CONTRACTS FOR THE BENEFIT OF THIRD PARTIES*

I. INTRODUCTION

In Coulls v. Bagot's Executor & Trustee Co. Ltd. Barwick C.J. said that 'it must be accepted that, according to our law, a person not a party to a contract may not himself sue upon it so as directly to enforce its obligations'. Accordingly, if A (the promisor) agrees with B (the promisee) for consideration provided by B, that A will confer a benefit upon C, C (the third party beneficiary) cannot himself enforce A's promise, since C is neither a party to the agreement nor to the consideration. This proposition (which I will call the third party rule) is now, as a matter of authority, unchallengeable. Yet it has never been much beloved by lawyers (I except members of the Courts of ultimate resort) and has been warmly detested by legal reformers. It is not of ancient lineage in its established form, and its parentage—or at least its juridical basis—has been the subject of controversy. It has been eroded by exceptions-indeed certain "exceptions" were established before the rule, which has thus never been of universal application—occurring in diverse areas of maximum pressure where the social interest in preserving orthodox family structure (e.g. the right of children to enforce benefits in their favour under their parents' ante-nuptial marriage settlement) and the force of commercial exigencies (e.g. the doctrine of the undisclosed principal) have procured immunity from the rule. The great weight of American authority admits a directly enforceable right in the third party beneficiary.3 Scots law recognizes a jus quaesitum tertio subject to the fulfilment of cetrain conditions.4

The principle of recovery generally recognized in American law is described by Williston⁵ as a 'distinct new principle of law' born out

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^{1 (1967) 40} A.L.J.R. 471.

² Id. at 477.

WILLISTON, CONTRACTS 828, s. 356 (3rd ed.); RESTATEMENT OF THE LAW OF CONTRACTS, ch. 6, ss. 133-6.

⁴ GLOAG, THE LAW OF CONTRACT 253-6 (2nd ed.); Dowrick, A Jus Quaesitum Tertio by Way of Contract in English Law, (1956) 19 M.L.R. 374.

⁵ WILLISTON, CONTRACTS 848-9, s. 357.

of the pressing necessity of the situation and the inherent reasonableness of the solution. There can be little doubt but that the third party rule operates to defeat reasonable expectations and to set moral obligations at a discount. Its endurance in English law is explicable partly by the respect commanded by the doctrine of privity of contract, and, paradoxically, by the skill with which English lawyers have succeeded in restricting the areas in which that doctrine operates.

II. THE ESTABLISHMENT OF THE THIRD PARTY RULE AND ITS ENDURANCE

Rather more than 100 years ago, William Tweddle married a Miss Guy. After the marriage, the two fathers agreed with each other that each would pay William a marriage portion. Neither of them made the promised payments and subsequently each of them died. William brought an action against the executor of his wife's father seeking to recover the sum which his father-in-law had promised to pay. The defendant demurred to the declaration, and the judges of the Queen's Bench upheld the demurrer on the ground that the plaintiff was a stranger to the consideration and thus could not take advantage of the father's contract.⁶

In 1915, the famous case of Dunlop Pneumatic Tyre Company Limited v. Selfridge & Company Limited came before the House of Lords. Lord Haldane said this:

In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.⁸

Judges and many text book writers appear to have accepted Lord Haldane's positive statement at full value despite a vigorous dissent by Professor Corbin in an article published in 1930.9 For example, in Salmond & Williams the principle is introduced in this way:

So far as the original operation of simple contracts is concerned, the common law position may be stated quite shortly. The only persons upon whom such a contract can at common law originally

⁶ Tweddle v. Atkinson, (1861) 1 B. & S. 393.

^{7 [1915]} A.C. 847.

⁸ Id. at 853.

