March, 1928.

ANNOUNCEMENT

The Review takes pleasure in announcing the election to the Business Board of the following members of the Second Year Class: Alexander Z. Brister, Franklin B. Gelder and Raymond deS. Shryock.

NOTES

THE UNIFORM WRITTEN OBLIGATIONS ACT—On May 13, 1927, the Uniform Written Obligations Act was passed by the Pennsylvania legislature. The title and important section of the act read:

To validate certain written transactions without consideration, and to make uniform the law relating thereto.

SECTION I. Be it enacted, &c., That a written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.

This section is followed by the usual section that its purpose is to make uniform the laws of the states, another permitting citing it by the above name, and the last section a repeal of inconsistent acts.

The act was drafted by Professor Williston of Harvard Law School, under the auspices of the American Law Institute, in slightly different form, but the form given above is that which was approved by the National Conference of Commissioners on Uniform State Laws in August, 1925, and the American Bar Association immediately thereafter.

So far as the writer has been able to ascertain Pennsylvania is the first and, at writing, the only state to adopt this act, which, as it was not primarily intended for jurisdictions where, as here, the common law with regard to sealed instruments is comparatively unchanged, is perhaps a justification of the gentle castigation recently administered to the enthusiasts for uniform laws by a member of the Philadelphia Bar.

1927 P. L. 985.

Its original form will be found in (1925) A. B. A. Rep. 594, and infra p. 582.

(1925) Handbook of National Conference of Commissioners on Uniform State Laws 214; approved for second time, ibid. 316.

(1925) A. B. A. Rep. 162.

At common law in the absence of consideration there was only one method of making a legally binding promise, namely by the execution and delivery of a sealed instrument. This deed derived its validity from the solemnity of its execution, which was once an historic fact and is now an historic survival, for there is but little trace of the solemn borrowing of a great noble's seal in the purchase of a printed form from a stationer or the typing of seal or L. s. The modern doctrine that a seal is that which is intended as such by the person executing the instrument, has gone so far that a dash one-eighth of an inch long has been held to be a seal when preceded by a testimonium clause. But despite the disappearance of the solemnity there does remain an intention to execute an instrument in a form which, for historical reasons, the common law considers binding. Many jurisdictions, led away by the maxim "Cessante ratione legis, cessat ipsa lex" and focusing their attention solely upon the disappearance of the solemnity of execution, have forgotten the very real value to society of the formal obligation, with the result that they have enacted statutes impairing the old-time force of sealed instruments, either by totally abolishing the effect of a seal, or by permitting merely a presumption of validity and that of varying weight. Pennsylvania, however, has retained the power of the seal unimpaired insofar as it makes a promise valid at law.

It is extremely useful to the community and to the legal profession to have an abracadabra by which a promise may be made legally binding without the uncertainty of proving consideration. In the absence of some magic token a creditor cannot release a liquidated, undisputed debt upon payment of less than is then due, despite the fact that it is frequently sound economic policy for him so to do. At the other end of the scale, perhaps, is the charitable subscription which is most conveniently substantiated by a seal. Not to mention those cases where there is grave doubt as to whether or not there is consideration for the agreement and here again the seal is a lifesaver to the hard-pressed lawyer. So that unquestionably the formal contract performs a very useful function in the community and the primary purpose of the proponents of this act manifestly was to create a formal contract for those states which have abolished the common law method of forming such a contract. That this is a laudable purpose is supported by the fact that three states, which have destroyed the efficacy of the seal, have passed statutes making writ-
ten contracts valid without consideration, but those acts contain certain dangers pointed out by the draftsman of the Uniform Act.\textsuperscript{12}

In addition to its primary purpose, the Uniform Act has certain advantages over the common law formal contract, hence having adopted this act, a state could abolish sealed instruments\textsuperscript{13} should it so desire, and have a more realistic and better type of formal obligation. The obvious objection to doing this is that deeds have been the subject of judicial decision for centuries and there is always serious inconvenience in throwing overboard a definite body of law in favor of any statute, however clear it may be. There are bound to be doubts and difficulties until the statute has received considerable judicial construction.

Some of the objections to a seal as stated by Mr. Williston before the National Conference of Commissioners on Uniform State Laws in support of this act follow:\textsuperscript{14} 1. The man in the street is unaware of the legal effect of "sealing" an instrument. This seems entirely true and, to the writer, the greatest virtue of this statute lies in the fact that no man is likely to stumble upon it unawares, for one has little sympathy with him, who seeks to avoid his obligation after executing a writing which, besides a promise, "also contains an additional express statement, in any form of language, that the signer intends to be legally bound."\textsuperscript{15} 2. There is danger of fraud in that a "seal" may be affixed after execution. This also seems obviously true although cases of this species of fraud are infrequent.\textsuperscript{16} 3. The difficulty as to what constitutes a seal. The Pennsylvania law as to what constitutes a seal is fairly certain, namely that it is the intention of the party "as exhibited on the face of the paper itself."\textsuperscript{17} In view of the fact that what is a seal has been the subject of judicial decision for centuries and has received a progressively liberal interpretation, it is perhaps doubtful whether the new act will give us any more certain criterion of the sanction of a formal contract until the phrase

"an additional express statement, in any form of language, that the signer intends to be legally bound"

has received judicial construction. This is, of course, the gist of the new act and in ascertaining its meaning a study of the original draft is helpful. It read:

Sec. 1. No written release or promise hereafter made and signed by the person releasing or promising shall be invalid or

\textsuperscript{12}I Williston, Contracts (1924) § 219.
\textsuperscript{13}Pennsylvania has already eliminated the necessity for a seal on an instrument conveying land. Act of April 30, 1925, P. L. 404.
\textsuperscript{14}Op. cit. supra note 3 at 197.
\textsuperscript{15}See the Act, supra p. 580.
\textsuperscript{16}For an example, see Wenchell v. Stevens, 30 Pa. Super. 527 (1906).
\textsuperscript{17}Hacker's Appeal, supra note 7.
unenforceable for lack of consideration, if the writing also contains an express statement, in any form of language, that the signer intends to be legally bound.\(^{18}\)

Is the phrase "I promise to pay $1000" valid under the act? It might well be argued that it is "an express statement, in any form of language, that the signer intends to be legally bound." But it is merely a promise, it is not an express statement of an intention to be legally bound. Our courts in their analysis have habitually considered, first, was a promise in fact made, and then the different question, is that promise valid. Although any promisor is concededly morally bound, his legal obligation is something quite different from the fact of making a promise. Furthermore, there is no doubt that this writing does not "also" contain a statement of intention. Undoubtedly, it was the opinion of the sponsors of the act that this was not a sufficient compliance with the statute.\(^{19}\) But to make the matter entirely clear, as well as to meet the writings next discussed, the word "additional" was inserted to support "also," despite the tautology, so that as enacted it reads: "also contains an additional express statement."

