During the period covered by this survey article, there have not been many cases in the field of contracts. In two of the cases the only question before the court was the sufficiency of the evidence, and in both of these cases the Tennessee Court of Appeals found that there was sufficient evidence to sustain the lower court, without going into an analysis of the evidence. Thus, there is no comment that can properly be made concerning those cases. There were two other cases, however, upon which some comment can properly be made.

Contracts—Third Party Beneficiary—Right of County to Assert Claim for Taxes as Beneficiary of Contract Between City and Tennessee Valley Authority

One area of contract law in which there has been considerable development, with attendant lack of definiteness as to the extent of the scope, is found in third party beneficiary contracts. A recent attempt to apply third party beneficiary doctrine to a novel type situation is found in Rutherford County v. City of Murfreesboro. There Rutherford County as plaintiff invoked the third party beneficiary doctrine in asserting a claim for tax money allegedly due it as a third party beneficiary of a contract between the defendant, City of Murfreesboro, and the TVA (Tennessee Valley Authority). The essential facts are these. The defendant city entered into a contract with the TVA for the purchase of electric power which would be sold by defendant city to customers. The contract took effect in 1939. Under the contract, an electric system was established by the defendant as a separate department, with its funds kept separate from other funds of defendant. Also, under the contract the defendant city was authorized to transfer funds from the electric department to the general funds of defendant to be used by it for municipal purposes. The amount taken from the electric department funds was computed, in part, by the application of county tax rates to the value of the electric system when the county government did not levy a property tax upon the electric system. Under the Tennessee Constitution and statute, this electric system when used for municipal purposes, presumably was

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2. 204 S.W.2d 633 (Tenn. 1957). The plaintiff also invoked the doctrine of a constructive trust, but the court held that there was no constructive trust.

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* Professor of Law, Vanderbilt University; member, Tennessee Bar
exempt from taxation by the plaintiff county. The county tax equivalent taken from the electric department funds was retained by the defendant city and no part of it was ever paid to the plaintiff county.

In the case at hand, plaintiff county sought to recover the total of the amount of county tax equivalent transferred from the electric system funds to the general funds of the defendant city. The money in controversy was collected from customers as payment for electricity furnished them by defendant city. Plaintiff claimed this tax equivalent to compensate plaintiff for the loss of county tax revenues by reason of the immunity from taxation of this publicly owned electric system. Plaintiff claimed that it was a third party beneficiary of the contract between TVA and the defendant city, and that the contract showed an intention to confer a benefit on plaintiff to the extent of the county tax equivalent taken from the electric department funds and transferred to the general funds to be used for municipal purposes. The defendant city demurred to plaintiff's bill of complaint on the ground that plaintiff, not being a party to the contract, had not shown any equitable interest in these revenues.

The lower court sustained the demurrer. In affirming the lower court, the Supreme Court of Tennessee denied relief to plaintiff county, holding that plaintiff was not a third party beneficiary of the contract between the defendant city and the TVA. The court thought that the contract did not show that the parties to it intended to confer the claimed benefit on plaintiff. The contract nowhere expressly provided that the plaintiff county was to receive any benefits under it. Nor did the contract expressly obligate the defendant to pay over to the plaintiff the county tax equivalent taken from the electric department revenues. Moreover, the court was of the opinion that the contract did not, by implication, grant such a benefit to the county. Although defendant's electric system is presumably exempt from taxation by the county, since it is used for a municipal purpose, nevertheless the law has imposed no duty on the defendant to assuage the disappointment of the plaintiff county resulting from this loss of revenue. Also, there is one particularly pertinent provision of the contract defining the use of the amount in lieu of taxes transferred from the electric funds to the general fund. It provides that the transferred funds could be "used for any permissible municipal purpose." The court thought that clause in the contract negated plaintiff's contention that the contract conferred upon plaintiff the claimed benefit. The payment of this money to the county would not be for a municipal purpose, and the contract provided that the transferred

funds could only be used for municipal purposes.

Isn't it a strange coincidence, however, that the amount of funds that could be transferred from the electric department funds to the general fund under the contract between defendant city and the TVA should be the county tax equivalent, if it was intended not to use those transferred funds to compensate the plaintiff county for lost taxes in that exact amount?4

Plaintiff does not seem to fit into either of the traditional categories of third party beneficiaries, as developed by Williston5 and the Restatement of Contracts,6 that has an enforceable interest in a contract. Plaintiff does not seem to fit into the mold of a creditor beneficiary since the performance of the promise, by defendant, if any there was, was not to satisfy an actual, or supposed or asserted duty of the promisee (TVA) to the beneficiary (plaintiff).7 TVA owed plaintiff no duty which defendant was undertaking to perform. Neither does plaintiff seem to fit into the category of a donee beneficiary, since there appears no purpose of the promisee (TVA) in obtaining any promise of performance by defendant to make a gift to the beneficiary (plaintiff).8 Hence, under the types of beneficiaries traditionally developed, plaintiff seems to fall into the category of an "incidental" beneficiary, which means he has no enforceable right at all. But then, as we will see presently, the third party beneficiary doctrine