⁹ Corbin, Contracts for the Benefit of Third Persons, (1930) 46 L.Q.R. 12.

confer rights or impose duties are those who are parties to the agreement constituting it.¹⁰

The authorities for this proposition are Dunlop v. Selfridge¹¹ and Tweddle v. Atkinson.¹²

But a champion to revive the discredited jus quaesitum tertio emerged in the person of Denning L.J. (as he then was) who in a sequence of three judgments in the Court of Appeal, set out to construct a doctrine of third party rights. These cases—Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board, 18 Drive Yourself Hire Company (London) Ltd. v. Strutt14 and Adler v. Dickson15—primarily assail the third party rule by challenging it historically on the ground that the decision in Tweddle v. Atkinson was contrary to a well settled line of prior authority. 16

Then in Midland Silicones v. Scruttons Ltd.¹⁷ the House of Lords strongly affirmed the principle that only a person who is a party to a contract can sue upon it. The refusal of the common law to recognize a jus quaesitum tertion arising by way of contract was, as counsel for the respondents submitted in the House of Lords, 'the orthodox view'. To this assertion, Viscount Simonds, in particular, responded with enthusiastic approbation:

For to me, heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I be easily led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent.¹⁸

Lord Denning, as he had then become, not unnaturally dissented from this view, in which, however, the other members of the House concurred.

¹⁰ SALMOND & WILLIAMS, CONTRACTS 382 (1945 ed.).

^{11 [1915]} A.C. 847.

^{12 (1861) 1} B. & S. 393.

^{13 [1949] 2} K.B. 500.

^{14 [1954] 1} K.B. 250.

^{15 [1955] 1} Q.B. 158.

¹⁶ See Denning, An Iconoclast Speaks, 3 Syd. L. Rev. 209, 214.
But in Coulls' case, (1967) 40 A.L.J.R. 471, Windeyer J., after examining the historical background of Tweddle v. Atkinson, was unable to conclude, as Lord Denning had done, that the case represented a subversion of the common law, or, therefore, that Lord Denning's endeavours to construct a common law doctrine of third party rights represented 'a struggle to restore the faith': id. at 484-6.

^{17 [1962]} A.C. 446.

¹⁸ Id. at 467.

The opinions expressed in the *Midland Silicones* case had been anticipated by the majority decision of the High Court of Australia in *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd.*¹⁹ in which Fullagar J. delivered a judgment with every line and every word of which Viscount Simonds expressed specific and admiring agreement.²⁰

It would thus seem evident that any doctrine of third party rights had finally been buried under the weight of unanimously adverse authority. But in Beswick v. Beswick²¹ Lord Denning made a further attempt to disinter the jus quaesitum tertio, notwithstanding that the precise point had not been argued by counsel before the Court of Appeal. Beswick's case went on to the House of Lords and, again, their Lordships affirmed the authority of Tweddle v. Atkinson and the subsequent decisions to the same effect.²² After the Court of Appeal had delivered judgment in Beswick's case, the High Court of Australia dealt with the same problem in Coulls' case. Barwick C.J. after making the statement with which I opened this paper went on to add:

For my part, I find no difficulty or embarrassment in this conclusion. Indeed, I would find it odd that a person to whom no promise was made could himself in his own right enforce a promise made to another.²³

Windeyer J. said:

By the common law of England only those who are parties to a contract can sue upon it. For us, that statement is incontrover-tible.²⁴

It must therefore now be taken as indeed incontrovertible that at common law only a party to a contract can directly enforce benefits conferred under it.

III. THE BASIS OF THE RULE

What is the basis of the third party rule? Does it depend upon privity of contract or upon the doctrine of consideration? Are the two doctrines distinct? Indeed, even if they are, 'is there a useful

^{19 (1956) 95} C.L.R. 43.

^{20 [1962]} A.C. 446, 472.

^{21 [1966]} Ch. 538.

²² [1967] 3 W.L.R. 932.

^{23 (1967) 40} A.L.J.R. 471, 477.

²⁴ Id. at 483.

distinction between denying a right of action to a person because no promise was made to him, and denying a right of action to a person to whom a promise was made because no consideration for it moved from him?²⁵

It must be conceded that privity and consideration have long been regarded as separate factors in the law of contract. In Tweddle v. Atkinson, all three Judges founded their decision on the principle that no action can be maintained on a promise by a stranger to the consideration. In Dunlop v. Selfridge, all six members of the House based their opinions on the same principle; but at the same time Lord Haldane clearly separated the doctrines of privity and consideration.²⁶