Now, let us consider a signed writing: (a) "I intend to be legally bound to pay Jones $1000," or (b) "I am hereby legally bound to pay Jones $1000." There will be grave doubt whether or not either of these is a compliance with the Act until there is a decision by our Supreme Court. Undoubtedly, the formula in the minds of the sponsors of the act was, (c) "I promise to pay $1000 and intend to be legally bound." Then, as well as the promise, we have also an additional express statement of the intention to be legally bound. It may be, however, that a court would consider (a) and (b) sufficiently like (c) in substance for them to disregard the precise phrasing of the statute, but there is no doubt that that was not the intention of the sponsors and that the original language was changed and the word "additional" was added to meet this very situation. Professor Freund raised this exact problem.\(^{20}\) Thereupon it was first moved to strike out "also" from the original draft, with the intention of making (a) and (b) valid, but, upon objection, on the contrary "additional" was added with the precise purpose of preventing either of them being binding in law.\(^{21}\) It was admitted that this was tautological in view of "also" but the sponsors desired to exclude absolutely the construction that the Act created an obligation unless there are both a promise and an expression of intention to be legally bound. This construction has the great advantage of lessening the possibility of a man unintentionally falling foul of the act, however little sympathy

\(^{18}\) Supra note 2.

\(^{19}\) Op. cit. supra note 3 at 195.

\(^{20}\) Ibid., 203, 209, 210.

\(^{21}\) Ibid., 203.
one might have with him, if he had used either of the two questionable forms.

A second possible danger, which seemed to occur frequently to those taking part in the debate, was that it might do away with the defense of failure of consideration, as distinguished from lack of consideration; so that a man might be held to his obligation although he had not received that for which he had bargained. But there was no doubt in the minds of the sponsors that the clause "shall not be invalid or unenforceable for lack of consideration" sufficiently specified that the statute was aimed only at lack of consideration. This phrase "lack of consideration" is one which has a well-defined legal meaning and usage very different from the equally common concept of "failure of consideration." It would be difficult, therefore, to make the act any clearer on this point than it is.

A further objection was raised that "shall not be invalid or unenforceable" might lead a court of equity to grant specific performance of such a contract, notwithstanding that such a court will not usually grant specific performance of a mere sealed instrument which lacks common law consideration. But it was not the opinion of the draftsman that this statute would have any effect on the chancellor's discretion with regard to specific performance and it would certainly seem that it would take stronger language than this to affect the remedy on a contract in equity.

We have, therefore, in Pennsylvania by virtue of this act a new type of formal contract, deriving its validity not from a seal but from an additional express statement of an intention to be legally bound. The requisites of this novel species of formal contract are: (a) that it be a signed writing, and (b) that it contain (i) a promise or release, and (2) an additional express statement of an intention to be legally bound. Number 2 being the abracadabra which supplies the sanction for the promise.

One of the most obvious situations in which this contract will be valuable, will be charitable subscriptions which are today upheld on so many contradictory theories of consideration that one can but doubt the logical value of any of the theories. We may now expect "I hereby promise to pay to Charitable Institution the sum set opposite my name and intend to be legally bound by this promise," as the eventual form of charitable subscription. Releases, also, may perhaps appear in this form after the Supreme Court has passed on a few obligations under the act, though one suspects that the bar will be slow to utilize it, until it has been construed and no doubt will, in the beginning, add the seal also for double security.

28 Ibid., 201, 207, 213.
29 Ibid., 204.
30 Lenning's Estate, 6 Pa. Dist. 249 (1897). Opinion by Penrose, J.
The price that we pay is the uncertainty necessarily attending an alteration of the fundamental law, until decisions of the Supreme Court have settled the fate of the statute.

William Foster Reeve, III.

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STATE CERTIFICATION OF AERIAL CARRIERS—The enactments by the Federal Congress of the Air Commerce Act\(^1\) and by numerous states of the Uniform Aeronautics Act\(^2\) and other comprehensive aerial legislation, have given to aeronautics an unprecedented vitality. This has been manifested in the establishing of privately owned and operated aerial lines throughout the nation, in the insuring of such operations, and in a hundred other ramifications. It is inevitable that the companies which undertake the operation of air mail routes under the provisions of the Air Mail Act,\(^3\) whereby the Postmaster General was instructed to contract for private operation of such lines, should not confine themselves to the carriage of mail. Their expansion into carriers of passengers and property for hire is a foregone conclusion. This development into the field of common carriers will bring the companies within the purview of public service commissions in the various states, and there will arise the question of the necessity of the certification of such aerial companies by the state commissions.

The recent application to the Public Service Commission of Pennsylvania by aviation companies seeking to engage in common carriage by air, presents the specific question of certification in that state. In general, the consideration given the problem there must be that given to it wherever it may arise. While the acts of the different states creating and empowering their respective commissions vary, and hence alter the jurisdiction of the commissions in their states, the Pennsylvania statute is more comprehensive than those of many other states and the authority of its commission relatively broader. Consequently, the limitations of that commission will apply to other commissions with equal, and, in some states, greater effect.

Where, as under the provisions of the Pennsylvania statute,\(^4\) the supervision of the commission extends to all common carriers conveying for profit within a state either passengers or property "by, through, over, above, or under land or water, or both,"\(^5\) it is obvious that the jurisdiction of the state commission includes aerial carriers. In any state where the jurisdiction of the commission is correspondingly extensive, any aviation company seeking to engage in purely

\(^5\) Ibid. Art. I, §1.
intrastate carriage of persons or property for hire must apply to the commission for approval of its operation and for the certification thereof.\(^6\)

Should such a company desire its operation to be interstate as well—and the nature of aerial travel makes it preeminently a means of long distance and hence interstate transportation—the consideration of its relation to a state commission becomes more involved. It has become axiomatic that where Congress has exercised its powers in any matter over which there is concurrent jurisdiction in the states and the Federal Government, the states cannot act. If, then, the interstate carriage by air of persons or property for hire is either a matter of such nature as to rest within the exclusive jurisdiction of Congress, or one which Congress in the exercise of its concurrent power has in fact regulated, the states are excluded from any regulation of it. The question to be determined becomes one of the relation of common carriage by aircraft to the federal and to the state governments.

An examination of the status of other forms of our rapidly developing transportation system will aid in arriving at an opinion of such relationship. The application of existing rules of law and of specific legislation to analogous situations must guide our judgment in considering this most recent development.

The Interstate Commerce Commission Act of 1887 and the amendments thereto, and the Transportation Act of 1920, regulate common carriers of three classes: those engaging in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water in continuous carriage; pipe lines; and telephone, telegraph and wireless companies. This enumeration confines the jurisdiction of the Interstate Commerce Commission to such carriers as are therein set forth, and consequently the authority of the Commission cannot extend under this enactment to common carriers engaging in interstate commerce by means of aircraft.

