly urge that if Rugarber was benefited at all, it would only be incidentally, and as a result of two conditions, namely: First—Potter's insolvency; second—inability to realize on a mechanics' lien claim.

This agreement of assumption everywhere declares in unmistakeable terms, that it was made for the sole purpose of preserving Potter's interest in the estate; of enabling him to continue the operation of the theatre, not only for 1912, but for 1913, and so anxious was he to accomplish this, that he agreed to work for the season of 1912, gratis.

The plaintiff, in his brief, at the bottom of the first page, says that "Potter and Coleman concluded to change the relationship of landlord and tenant." The agreement shows conclusively that the object of the agreement was a continuation, not a change, of that relation.

Near the bottom of page three plaintiff says: "Potter surrendered all the interest he had in the premises." There is absolutely no fact to support an assertion so rash. He surrendered *nothing;* he would have lost *all,* had he not induced Coleman to sign this agreement; the only way he retained his interest, *was by this agreement.*

For these reasons, we respectfully ask that the judgment be affirmed.

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