In Coulls' case, both doctrines were considered by Barwick C.J. and Windeyer J. In that case, upon their Honours' construction of the writing, there was a promise by A to B and C jointly, for consideration provided solely by B, to pay benefits to B and C. After B's death, C sought to enforce payment to herself. At first sight, therefore, although C was a party to the agreement, she had provided no consideration. But, although Taylor and Owen II. differed from the construction favoured by Barwick C.J. and Windeyer J., they agreed that if, on its true construction, the transaction was one whereby A promised B and C to make payments to them jointly, C was entitled to receive them after B's death notwithstanding that she personally gave no consideration. The ground for this view was, however, that it could not lie in A's mouth to question whether the consideration which he received for his promise moved from both B and C, or, as between themselves, only from one of them.27 It does not appear that their Honours were suggesting that, had B and C been several promisees, consideration furnished by B would have entitled C to enforce A's promise. The essence of the matter was the joint promise. In these circumstances, therefore, A could not assert that, as between him and C, it was a gratuitous promise. Barwick C.J. put it that A could not deny 'either privity or consideration', having previously observed that 'questions of consideration and of privity are not always kept distinct'; in cases, especially, where, though lack of privity is the real obstacle to recovery, absence of consideration is added as an unnecessary and irrelevant reason.²⁸ Windeyer J. pointed out that the

²⁵ per Windeyer J. in Coulls' case, (1967) 40 A.L.J.R. 471, 483.

^{26 [1915]} A.C. 847, 853.

²⁷ per Barwick C.J., (1967) 40 A.L.J.R. 471, 477.

²⁸ Ibid.

early cases certainly distinguished, verbally at least, between lack of privity in the strict sense and lack of consideration; although the two requisites merged in the strict view of a contract as a bargain, that is, a promise for which the promisee has paid the price.29

Despite these statements, it is respectfully submitted that the distinction between the two doctrines is not only not "useful", but is, in reality, non-existent. It is generally accepted that the basic concept in English law is of contract as bargain: this is, as Windeyer J. says, as promise for which the promisee has paid the price. This view powerfully influenced the nineteenth century legal mind and maintains its influence in other less relevant areas of the law, e.g. the necessity for an invitee to establish a common material interest between himself and the occupier. The same attitude is to be seen in what Professor Fleming has called 'the contract-tort catena of cases,'30 i.e. such cases as Langridge v. Levy³¹ and Winterbottom v. Wright.³² The confusion between privity and proximity which these cases illustrate and which was not finally dispelled until Donoghue v. Stevenson³³ stems from this notion of the supremacy of "bargain". It is perhaps significant that it was in Tweddle v. Atkinson that the view that natural love and affection or some tie stemming from a family relationship could provide good consideration was finally rejected.34

But once given the established rule that it is the promisee who must furnish the price (i.e. consideration must move from the promisee) it may be seen that there is no distinction between describing C as a stranger to the contract, or as a stranger to the consideration. The doctrine of privity means privity of contract, not privity of promise. If a contract consists of a promise supported by consideration furnished by the promisee, it follows that no-one can be party to a contract and yet a stranger to the consideration: although he may be a party to a promise and a stranger to the consideration. To say that C cannot sue because he has furnished no consideration or because he is a stranger to the contract, are but two ways of saying the same thing.35

Henceforth in this paper, I propose to use the term "privity" to comprehend both doctrines.

²⁹ Id. at 483-4.

³⁰ FLEMING, LAW OF TORTS 137 and 142 (3rd ed.).

^{31 (1837) 2} M. & W. 519. 32 (1842) 10 M. & W. 109.

^{33 [1932]} A.C. 562.

³⁴ See per Wightman J., (1861) 1 B. & S. 393, 397-8.

³⁵ See Cheshire & Fifoot, Law of Contract 65 (6th ed.).

IV. THE ENFORCEABILITY OF THE THIRD PARTY CONTRACT

A third party contract is valid and enforceable between the parties to it. The inability of the third party beneficiary to enforce the promise in his favour does not diminish the efficacy of the contract between the promisor and the promisee. Nor is the promisee relieved from his obligation to perform his promise according to its tenor. But excluding any question of trust, to which I will return, the parties to the contract can vary or rescind their agreement without reference to the beneficiary.³⁶

If the promisor fails to perform the agreement on his part, it is clear that the promisee may maintain an action for damages. But what is not so clear is whether, as a matter of law, he is entitled to recover only nominal damages, or whether the damages are, according to ordinary principles, to be assessed in relation to the actual foreseeable degree of loss sustained.