Congress has, however, enacted the Air Commerce Act,\(^8\) entitled "An act to encourage and regulate the use of aircraft in commerce," and based upon the commerce clause of the Constitution. It instructs the Secretary of Commerce "to foster air commerce" and authorizes him to issue regulations "necessary to execute the functions vested in him" by the act.\(^9\) He is instructed to provide for the registration of aircraft and the rating thereof as to airworthiness, and also for the licensing of pilots;\(^10\) but registration by the Secretary, with its result-


\(^{7}\) All codified in U. S. C. (1925) Tit. 49, c. 1.

\(^{8}\) Supra note 1.

\(^{9}\) Ibid., § 8 (1).

\(^{10}\) Ibid., § 3.
ANT regulation, is mandatory only for such aircraft as engage in interstate or foreign commerce. The regulations which have been promulgated under this act concern the airworthiness of aircraft registered by the Department of Commerce, the competency of the pilots, and air traffic rules, with several miscellaneous provisions not affecting commerce. In other words, the regulations relate to the safety of the craft and the competency of the crews, and do not attempt or profess to regulate the act of transportation of persons or property. They are police measures taken to insure the protection of the public in and from aerial travel. This provision for compulsory registration of aircraft engaged in interstate or foreign commerce—the effect of which is to render assurance of the airworthiness of the craft and the competency of the crew, which seem to be safety measures provided to foster air commerce—is the sole indication of the control of interstate commerce by aircraft.

The conclusion, then, is that Congress, in exercising its powers of control over interstate commerce by air, has exercised a police control over the aircraft and their crews engaging in such traffic. It has taken steps to make the instrumentality safe, but has not controlled the act of transportation. In view of the theory that an expression of policy on the part of Congress in regard to a matter within its jurisdiction occupies the field so far as that matter is concerned, it would seem that the act should be interpreted to mean that Congress has, in the instance of aerial carriers, indicated its intention to permit the carriers to operate without other requirements than safe equipment and competent personnel.

The judicial element in the problem differs somewhat from the legislative. Formerly, the state public service commissions have considered as coming within their jurisdiction interstate carriers by automobile where the traffic has been local in character, since such carriers are not within the enumerated classes of the Transportation Act. This was entirely consistent with the law as expressed by the United States Supreme Court.

Subsequent to these rulings by the state commissions, however, the Supreme Court, in the case of Buck v. Kuykendall, decided that the Commission of the State of Washington could not refuse a certificate to an interstate autobus stage line operated over a federal aid highway. The decision was placed upon the grounds that power to grant or refuse certificates to such lines by the state commission was

11 Ibid., § 11.
12 Chambersburg, etc. Street Railway Co. v. Hardman, 5 Pa. P. S. C. Rep. 58 (1921); Application of Bush & Sons Co., 13 Md. P. S. C. Rep. 270 (1922). See also Report of Virginia State Corporation Commission (1924), 430 et seq., for a number of cases in which certificates were refused to companies seeking to operate interstate.
13 Minnesota Rate Cases, 230 U. S. 352 (1913); Port Richmond, etc. Ferry Co. v. Hudson County, 234 U. S. 317 (1914).
a regulation of interstate commerce, and that it defeated the purpose of Congress in giving federal aid for interstate highway construction. This latter ground was declared not to change the application of the former rule in a similar case in which the traffic was over highways constructed entirely by means of state moneys. This fact is here noted because such a basis for a decision does not arise in the case of an aerial carrier and it is important that it is not considered a material cause for the decision. It should be observed, however, that the lighting of airways by means of federal appropriations may give rise to a closely analogous situation.

In referring, in *Buck v. Kuykendall*, to the exercise of authority by the state commission, the Court pointed out a frequent policy of public service commissions—the prohibition of competition—but frowned upon the effect of such a policy, stating:

> "It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose, and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of Federal action—the existence of adequate facilities for conducting interstate commerce."

Following these decisions, the Pennsylvania Commission has reversed its earlier ruling and held that it has no authority over interstate carriers by motor vehicle except to the extent to which they engage in intrastate commerce. This interpretation of the law is given elsewhere and has been upheld by the Supreme Court.

The situation with regard to interstate aerial carriers is similar to that of interstate autobus lines. No federal commission has been granted authority over either of them. They are, so to speak, legal orphans for whom no guardian has been appointed, and it appears that the states are not permitted to assume such guardianship. Certification by a state commission is usually granted when the commission finds that the granting of the application is "necessary or proper for the service, accommodation, convenience, or safety of the public." The application of such a provision to an interstate carrier

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26 *267 U. S. at 315, 316. (Italics ours.)
27 *Supra* note 12.
31 *Supra* note 4, Art. V, § 18, PA. STAT. § 18149.
necessarily places in the hands of a state commission the "test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce." 22 And this, it is seen, has been declared to be an unauthorized extension of the powers of the public service commission of a state.

Thus, even though there has been no Congressional expression in a matter in which it would seem that "Congress must be the judge of the necessity of federal action," 23 under the decisions of the Supreme Court, interstate carriers by automobile are not subject to regulation by the states so far as their interstate traffic is concerned.24 The rule of these cases has been applied to interstate ferries,25 and it would seem that it must perforce apply to interstate common carriers by air. We must conclude, therefore, that an interstate carrier by aircraft is not required to apply to the public service commission of a state for a certificate of public convenience covering its operation in interstate traffic, and that a state commission can exercise authority over such a carrier only insofar as the carrier engages in intrastate commerce within that state. If this allows such carriage to rest largely within the unrestrained will of the individual, the only apparent solution is further legislation upon the matter by Congress.

Roger F. Williams.


RIGHT OF LIFE BENEFICIARY TO AN APPORTIONMENT OF PROFIT REALIZED BY TRUSTEES ON SALE OF STOCK—The Supreme Court of Pennsylvania, in Nirdlinger's Estate,1 deals with a question which has very rarely been brought before the courts, despite the numerous cases in which the rights of life tenants and remaindermen have been determined.

In this case, the testator left his estate to trustees, who were directed to pay the "rents, issues, income, dividends, and revenue" to certain beneficiaries for life, and at their death to pay the corpus to remaindermen. The trustees, acting with proper authority, entered into an agreement for the leasing of five theaters and advanced money for this purpose. A corporation was formed to operate each theater and the trustees received one-fifth of the stock of these five corporations, having advanced a total of $21,370, which the court treats as the price of the stock. At a later date, the trustees sold the stock for

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23 Minnesota Rate Cases, supra note 13 at 403.
25 McNeely v. Mayor, etc. of Natchez, 4 F. (2d) 899 (C. C. A. 5th, 1925); McNeely v. Mayor, etc. of Vidalia, 6 F. (2d) 21 (W. D. La. 1925).

1 290 Pa. 457, 139 Atl. 200 (1927).
The life beneficiaries claimed that they were entitled to $40,000 of the proceeds of this sale which, they contended, represented earnings accumulated by the corporations while the trustees were the owners of the stock.

The court held that the life beneficiaries were entitled to as much of the proceeds of the sale as they could prove to represent earnings accumulated by the corporations during the period in which the trust had been in existence. The record was not sufficiently clear to enable the court to determine whether such earnings existed.