4. An amendment to the Tennessee Valley Authority Act, which became effective after the effective date of the contract in question, now apparently requires payment of a certain percentage of gross receipts to counties to make up for tax losses, such as plaintiff county suffered in the case at hand. 48 Stat. 58 (1933), 16 U.S.C. § 831 (1952). Since this amendment became effective after the contract in question, the court did not apply it to the facts at hand.
5. 2 Williston, Contracts § 356 (rev. ed. 1936).
7. "(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is . . .:
(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisee to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;
(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;
(c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.
"(2) Such a promise as is described in Subsection (1a) is a gift promise. Such a promise as is described in Subsection (1b) is a promise to discharge the promisee's duty."
8. Restatement, Contracts § 133 (1) (b) (1932).
continues to be progressive and the courts have given third party beneficiaries enforceable rights even though the party could not fit himself into either of the traditional categories of creditor or donee beneficiary that have been used to give rights that were enforceable.

**Contracts—Union Members as Third Party Beneficiary Under Collective Bargaining Contract Between Union and Employer—Interpretation of Control Provision Governing Vacation Pay.**

*Textile Workers Union of America v. Brookside Mills* is a case coming in a much litigated area of third party beneficiary theory. There, union members, along with the union, as plaintiffs, were permitted to recover on a collective bargaining contract made by the union and the employer defendant for the benefit of the individual members of the union. Although the union joined with the individual members in enforcing this contract, nevertheless this is one area where the union members themselves, as plaintiffs, have successfully invoked third party beneficiary doctrine, thus expanding the horizons of this doctrine beyond the over-mechanical, restricted, traditional two categories of donee and creditor beneficiaries which alone have enforceable rights. While there are numerous cases sustaining the right of the union member to sue as a third party beneficiary under collective bargaining contracts made by the employer and the union, yet it is far from realistic to say that the union member fits into either the creditor beneficiary or the donee beneficiary mold.

In the case at hand, there was a suit to recover vacation pay allegedly due under a collective bargaining agreement made by the defendant (employer) and the union. The suit was brought by certain employees and the union as a class suit on behalf of the individual plaintiffs and all others similarly situated.

With respect to vacation pay, the contract provided, in part, that all “employees who on June 1, 1950, and on June 1 of each succeeding contract year, have continuous service with the employer will be paid vacation pay according” to schedules based on length of service. The employment of complaining employees had been terminated prior to March 20, 1956, because of the employer’s decision to discontinue operations.

The defendant (employer) resisted the vacation pay claim of these

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9. 309 S.W.2d 371 (Tenn. 1958).
10. Tennessee Coal, Iron & R.R. v. Sizemore, 258 Ala. 344, 62 So.2d 459 (1952); Leahy v. Smith, 137 Cal. App.2d 394, 290 P.2d 679 (1955) (non-union employee enforced rights as third party beneficiary under collective bargaining agreement); Yazoo & M.V.R.R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931) (non-union employee maintained an action against railroad to recover compensation specified in the union contract); On individual employees as third party beneficiaries of collective bargaining agreements, see Annot., 18 A.L.R.2d 352 (1951); 4 CORBIN, CONTRACTS § 782 (1951); 2 WILLISTON, CONTRACTS § 379A (rev.ed.).
employees for the period in question on the ground that the contract provision for the payment of vacation payment that the individual must have been an employee on June 1, 1956, and have continuous service as of that date; that since none of these complaining employees were in the employment of the company at that time, they were not entitled to vacation pay. The plaintiffs, on the other hand, insisted that June 1 was not an eligibility date, but was a date fixed for a measure of time within which to compute accumulated compensation earned by the employees in the period of service. The collective bargaining contract ran from June 1 until June 1 of each year.

The Supreme Court of Tennessee affirmed the lower court, holding that the employees were entitled to vacation pay for the period, although they were not employed on June 1. The court thought that the contract did not require that the services be continuous up to June 1, pointing out that the contract did not say “all who are employees on June 1,” but says “all employees on June 1” shall receive certain vacation pay. The contract was, thought the court, susceptible of the construction that the continuous minimum service of six months could be any time within the contract year between June 1 and June 1. Moreover, past practice showed that the employer (defendant) had paid vacation pay to employees who were temporarily laid off on June 1, but did not pay those persons whose services were terminated through the fault or voluntary action of the employee.

This interpretation of the contract by the defendant (employer) in paying vacation pay to employees who were temporarily laid off on June 1 is, of course, entitled to much consideration in showing the meaning of the contract to which legal effect should be given. The practical interpretation given to a contract by the parties themselves will be given great weight by the court. Moreover, as between two possible and reasonable meanings that could be given a contract, the court will adopt that one which is the less favorable in its legal effect to the party who chose the words. This rule may possibly have some application here, since the defendant (employer) presumably chose the words in which it agreed to pay vacation pay.

11. 3 Corbin, Contracts § 558 (1951); 3 Williston, Contracts § 623 (rev. ed.).
12. 3 Corbin, Contracts § 559 (1951); 3 Williston, Contracts § 621 (rev. ed.).