Here, there is again a conflict of authorities, and the cases are collected by Mr J. G. Starke Q.C. in an article in the Australian Law Journal⁸⁷ and are referred to in *Cathel's* case by Else-Mitchell J.⁸⁸ The argument in favour of the recovery of nominal damages only depends upon the proposition that the promisee cannot recover substantial damages corresponding to the actual loss which the third party beneficiary has suffered, because, ex hypothesi, the promisee's own loss cannot be more than minimal, since he is to receive no substantial benefit.

Since the promisee is the only person who can enforce the contract, if he sues, he is entitled to recover the damage which he himself has sustained. Accordingly, there seems to be no room for any a priori principle restricting recovery, as a matter of law, to nominal damages, or, on the other hand, permitting the promisee (where there is no trust) to recover the damage which the beneficiary has suffered or directing the promisee in that event to hold the proceeds of the action on the beneficiary's behalf.³⁹ In Coulls' case, Windeyer J. pointed

³⁶ See per Sugerman J. in Cathels v. Commissioner of Stamp Duties, (1962) 79 W.N. (N.S.W.) 271, 272.

^{37 (1948) 21} A.L.J. 422, 423-4.

^{38 (1962) 79} W.N. (N.S.W.) 271, 282.

³⁹ See per Windeyer J. in Coulls' case, (1967) 40 A.L.J.R. 471, 486-7, specifically approved in Beswick's case by Lord Pearce, [1967] 3 W.L.R. 932, 949, and by Lord Upjohn, id. at 961. If the promisee is a trustee for a third party beneficiary, then he can recover damages equivalent in extent to the

out that, if the contract were that the promisor was to discharge a debt due to the beneficiary by the promisee, then the damage suffered by the promisee in the case of the promisor's failure to perform would be more than nominal. Another case might be where the beneficiary was a person whom the promisee felt a duty to reward, or was someone who, with the aid of the money promised to be paid, was to engage in some activity from which the promisee was to derive benefit. In all these cases, breach of the contract might well involve the promisee in more than nominal damage. It follows that the true rule must be that the promisee is entitled to recover such damage as he has suffered according to the ordinary principles for the assessment of damages for breach of contract.

But since, where there is no trust, the promisee cannot be compelled to hold the proceeds of his action on the beneficiary's behalf (not-withstanding the statements of Lord Denning M.R. and Danckwerts L.J. to the contrary in *Beswick's* case in the Court of Appeal,⁴⁰) damages may well be an inadequate remedy so far as the beneficiary is concerned. There seems now to be no doubt, following the opinion of the House of Lords in *Beswick's* case and the views of Barwick C.J. and Windeyer J. in *Coulls'* case, that where specific performance is an available remedy, the promisee may obtain that form of relief; and this may be so notwithstanding that the contract involves the payment of money, provided that damages are not in the circumstances an adequate remedy. In the circumstances often to be encountered, they will not.⁴¹

V. AREAS IN WHICH THE THIRD PARTY RULE DOES NOT APPLY

To use the term "exception to the third party rule" would be to apply too indeterminate a label. In certain cases, "exclusion" or "circumvention" would be more apt a word. The cases display some reluctance to acknowledge the existence of true exceptions, that is, transactions where a third party beneficiary may directly enforce his promised benefits despite the absence of privity. Accordingly, where the operation of the third party rule has been avoided, there has rarely

beneficiary's loss. The dictum of Lush J. in Lloyds v. Harper, (1880) 16 Ch. D. 290, 321, must be confined to this situation: per Windeyer J. in Coulls' case, at 486-7.

^{40 [1966] 1} Ch. 538.

⁴¹ See per Lord Pearce [1967] 3 W.L.R. 932, 949-952, and per Windeyer J., (1967) 40 A.L.J.R. 471, 487.

been an overt refusal to apply it. The result has been justified by discovering (or inventing) consideration where none exists, or by the invocation of some other mitigating device (such as the trust), in each case with some violence to legal logic.

1. AN ESTABLISHED EXCLUSION: ANTE-NUPTIAL MARRIAGE SETTLEMENTS

A voluntary covenant, contained in an ante-nuptial marriage settlement, to settle property on the issue of the marriage confers enforceable rights upon the beneficiaries.⁴² This would seem to be a clear exception to the third party rule, but the courts have sought to explain it consistently with the doctrine of privity.