It is to be noted that the corporations did not distribute any part of these accumulated earnings in the form of dividends. The trustees merely sold their stock at a price which was enhanced by the fact that the accumulated earnings existed. This is the feature that distinguishes Nirdlinger's Estate from the ordinary cases which the courts have hitherto been called upon to decide.

Owing to the dearth of authorities directly in point, the court was forced to examine the decisions relating to the rights of life tenant and remainderman as to extraordinary dividends on stock in which trust funds are invested.

When a corporation distributes an extraordinary dividend, whether in stock or cash, the rights of the life tenant are governed, in Pennsylvania, by the rule established in Earp's Appeal. The dividend is apportioned so that the life tenant receives the part which is a distribution of earnings accumulated by the corporation during the life tenancy, provided always that the principal of the trust fund is not thereby impaired. The balance is considered capital and belongs to the corpus. This rule has been settled law in Pennsylvania since its adoption and has become the majority view of the question.

The principal minority view, known as the Massachusetts rule, is theoretically based on the purpose of the corporation in declaring the dividend. In practice, the rule is usually applied in the manner stated in the leading case of Minot v. Paine:

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4 Complete lists of cases may be found in 24 A. L. R. 42 (1923), supplemented by 42 A. L. R. 451 (1926) and 50 A. L. R. 376 (1927).

5 99 Mass. 101 (1868).
NOTES

“A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital.”

The rule of Earp's Appeal has also been applied where the corporation declares a dividend in process of liquidation. Such dividend is apportioned between life tenant and remainderman, the former receiving an amount equal to the earnings accumulated during the trust. For many years after its adoption, it was the general understanding that the doctrine of Earp's Appeal was restricted to cases where there had been an actual distribution by the corporation.

The first extension of the principle was made to cover a case where the trustee sold the stock to the corporation which issued it. This was held to be a total or partial liquidation, as the case might be, and the proceeds were apportioned in accordance with the general rule. And it made no difference that the corporation continued in business; the courts held that, as to this particular stock, there was in effect a liquidation.

The court in Nirdlinger's Estate would seem to make a further extension of the rule and apply it to a sale of stock in the ordinary course of business, in the open market. The reasoning of the court is that the sale is, in substance, a distribution by the corporation as far as the trustees are concerned. Once this step has been taken, it becomes inevitable that the usual apportionment must be ordered. The problem is whether the reasoning on which the rule of Earp's Appeal is based demands that the rule be extended still further and applied to situations which originally were not within its apparent scope.

The claim of the life tenant is that the acts of the corporation, although binding as to its own stockholders, do not settle the rights of the life tenant as against the remainderman. These rights are derived from the will or deed of trust and are governed by the intent of the testator or settlor. The conclusion sought to be reached is that the mere failure on the part of the corporation to distribute the accumulated earnings should not defeat the life tenant as long as the

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1 Cobb v. Fant, 36 S. C. 1, 14 S. E. 959 (1892).
2 Moss's Appeal, 83 Pa. 264 (1877); Connolly's Estate (No. 1), 198 Pa. 137, 142, 47 Atl. 1125, 1127 (1901).
3 Re U. S. Trust Co., supra note 2; McKeown's Estate, 263 Pa. 78, 106 Atl. 189 (1919).
4 Re Schaefer, supra note 2.
5 290 Pa. at page 472, 139 Atl. at page 206: "The sale, in substance and effect, amounts to a distribution, as in the case of liquidation of a corporation. The court will disregard the form and treat it as a distribution of accumulated interest or earnings, keeping in mind always that the intact value of the corpus shall not be in any way depleted. Equity looks through the form and holds to the substance and will distribute that sum according to equitable principles."
6 Robinson's Trust, 218 Pa. 481, 67 Atl. 775 (1907); see Gibbons v. Mahon, 136 U. S. 549, 559 (1890); Re Osborne, 209 N. Y. 450, 458, 103 N. E. 723, 730 (1913); Perry, Trusts (6th ed. 1911) 875n.
trustee has come into possession, by a sale of the stock, of an equal sum.

This conclusion seems to involve an assumption that the testator intended such profits to go to the life tenant. It is well settled that if the testator or settlor expresses a clear intent that the life tenant should receive more than the normal application of the rule in *Earp's Appeal* would give him, this intent will be carried out. But the burden of establishing such an intent rests on the life tenant. As a stockholder, the testator got no right to accumulated earnings until the corporation distributed them and he would naturally intend the same rule to be applied to the life tenant.

Furthermore, when a person sells stock at a large profit, he usually regards the profit as an addition to his principal, even though part of the profit represents accumulated earnings of the corporation. Therefore, unless there is a clear direction to pay such profits to the life tenant, it would seem that when the life tenant gets a share of an extraordinary dividend, he is receiving all that the intent of the testator would reasonably cover.

The opinion in *Nirdlinger's Estate* does not put the decision on the ground that the testator intended the life beneficiaries to receive more than the application of the rule in *Earp's Appeal* would give them. If such an intent is apparent on the face of the whole will, the case could be decided on its own facts without extending the rule. But when the rule has once been extended, it would seem to become impossible to carry out the directions of the testator, no matter how clearly expressed. For if these profits are now held to be income, as a matter of law, an express direction that they shall belong to the corpus would apparently violate the rule against accumulations.

Evidently the court intends this very result to follow. In *Jones v. Integrity Trust Co.* (decided January 23, 1928), it states that

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13 Robinson's Trust, *supra* note 12. (Life tenant was given a stock dividend which represented earnings accumulated prior to the creation of the trust).

14 Waterman's Estate, 279 Pa. 491, 495, 124 Atl. 166, 167 (1924): "This burden is not, and should not be, a light one, for the general rule is equitable and just."

15 Gibbons v. Mahon, *supra* note 12, at 558; U. S. Trust Co. v. Heye, 224 N. Y. 242, 254, 120 N. E. 645, 648 (1918). In *Moss's Appeal, supra* note 8, at 269, Paxson, J., says: "Nothing earned can be regarded as profits until it shall have been declared to be so by the corporation itself. A stockholder has no right to claim it until the corporation decides to distribute it as profits." In reply to this it is said that the stockholder has an equitable interest in the accumulated profits. Peterson's Estate, 242 Pa. 330, 333, 89 Atl. 126, 127 (1913).

16 Wallace v. Wallace, 90 S. C. 61, 75, 72 S. E. 553, 557 (1911)."
former decisions are not to be applied when the testator or settlor has “provided a different method of distribution.” But it must be noted that the statement is qualified in the following significant manner:

“What the will or deed specifies must be carried into effect, so far as it is legal.”

When the court is called upon to decide a case where the testator has provided that such profits or extraordinary dividends shall belong to the corpus, we may expect that the court will refuse to carry out this provision because it is in violation of the rule against accumulations and therefore illegal. This is the plain intimation which the language of the court conveys. If the court did not have this situation in view, the qualification “so far as it is legal” would seem to be unnecessary because it is difficult to see what other rule of law would be violated by a provision of this nature.

