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## Third Party Beneficiaries in Pennsylvania

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## NOTES

### THIRD PARTY BENEFICIARIES IN PENNSYLVANIA

From the mass of practically irreconcilable cases dealing with third party beneficiary contracts in Pennsylvania there has at last come a new one, *Commonwealth v. Great American Indemnity Co.*,<sup>1</sup> which is a culmination of the trend of the decisions for the past eight years. The facts of the case briefly are: A obtained a contract from the Commonwealth of Pennsylvania to construct a new office building at Harrisburg. Under the Act of April 22, 1903, P. L. 255, it is the duty of the proper officers of the Commonwealth to require of every contractor for public work, as a condition precedent to the award of the contract to him, that he give approved security to pay all those who furnish labor or materials in the performance of such contract. A tendered such a bond as required with the defendant company as surety, yet the bond *did not expressly say that it was for the benefit of any materialman having a just claim, but said it was for the benefit of the obligee, the Commonwealth.* Through a loss by fire A became greatly indebted to B, one of the materialmen. By authority of the Act of June 23, 1931, P. L. 1181, B brought

an action in the name of the Commonwealth of Pennsylvania to his own use against the defendant surety company on its bond and recovery was allowed. Mr. Justice Kephart in a concurring opinion specifically states "that the decision in this case overrules *Greene County v. Southern Surety Co.*, 292 Pa. 304", and a substantial group of cases following it.

The trend toward the decision in *Commonwealth v. Great American Indemnity Co.*, supra, began with *Brill v. Brill*,<sup>2</sup> an excellent opinion, in which the Supreme Court by affirming the opinion of the lower court judge, Stern, J., heralded its break away<sup>3</sup> from the earlier conflicting lines of decision. These cases seem to have been decided more from a factual standpoint than from a legal one.<sup>4</sup> The unfortunate reception of this decision in later cases is to be regretted. These decisions refer to *Brill v. Brill* as involving a question of public policy, thus dismissing it with a wave of the hand.<sup>5</sup> Next in the evolutionary process came *Greene County v. Southern Surety Co.*, supra. Although at first blush it looks like a step backward from its worthy predecessor, still the court suggests on page 314 of the opinion that the legislature must be the one to alter the then existing law in order to permit the materialmen and subcontractors, the third parties of the construction bond contract, to sue on it. The third step forward came early in 1933 with *Concrete Products Co. v. United States Fidelity & Guaranty Co.*<sup>6</sup> The facts here were identical with those of the *Greene County* case and the case which is the subject of this note, with this one pertinent exception, *the bond in the Concrete Products case specifically stated that it was not only for the benefit of the obligee, the Borough of West Reading, but also for the benefit of the materialmen and subcontractors.* The plaintiff, a materialman, sued the defendant surety company in its own name on the bond and recovered, the court distinguishing the *Greene County* case for the reasons given in the above italicized words. Lastly we have the *Great American Indemnity Co.* case, which with the aid of a statute and a well written opinion stands out as a new light on the question of third party beneficiary contracts in Pennsylvania.<sup>7</sup>

<sup>2</sup>282 Pa. 276 (1925).

<sup>3</sup>See the comment on this case in *Tasin v. Bastress*, 284 Pa. 47, 57 (1925).

<sup>4</sup>*Hind v. Holdship*, 2 Watts 104, (1833); *Blymire v. Boistle*, 6 Watts 182, (1837); *Adams v. Kuehn*, 119 Pa. 76, (1888).

<sup>5</sup>*Greene Co. v. Southern Surety Co.*, 292 Pa. 304, 312 (1927); *Book's Estate*, 297 Pa. 543, 550 (1929).

<sup>6</sup>310 Pa. 158 (1933).

<sup>7</sup>It might be well to add here that some earlier cases were decided in Pennsylvania which correspond with the holding of *Commonwealth v. Great American Indemnity Co.*, 312 Pa. 183, (1933). These reached the same result because the bond given was made in pursuance of a statute or ordinance for the protection of laborers and materialmen, and those who came within the protected class were permitted to sue the surety on the bond: *Philadelphia, to use, etc. v. McLinden*, 205 Pa. 172, (1903); *Philadelphia v. Stewart*, 195 Pa. 309, (1900); *Philadelphia v. Harry C. Nicholls Co.*, 214 Pa. 265, (1906). The holdings, however, are limited to the question of whether or not the materialman or subcontractor could rightfully sue and collect on the bond in accordance with the ordinances and do not go beyond.