In Hille v. Gomme⁴³ Lord Cottenham L.C. described the children of the marriage as quasi-parties to the contract. Explaining this, Buckley J. in Re Cook's Settlement Trusts⁴⁴ said:

This seems to be a debatable concept in the days of the pill. But the established basis certainly appears to be that the child-beneficiary is treated as being within the marriage consideration.

2. AN APPARENT EXCEPTION: ASSIGNMENT

It is said that the process of assignment constitutes a clear exception to the doctrine of privity.⁴⁶ It is submitted however that this view is incorrect.

Assignment is one mode whereby contractual rights and obligations existing between the original contracting parties come subsequently to exist between other persons. The essence of the process is one of substitution by reason of which the original party drops out of the contract and is replaced by the third party. 'The original party ceases to be a party and the third person becomes a party in his stead.'47 If this is a correct analysis, and it is submitted that it is, then it is not valid to regard assignment as a means whereby a stranger to a contract may enforce rights under it. The essence of the third party rule

⁴² Colyear v. Mulgrave, (1836) 2 Keen 81.

^{43 (1839) 5} My. & Cr. 250, 254.

^{44 [1964] 3} All E.R. 898.

⁴⁵ Id. at 904.

⁴⁶ TREITEL, THE LAW OF CONTRACT 412.

⁴⁷ SALMOND & WILLIAMS, CONTRACTS 443.

is that the stranger remains a stranger, and is a stranger at the time when he attempts to assert his rights under the contract. But a party by assignment becomes truly a party to the contract. If, therefore, subsequently to the assignment, he endeavours to assert his rights, he does so as a party and not as a stranger. It follows that there seems to be no proper ground for categorising rights obtained by assignment as examples of a jus quaesitum tertio by way of contract.⁴⁸

3. AN EQUITABLE EXCEPTION: RESTRICTIVE COVENANTS CONCERNING LAND

The doctrine of privity prevents a person not only from becoming entitled, but also from being bound, under the terms of a contract to which he is not a party. Accordingly, the development of the law relating to restrictive covenants, which was established before *Tweddle v. Atkinson*, has always formed an exception to the third party rule, although not entirely uninfluenced by it.

The rule in Tulk v. Moxhay,49 as is well known, prescribes that a negative covenant entered into by adjoining land owners imposes an equitable burden upon the servient tenement which is enforceable in the same way, and to the same extent, as any other equitable interest such as a trust. The right to enforce the negative undertaking passes to the subsequent owners of the dominant tenement, and the liability to perform it passes to all those who take the servient tenement, except a purchaser for value of the legal estate therein without notice, actual or constructive, of the covenant.

Originally, the doctrine was based upon notice. But in Luker v. Dennis⁵⁰ the rule was extended far beyond its genesis. There, the only basis upon which the defendant was held bound by the original covenant was the fact that he had notice of it at the time he took an assignment of the servient tenement. But no proprietary relation in respect of the burdened property had ever existed between the original covenanting parties. This was indeed a relaxation of the privity rule based solely upon the doctrine of notice pure and simple. Thereafter, however, the Courts exhibited some revulsion against so heterodox a development, and have since required a restrictive covenant to possess what Dr Cheshire has called a real as distinct from a personal flavour before it becomes available to and enforceable against

⁴⁸ See Dowrick, A Jus Quaesitum Tertio by Way of Contract in English Law, 19 M.L.R. 374, 385.

^{49 (1848) 2} Ph. 774.

^{50 (1877) 7} Ch. D. 227.

third parties.⁵¹ It has thus become essential that the original vendor, the covenantee, should have retained other land for the benefit and protection of which the restrictive covenant was taken. Further, there are statutory provisions which require that restrictions before they are capable of binding third parties must be contained in an instrument which complies with the exigencies of any relevant statutory provision.⁵²

If, as it seems, the exception in this case to the doctrine of privity rests upon the creation and acquisition of a proprietary interest, the question then arises whether this doctrine is applicable where the interest is created in property other than land. To some extent similar restrictions upon the disposition of chattels have been enforced. In De Mattos v. Gibson⁵³ Knight-Bruce L.J. delivered himself of a dictum which had a profound effect upon the transfer of chattels. His Lordship said:

Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made . . . with a third person, to use and employ the property . . . in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.⁵⁴