The few cases which have arrived at the same result that was reached in *Nirdlinger’s Estate* did so on the ground that the expressed intention of the testator was clear that the life tenant should receive profits which would otherwise belong to the corpus.\(^{20}\) The cases show an evident desire not to extend the general rule. In other closely analogous cases, the testator intended to restrict the remainderman to the cash value of the estate at the time of the testator’s death.\(^ {21}\)

Aside from theoretical considerations, the decision arrived at in *Nirdlinger’s Estate* is of the greatest practical concern to trustees. Although the apportionment rendered necessary by *Earp’s Appeal* is always difficult, extraordinary dividends and sales by way of liquidation are relatively infrequent. Now the problem will apparently arise whenever the trustee sells stock at a profit.

In applying the apportionment rule to a case where the trustee sold stock to the corporation which had issued it, the New York court in *Re Schaefer*\(^ {22}\) said:

“We need not now consider whether or not the application of this just and reasonable rule will result in compelling trustees to make nice discriminations and apportionments whenever they sell stock for more than it cost them. As suggested in *Matter of Rogers*,\(^ {23}\) the inconvenience and inherent difficulty in so doing may serve to prevent any such extension of the rule.”

The difficulties mentioned are so great that they can probably be settled in each case only by recourse to the courts. The court in *Nirdlinger’s Estate* answers this objection, saying:\(^ {24}\)


\(^{21}\) Quay’s Estate, *supra* note 19; Park’s Estate, 173 Pa. 190, 33 Atl. 884 (1896).

\(^{22}\) 178 App. Div. at 122, 165 N. Y. Supp. at 23 (1917).


\(^{24}\) 200 Pa. at page 477, 139 Atl. at page 207.
"That much litigation would follow is no objection; there will always be litigation over estates when testators choose to place them in a position for litigation."

The only way by which the testator can now avoid litigation would seem to be by expressly providing that profits from the sale of stocks shall be paid to the life beneficiary. If he directs that they shall be considered part of the corpus, he will be likely to violate the rule against accumulations. If he is silent, there will be a suit by the life tenant or remainderman, each of whom will claim that part or all of the profits belongs to him.

The position of the trustee is made very difficult, for the problem cannot always be avoided by retaining the stock. If the best interests of the estate dictate a sale, the trustee is under the duty of making the sale and may be liable if he does not do so.2

Nirdlinger's Estate seems to be another step in the general direction of greater liberality to the life beneficiary but only further decisions can show whether this was the intention of the court. The extreme would be reached if the trustee was compelled to sell stock in order to apportion accumulated income to the life tenant, a question on which the court naturally declined to express an opinion.

R. B.

THE RIGHTS OF A THIRD PARTY BENEFICIARY IN PENNSYLVANIA—A learned authority on the law of contracts has concluded that it is doubtful in Pennsylvania whether the rights of a person not a party to a contract the performance of which will benefit him will be enforced.1 Recently, however, the Supreme Court of that state, in the case of County of Greene v. Southern Surety Co.,2 has left little doubt as to its present attitude on the subject. The point actually decided in this case was that, in the absence of statutory regulation, material men are not entitled to maintain an action against the surety on a bond conditioned for the faithful performance of the contractor's obligations to the county. Based on the facts of this particular case, this ruling represents not only a sound, practical conclusion,3 but also

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2 This point is discussed in Taylor's Estate, 277 Pa. 518, 121 Atl. 310 (1923); Brown's Estate, 287 Pa. 499, 135 Atl. 112 (1926).

1 1 Williston Contracts (1920) § 368.

2 Pennsylvania Supreme Court, decided Dec. 7, 1927.

3 The bond in suit read: "that we, Sam'l Gamble Co. . . . 'Principal', and Southern Surety Co. . . . called the 'Surety', are . . . bound unto the County of Greene in . . . sum of . . . to be paid to the said County . . . Whereas, the . . . 'Principal' has entered into a contract with the County . . . for the improvement of a highway . . . Now, . . . the condition of this obligation is . . . that . . . the . . . 'Principal' . . . shall save harmless the County of Greene from . . . any liability for payment of wages due
one supported by a long, uninterrupted line of authority within the state. The opinion, however, is not confined to this point alone, but goes on to give an extensive survey of the rights of third party beneficiaries in Pennsylvania. In view of such significant dicta, a close examination of the court's conclusions seems timely.

The court divides promises for the benefit of third persons into two general groups:

“(1), promises where the promisee has no pecuniary interest in the performance of the contract, his object in entering into it being the benefit of third persons; and (2), promises where the promisee seeks indirectly to discharge obligations of his own to a third person by securing from the promisor a promise to pay this creditor. In the first class of cases, the third person is . . . described as a 'donee' beneficiary; and in the second, as a 'creditor' beneficiary.”

The court points out that where the “third person is a creditor beneficiary there can be no recovery.” However, the harshness of this rule is somewhat alleviated when one group of cases, not classified in the Greene County case under the creditor rule, is recognized as a separate and distinct class. This type is where property has been transferred to the promisor on his agreement to pay the debts or accounts of others. Under this category fall the familiar cases (1) where property is sold subject to mortgage; (2) where one buys the stock of a tradesman and undertakes to fill the contracts and pay the debts of the vendor; and (3) where a devisee accepts property assuming to pay the devisor's debts. Action by the third party is permitted in these situations.

On the other hand, a donee beneficiary or materials furnished . . . and shall well and truly pay for all material furnished . . . ” The general tenor of the bond shows that it was intended primarily for the county's indemnity, and to stand as security for the proper completion of the work. If material men were allowed to sue, the amount of the bond might be exhausted before defects in the workmanship were discovered, and the county's security would have vanished in the meantime. With this possibility in view it cannot successfully be contended the county intended to give the material men a right to sue on this bond.


*This absolute denial of right is based upon the reasons advanced in Blymire v. Boistle, 6 Watts 182 (Pa. 1837) discussed infra note 10.

*Legatees are also permitted an action against a devisee who has assumed to pay the devisor's legacies. But these, of course, are not creditor beneficiary cases.

*It is difficult to understand why where the promisor is held beyond the liability of a trustee these cases do not constitute exceptions to the creditor beneficiary rule. See discussion infra page 598.
may recover only where the consideration for the promise is a transfer of property or money to the promisor or where unusual circumstances are present."

But the court adds,8

"There is no good reason why A for a consideration could not contract with B that the latter should perform some service for C, and C ought to be able to enforce the promise. . . . But our decisions are too numerous the other way and it would seem the legislature is the only authority that could possibly change the rule."

Under such circumstances a brief consideration of the authorities which force the court to adopt this conservative attitude may assist in giving a better understanding of its conclusions.9

Creditor beneficiaries will be first discussed. The leading Pennsylvania case is *Blymire v. Boistle*,10 decided in 1837. The rule was then established that a creditor beneficiary could not maintain an action upon a contract to which he was not a party, because the promise was made for the benefit of the contracting party and, hence the third party was a stranger to the consideration.11 Further, since

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8 For purposes of simplicity, as in Mr. Justice Kephart's example, A is hereafter used to denote a promisee, B, a promisor, and C a third party.