If the opinion in the *Great American Indemnity Co.* case is to be taken literally, it stands on a very narrow ground. The Act of June 23, 1931, P. L. 1181, applies only to public works or improvement contracts of the Commonwealth or municipal corporations. Yet the dicta of the case extend far beyond this limited field. It breathes a completely new manner of handling third party beneficiary cases in Pennsylvania in the future. For example the court quotes with approval on page 191 of the opinion from an article of Professor Arthur L. Corbin<sup>8</sup> saying that "if there is a promise to pay money to an ascertainable person, the fact that he is a third person who gave no consideration for the promise does not prevent him from enforcing it". In the original Professor Corbin has gone somewhat further. "The fact that he was not identified at the time of making the contract does not prevent him from being 'ascertainable' at the time of the performance". The logic of this latter quotation is obvious because when the surety bond contract is made, the contractor may not know definitely and probably does not know, who his subcontractors and materialmen will be. Fortunately the Supreme Court did not stop here but went ahead, approving whole sections from the Restatement of the Law of Contracts.<sup>9</sup> Sections 133, 135, and 345 are quoted from at length. The real significance of this wholehearted approval comes to a head when it is realized that although the *Great American Indemnity Co.* case is a donee beneficiary case, even so the sections named above embrace the *rules applicable to donee beneficiary contracts as well as creditor beneficiary contracts*. The Supreme Court seems to indicate in its other decisions concerning construction bond contracts that this type of case deals with creditor beneficiaries.<sup>10</sup> The impetus undoubtedly came from the passage of a number of acts by the legislature in 1931 establishing the public policy of the state in regard to labor and materialmen suing on public works contractors' building bonds.<sup>11</sup> That the

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<sup>8</sup>"Third Parties as Beneficiaries of Contractor's Surety Bonds", "Selected Readings in the Law of Contracts", pp. 667, 669; 38 Yale L. J. 1.

<sup>9</sup>312Pa. 183, 192, (1933).

<sup>10</sup>The Greene County case apparently proceeds on this theory, for it is there stated (292 Pa. at 316): "Even if we were to assume this to be a donee beneficiary contract, there could be no recovery \* \* \* ." In *Concrete Products Co. v. U. S. Fidelity and Guaranty Co.*, 310 Pa. 158, 163, in distinguishing the Greene County case, it is stated: "The bond gave the plaintiffs in this suit the status not of mere creditor beneficiaries, but of direct promisees".

<sup>11</sup>Act of May 29, 1931, P. L. 243, sec. 617.

Act of June 1, 1931, P. L. 350, sec. 2408 (h).

Act of June 9, 1931, P. L. 386, sec. 1202, cl. 54.

Act of June 22, 1931, P. L. 880.

Act of June 22, 1931, P. L. 881.

Act of June 23, 1931, P. L. 932, sec. 1915.

Act of June 23, 1931, P. L. 1181.

Act of June 24, 1931, P. L. 1206, sec. 1804.

Act of June 26, 1931, P. L. 1388, sec. 13.

Supreme Court has seen fit to extend public policy in relation to third party beneficiary contracts by embracing the rules laid down on that subject in the Restatement of the Law of Contracts and has thus aligned itself with its sister courts regarding the principles to be applied in the future to such cases is a welcome transition from the conflicting doctrines of the older cases.<sup>12</sup>

The general rule in the Restatement of the Law of Contracts is that creditor and donee beneficiaries are treated substantially alike, both being able to recover as against the promisor: the former if the performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary; the latter if it appears that the *purpose* of the promisee in obtaining the promise of the performance thereof is to make a gift to the beneficiary, or to confer a right not due, or supposed or asserted to be due, even though he was not in privity of contract with the promisor.

The *Great American Indemnity Co.* case has solved another issue which has caused the Supreme Court to double back on its tracks since 1925. Professor Reese in his article<sup>13</sup> hails *Brill v. Brill*, supra, thus:

"*Brill v. Brill* is revolutionary in another respect. It has been the law in Pennsylvania that a third person could not sue on a contract made for his benefit where the contract was under seal, on the ground that to permit him to do so would permit an action on sealed instrument in assumpsit where the proper remedy should be covenant. *Brill v. Brill* points out that this reason is a technicality dependent upon old rules of pleading which no longer exist and holds that where a third person would otherwise be permitted to sue he is not to be refused a remedy because the contract upon which he seeks to sue is under seal."<sup>14</sup>

The *Greene County* case absolutely refused to accept this policy and said that, "one other reason why this plaintiff cannot maintain a suit on the bond" is because he is a third person and not a party to the sealed instrument, thus draining *Brill v. Brill* of its last ounce of strength.<sup>15</sup> The court, however, in the *Great American Indemnity Co.* case saw fit to return to its earlier position and has now settled the question once and for all, permitting a third person to sue on a sealed instrument even though he is not a party to it and saying that the pleadings are no longer the most important thing in litigation and consequently should not be used as instruments to defeat justice.<sup>16</sup>

James Rick, III.

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<sup>12</sup>For two very able discussions as to the status of the law in Pennsylvania on third party beneficiary cases prior to 1928 see: "Contracts for Benefit of Third Persons"; Prof. Fred S. Reese (1925), 29 Dickinson L. R. 229; "The Law of Third Party Beneficiaries in Pennsylvania", Arthur L. Corbin (1928) 77 U. of P. L. R. 1.

<sup>13</sup>29 Dickinson L. R. 229, 246.

<sup>14</sup>Note 5 supra.

<sup>15</sup>292 Pa. 304, 316, (1927).

<sup>16</sup>312 Pa. 183, 188, (1933).