9 Cases of novation and assignment, although often confused with the problem of third party beneficiaries, are not discussed here. Further, where B promises to both A and C to do something to benefit C, although the consideration moves from A only, this is not properly a third party case, for C is considered a promisee. *Howell v. Kelly*, 149 Pa. 473, 24 Atl. 224 (1892); *McBride v. Western Penna. Paper Co.*, 263 Pa. 345, 106 Atl. 720 (1919); *Depuy v. Loomis*, 74 Pa. Super. 497 (1920) can all be explained on this latter ground.

10 *Watts* 182 (Pa. 1837). In this case the facts were: A conveyed to B his interest in certain realty in consideration of B’s promise to pay A’s debt to C. It does not appear whether the property conveyed was of equal, greater, or less value than the debt due. C sued B and was not allowed to recover. Accord: *Ramsdale v. Horton*, 3 Pa. 330 (1846); *Torrens v. Campbell*, 74 Pa. 470 (1873); *Kountz v. Holthouse*, 85 Pa. 235 (1877); *Adams v. Kuehn*, 119 Pa. 76, 13 Atl. 184 (1888); *Sweeney v. Houston*, 243 Pa. 542, 90 Atl. 347 (1914).

11 The general common law rule was that one not a party to the contract could not sue on it, because the promise was not made to him, nor did the consideration move from him. However, it was early held in Pennsylvania that no express promise need be made to a third party, nor need the consideration move from him. In the event the promise was made strictly for the benefit of the third party (as in a donee case) he at least was not a stranger to the consideration. But where the promise was made for the benefit of the contracting party the third person remained a stranger to the consideration and could not sue. *Hind v. Holdship*, 2 Watts 104 (Pa. 1833); *Blymire v. Boistle*, *supra* note 5. However, while this language has been often repeated, it really is of small significance. Logically, unless part of the consideration moves from the third party, or unless his relation to the promisee is such
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the promisee could show pecuniary damage in the amount of the debt
the promisor had assumed to pay the third party, he had an adequate
remedy for his own indemnity in case of non-performance. There-
fore, to allow the beneficiary an action would subject the promisor to
two suits for the same debt. The court deemed this an insuperable
obstacle to the creditor's right.

However, even at this date there was one sort of beneficiary, also
a creditor, who was given a right of action: namely, where the prom-
isor had received property or money in consideration of his promise
to apply it to the debts of another. These cases are really gov-
erned by the law of trusts. But further exceptions (mortgagee,13
deviser,14 and tradesman15 cases), grouped in the Greene County
case under a separate head, soon became well established. As Mr.
Justice Kephart properly points out, these cases cannot be explained
on the grounds of trust or equitable charge, because it is intended
that the promisor use the property in any way he sees fit and pay
the creditor by any means at his command. But an attempt to justify
them upon the theory of augmentation of the promisor's estate is
equally untenable, unless the debt due is smaller than the considera-
tion received. If the type of consideration the promisor received was
the determinant of the creditor's right, and he was allowed to sue upon

that under the archaic theory of Dutton v. Poole, 2 Levinz 211 (Eng. 1677)
he is "within the consideration," a third person in fact is a stranger to the
consideration of a contract to which he is not a party. The fact that the
promisee intended to benefit him does not alter this. Brill v. Brill, infra note
32; Tasin v. Bastress, infra note 33.

22 Where the very property transferred, or its proceeds, are to be deliv-
ered or paid to the third party, that property is said to be impressed with a
Long, 77 Pa. 143 (1874); Justice v. Tallman, 86 Pa. 147 (1878); McAvoy
& McMichael v. T. I. T. Co., 27 Pa. Super. 271 (1905). However, it is
worthy of note that the rule governing this class of cases is not nearly as
comprehensive as the one stated in the Greene County case, viz.: "Where prop-
erty has been transferred to the promisor on his agreement to pay the debt
or account of others." Howes v. Scott, 224 Pa. 7, 73 Atl. 186 (1909) would
fit under the latter rule, but not under the former. In this case A owed C
money; he also was bound by a contract to buy certain realty from X. In
consideration of B's promise to pay A's debt to C, A assigned his interest in
the realty contract to B. C sued B and recovered. This case on its facts is
really contra to Blymire v. Boistle, and is significant for that reason.

23 Hoff's Appeal, 24 Pa. 200 (1855); Lennig's Estate, 52 Pa. 139 (1866);


25 Bellas v. Fagely, 19 Pa. 273 (1852); White v. Thiedens, 106 Pa. 173
(1884); Delp v. Brewing Co., 123 Pa. 42, 15 Atl. 871 (1888). See also Camp-
bell v. Lacock, 40 Pa. 448 (1861). Here A sold out his interest in a partner-
ship to X, who agreed to fill the firm's contracts and to assume the firm debts.
A required X to give surety for this promise. B became surety and was sued
by a firm creditor C. C did not recover, but there is a dictum that he could
have recovered against X.
the quasi-contractual doctrine of unjust enrichment, the promisor's liability should be limited by the amount of that unjust enrichment. The early cases in which a vendee bought out a business and assumed the debts thereof recognized this fact and bound the promisor only "as far as the consideration would go." But this distinction was soon lost sight of and the promisor, when sued, became subject to a full debtor's liability when it became necessary to pay the debts so assumed. And if the grantee of a mortgagor has assumed a mortgage he is liable personally to the mortgagee in the event that the sale of the property fails to satisfy the entire debt. In these cases a trust or unjust enrichment theory falls short of explaining the true nature of the creditor's claim. It is difficult to understand in what manner a mortgage debt differs from any other debt. It is equally difficult to find any rational basis for preferring the creditors named above and denying the right to sue to practically all others. Where suit is permitted, it lies in assumpsit. However, in Pennsylvania, this fact is not conclusive of the theory of the creditor's action because of this state's liberal procedure in administering equity through assumpsit. If recovery is given on a contractual basis, then at common law no one kind of consideration was recognized as more binding than another. Further, the primary object of the promise being to benefit the promisee, the third party remains a stranger to the consideration. The fact that the promisor has assets in his hands cannot alter this. Hence the limitation of the right to these few types of creditors is illogical and arbitrary. On the other hand, if recovery is granted on some equitable theory, the decisions holding the promisor personally liable beyond the assets in his hands are also inconsistent. Nevertheless, with the reservations noted, the rule of Blymire v. Boistle has been quoted and applied in more than fifty supreme court cases within this one jurisdiction. The conclusion, then, is, if the creditor could not claim as cestui que trust, his right did not ultimately hinge on the validity of the contract sued on, nor upon the kind of consideration given for the promisor's promise, but upon whether his case on its facts fitted under one of the preferred groups in which recovery was permitted.

Donee beneficiaries have been permitted to recover by Pennsyl-

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28 See Corbin, Contracts for the Benefit of Third Persons (1918) 27 Yale L. J. 1011.
27 Beers v. Robinson, 9 Pa. 229 (1848); Vincent v. Watson, 18 Pa. 96 (1851).
24 Despite the logic of the situation, mortgage cases are generally treated in a separate class. See 1 WILLISTON, CONTRACTS (1920) § 384.
vania courts more often than creditors; but not in all situations by any means. In the Blynwre case, Justice Sergeant said: *Where one person contracts with another to pay money to a third, or deliver over some valuable thing, and such third person is thus the only party in interest, he ought to possess the right to release the demand, or recover it by action."

Seventy-five years later it was said in Hoffa v. Hoffa: *that, if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested."

It is noteworthy that where the party is merely a donee and no obligation runs to him from the promisee, several difficulties in the path of recovery by a creditor are immediately obviated. In the first place, the promise is made for the donee's benefit, in which case he is not a stranger to the consideration. Secondly, the promisee cannot recover substantial damages for nonperformance of the promisor's obligation, because he can show no pecuniary loss. Practically speaking, this removes the danger of two suits. Thirdly, the beneficiary has no other means of obtaining what the promisee intended him to receive, since the promisee owed him no legal duty. Therefore, the reason for favoring the donee becomes apparent.

Nevertheless, most of the cases allowing recovery have been based either on the unjust enrichment of the promisor's estate or upon the existence of a trust. In most donee cases emphasis has been placed on the fact that the promise was made for the sole benefit of the third party. However, while this was essential, it could not be

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22 Beneficiaries in life insurance policies are allowed to sue, even though there is no Pennsylvania statute conferring this right. However, these cases are considered as constituting a separate class, distinguishable as mercantile instruments. 1 WILLISTON, CONTRACTS (1920) § 359.

23 6 Watts at 184 (Pa. 1837).


26 1 WILLISTON, CONTRACTS (1920) § 357.

27 Edmundson's Estate, 259 Pa. 429, 103 Atl. 277 (1918). The facts were: A conveyed land to B in consideration of B's promise to pay to C a fixed amount of the proceeds from an intended sale of the property, or if B made no sale during her lifetime, then she was to leave the agreed amount to C in her will. B left by her will less than the proper sum to C. C sued B and recovered the full measure of B's promise. Accord: Hostetter v. Hollinger, 117 Pa. 611, 12 Atl. 741 (1888); Hoffa v. Hoffa, supra note 24. See also Blymire v. Boistle, Ramsdale v. Horton, Torrens v. Campbell, Kountz v. Holtzhouse, Adams v. Kuehn, Sweeney v. Houston, all supra note 19. As an example of the confusion existing, see McBride v. Western Penna. Paper Co., supra note 9. The result of this case could have been reached without a discussion of the rights of third parties on either of two grounds: (1) that the promise was made to the plaintiff, C, and hence he was a party to the contract; or (2)
applied to the decided cases as a test of the right to sue, because had it been used, every donee could have maintained an action. For a like reason the fact that the third party was the only one at interest could not operate as a final determinant. The test was still found in the nature of the consideration passing from promisee to promisor.

If this consideration was property so that the promisor became a pseudo-trustee, then the third party might sue. It was said in Adams v. Kuehn:

"In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee."

This conclusively shows that the beneficiary did not recover, in the court's opinion, on a contractual right, but on some equitable or property right. Hence, if A conveyed property worth $1000 to B, and in consideration of this conveyance, B promised to pay C $2000 as a gift, C should only be allowed to recover $1000 from B. However, one decision seems to indicate a contrary result would be reached, and that C would be allowed the full measure of B's promise. If this is true, it would show no more than a tendency to be consistent with the inconsistency noted in the creditor cases. Disregarding the case just mentioned, on strict contractual grounds, no donee may have an action; yet in certain cases he may enforce in assumpsit equitable rights vested in him by the transfer of property to the promisor.

If the above discussion marks the boundary limit of Pennsylvania's decisions upon this topic, justification for the pronouncements of the court in the Greene County case exists. However, two cases, Brill v. Brill and Tasin v. Bastress, decided within the last three years, present another example. The court discussed at length the rights of third parties on contracts, but the only question at issue was in whom was the title to certain securities.

This contention in the donee's behalf is stated differently in some cases, which say that where the release by the third party would be a sufficient discharge of the promisor, the donee should have an action. See Kountz v. Holtz, supra note 10; Freeman v. Penna. R. Co., 173 Pa. 274, 33 Atl. 1034 (1896).

14 See cases cited supra note 27.
32 Pa. at 86.
28 "It is not important to inquire whether the consideration of the mortgage was the conveyance of real estate . . . or the surrender . . . of personal property. The mortgage [containing the promise] is under seal and imports a consideration for all its covenants." McClaughry v. McClaughry, 121 Pa. 477, 483, 33 Atl. 1034 (1888). And see Hostetter v. Hollinger, supra note 27.
52 282 Pa. 276, 127 Atl. 840 (1925). In this case B was the obligor on a sealed bond in which he promised to pay $150 per month to A, the obligee.
years, require special comment. In the Brill case, *Blymire v. Boistle* is quoted with approval, from which it must be inferred that the third party was there considered a donee beneficiary. From the authorities the court draws the conclusion: 34

". . . if the promise be to pay money to a third person, but it is made for the benefit and in relief of the other party to the agreement, the third person obtains no rights under the contract. If, on the other hand, the promise to pay to the third person is not for the benefit primarily of the other party to the contract, but for that of the third person himself, the latter has a legal or equitable interest in the contract which enables him to enforce rights thereunder, even though he himself was not a party to the consideration paid to the promisor. . . . Without discussing these [authorities] in detail, however, the test of the third person's right of action seems to depend upon the question as to whether the promise is made primarily for the benefit of the other party to the contract or of the third person. . . . Of course, this distinction cannot exist in an absolute sense, because in every case there is presumably *some* benefit accruing to the promisee. . . . Also presumably *some* benefit accruing to the third person. . . . But while, therefore, both the promisee and third person no doubt receive some benefit in every such contract, the determining question is, whose interest and benefit are *primarily* subserved and as a matter of paramount purpose."

Of this amount, $110 was stated to be for the benefit of A, and $40 "to the obligee [A] as guardian of the person of her son Edward [C], through the guardian of the estate of the said Edward." B defaulted in the monthly payments. A threatened to sue. B paid A a lump sum settlement and A gave him a sealed release of both her own and C's interest in the bond. C, the illegitimate son of A, sued by his next friend and was allowed to recover the amount stated to be due him. The court held A's release inoperative as to C's rights, because A had not been appointed C's legal guardian and she had no power to release his interest in the contract between herself and B. The only consideration for the bond sued on was imported by the seal. A, by statute, was obligated to support C. B's promise seems to have been made to relieve A of her statutory duty. This case cannot be distinguished on the grounds that B also had a duty to support C, because on the record B denied paternity and it was never shown that he was in fact the father. Furthermore, the doctrine that the moral consideration of love and affection is sufficient to support such a promise (see *Marshall v. Marshall*, 510 Pa. Super. 1915) is inapplicable. 32

34 *Brill v. Brill*, supra note 32 at 279, 127 Atl. at 841.
The court goes on to say:

"... the requirement that the third person be a party to the consideration is alternative and not additional to the requirement that he have a legal or equitable interest in the contract. ... The point is that the primary and main benefit [of this bond] is for Edward, the third party involved. He has a definite, vital interest in the fund created and in the income therefrom, and it would certainly seem that he thereby comes well within the requirement laid down ... that the contract should create in him 'a legal or equitable interest'."

The authorities cited do not support this conclusion, but hold as previously shown, that it is the nature of the consideration received by the promisor which vests this legal or equitable interest in the third party—not the mere intention to benefit him primarily. The promisor in the Brill case held no assets and received no money or property from which to pay the beneficiary. In fact, the only consideration for his promise was imported by the seal on the bond containing that promise. Another point of note is that the obligee had a statutory obligation to the third party. From the facts it seems proper to conclude that the bond sued on was given in relief of this duty. For this reason the case would appear to be that of a creditor beneficiary rather than of a donee. The court in Tasin v. Bastress treated it as such.

In the latter case, a true donee type (in which the lower court found as a fact that the promisor held no funds nor assets in his hands), recovery was granted the third party. Mr. Justice Simpson says:

"... There are, at the present time, only a few jurisdictions which hold that the donee beneficiary cannot sue in his own name. ... the reason for this conclusion rests in the fact that, as the promisee would lose nothing by a breach of the contract, he could never recover more than nominal damages, and, hence, if the beneficiary could not sue, the promisor could retain the fruits of the contract without fulfilling its obligations. In

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35 See cases cited supra note 27.

36 The Greene County case reverts to the rule that one not a party to a sealed instrument may never sue in covenant upon it. With the exception of the Brill case, this seems to represent the great weight of authority in this jurisdiction. Strohecker v. Grant, 16 S. & R. 237 (Pa. 1827); Uhland v. Uhland, 17 S. & R. 265 (Pa. 1828); DeBolle v. Penna. Ins. Co., 4 Whar. 74 (Pa. 1837).

37 Act of 1917, P. L. 774 § 1, PA. STAT. (West, 1920) § 7700, provides: "Any parent who shall wilfully neglect or refuse to contribute reasonably to the support and maintenance of a child born out of lawful wedlock shall be guilty of a misdemeanor ..."

38 284 Pa. at 57, 130 Atl. at 420.

view of this it necessarily follows that where, as here, the beneficiary is the only one who can be substantially benefited by such a promise, he should be allowed to recover in some form of action. . . . Even in this latter [creditor] class of cases, although the decisions here and elsewhere are not uniform, 'the American jurisdictions are but few which do not allow the creditor a direct action at law against the promisor.' . . . In this state we have usually adopted the other view, but a movement in accordance with the general opinion would seem to be at least fore-shadowed by Brill v. Brill . . . The fear suggested in the argument of that case, and in the opinions in other creditor beneficiary cases, that to hold the latter entitled to sue in his own name, might unjustly subject the promisor to two suits, since the promisee has a personal interest in the payment to be made, and hence ought to be entitled to enforce it, is more imaginary than real. If the rule of Brill v. Brill, supra, is applied, the courts will always decide, from the agreement and the attending circumstances, who was primarily intended to be benefited by it, and, as they so determine, will sustain or defeat the claim, no matter which of the parties brings the suit. . . . Of course, in this class of cases, presumptively, the agreement is made for the benefit of the promisee, but if it clearly appears that the beneficiary was the one primarily to be benefited, there is no substantial reason why it should not be so adjudged."

The language of these opinions and the decisions themselves present a sharp contrast to the earlier cases. If the test suggested and applied had been followed, the distinction between donee and creditor beneficiaries became secondary—mere evidence to determine whom the contracting parties primarily intended to benefit. If that question was decided in favor of the third party, he then from the moment the contract was made was invested with a contractual right which enabled him to enforce the full performance of the promise—not merely the giving over of property which "in good conscience" belonged to him.

In the Greene County case, these two decisions are commented upon, but not overruled. Of Brill v. Brill Mr. Justice Kephart says: "That case was decided purely upon the grounds of public policy." While this may present the correct explanation of the reason for the court's decision, it does not seem, in view of the language used in that case, to afford legal grounds for a distinguishable distinction. Tasin v. Bastress is disposed of in the following manner: "This decision created a new class of exceptions, and its effect is limited to that class." This new class of cases then consists of those in which B, the promisor, has promised to pay C, the third party, a sum of money in consideration of A's promise to discontinue litigation against B. Given this state of facts, it would seem that C can recover. Yet a promise to discontinue litigation differs in no legal respect from any
other common law consideration. The promisor's estate has not been augmented, nor is there anything of which he can be trustee. Obviously this new type of exceptions rests upon an artificial basis. Recognition of the classification, created by the Greene County case, results in (1) a neutralization of Brill v. Brill and Tasin v. Bastress, rendering their language practically meaningless; and (2) an affirmation of the old Pennsylvania donee rule with the Bastress case representing a new modification.

Despite a further loophole, namely, allowing suit "where unusual circumstances are present," the attitude of the court in the Greene County case is definitely unfavorable to recovery by third parties. However, the means of expressing that attitude appears unsatisfactory. If the comprehensive dicta of the Greene County opinion are given any weight, which from a practical standpoint seems inevitable, then the case will not diminish the existing confusion and uncertainty. On the other hand, could the test, suggested by Brill v. Brill and Tasin v. Bastress have been adopted, as was evidently intended by the sweeping language used in those decisions, the result would have been to introduce definiteness, certainty, and logic into a situation lacking these elements. It is to be regretted that the Supreme Court did not feel it proper to affirm these cases, but considered it necessary to explain them and nullify the effect of their rationalizing influence.

E. S.

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40 It has been held by some courts that the promisor is a trustee of the title to his own promise for the benefit of the third party as a cestui que trust. This makes the promisor a creditor of his own debt and seems an unwarranted extension of trust law. See McFadden v. Jenkyns, 1 Phillip 153 (Eng. 1842); Moore v. Darton, 4 De G. & Sm. 517 (Eng. 1851). But no case has been found in which Pennsylvania has shown any inclination to adopt this academic theory.

41 The effect of the dicta can be seen already. In Keystone State Construction Co. v. Phila. Electric Co., reported in The Legal Intelligencer, Feb. 3, 1928, at 88, Gordon, J., of the county court, bases his decision that a creditor beneficiary cannot sue upon the Greene County case.

42 This result would not have been as far reaching as the one attained in a great majority of jurisdictions where actions by both creditor and donee beneficiaries are permitted. The one test which covers both types is, Did the parties, A and B, intend C, the third party, to have a right of action on the A-B contract? See 1 Williston, Contracts (1920) §§ 368, 381.