The principle so enunciated appeared to be congruent with that propounded in Tulk v. Moxhay namely, that it applied whenever a defendant bought property with actual or constructive notice that it was subject to a restrictive covenant. But, as we have seen, the original basis of Tulk v. Moxhay was modified by the necessity that the covenant to be enforceable must be in protection of some proprietary interest. In London County Council v. Allen⁵⁵ the Court of Appeal entered a caveat against the acceptance of Knight-Bruce L.J.'s dictum at its full value. In 1926, however, the Privy Council in Lord Strathcona S.S. Company v. Dominion Coal Company⁵⁶ applied De Mattos v. Gibson in a case where, while there was an existing con-

⁵¹ See Cheshire, Modern Real Property 515 et seq. (9th ed.).

⁵² See, e.g., s. 88 (1) of the Conveyancing Act 1919 (N.S.W.) as amended. Cf. ss. 69 and 129A of the Transfer of Land Act 1893 (W.A.), as amended, and Kerr, Australian Lands Title (Torrens System) 249-250 (1927 ed.).

^{53 (1848) 4} De G. & J. 276.

⁵⁴ Id. at 277.

^{55 [1914] 3} K.B. 642.

^{56 [1926]} A.C. 108.

tractual interest, there was no proprietary interest such as the modifications to the rule in Tulk v. Moxhay had come to require.

In Australia, the Strathcona case has been restrictively explained by the Full Court of New South Wales in Shell Oil Company of Australia Ltd. v. McIlwraith McEachern Ltd.⁵⁷ and by the High Court in Howie v. New South Wales Lawn Tennis Club Limited.⁵⁸ Ultimately, in Port Line Limited v. Ben Line Steamers Limited⁵⁹ Diplock J. expressed the view that the Strathcona case was wrongly decided.

It is probable, therefore, that the High Court will not apply the *Strathcona* case (except, perhaps, where the chattel is a ship) where there is no element akin to the protection of a dominant tenement in the land law, a criterion which could scarcely be satisfied in the case of moveables.

4. AN EQUITABLE CIRCUMVENTION: THE DEVICE OF THE TRUST

While the common law was establishing the rule that a third party cannot sue to enforce a contract made for his benefit, equity in a long series of cases from *Tomlinson v. Gill*⁸⁰ onwards, gave a remedy to the third party by means of the equitable doctrine of the constructive trust.⁶¹

The decision of the House of Lords in Les Affreteurs Reunis Societe Anonyme v. Walford⁶² fixes the apotheosis of this mitigating device, employed on occasions where little more than a bare intention to benefit could be discerned. Thereafter, judicial opinion withdrew its earlier patronage, and the reaction culminated in the restriction upon the trust concept expressed in Vandepitte v. Preferred Accident Insurance Corporation of New York⁶³ and applied in Green v. Russell.⁶⁴

The courts have in turn acclaimed and rejected the device and the grounds put forward by the judges in support of the most divergent decisions are not easily reconcilable.

The inconsistency in the authorities is demonstrated by the fact that the courts have held in some cases that a life insurance policy

^{57 (1945) 45} S.R. (N.S.W.) 144.

^{58 (1956) 95} C.L.R. 132.

^{59 [1958] 2} Q.B. 146.

^{60 (1756)} Ambler 330.

⁶¹ See generally, Furmston, Return to Dunlop v. Selfridge?, (1960) 23 M.L.R. 373.

^{62 [1919]} A.C. 801.

^{63 [1933]} A.C. 70.

^{64 [1959] 2} Q.B. 226.

expressed to be for the benefit of a third party creates a trust in his favour, ⁶⁵ but in others, upon no discerning principle, have arrived at a precisely opposite conclusion. ⁶⁶ It seems, however, that there are at least two ingredients which must necessarily be established if the court is to find a trust.

First, there must be an intention to benefit the third party, by assuming some kind of fiduciary responsibility towards him. ⁶⁷ Second, the intention to benefit the third party must be irrevocable. It was on this ground that a trust was rejected in Re Sinclair's Life Policy ⁶⁸ where there was a clear intention to benefit: but the court found that the policy of life insurance in terms enabled the assured to surrender the policy for his own benefit, and thus divert the proceeds from the named beneficiary. Similarly, in Re Schebsman ⁶⁹ the court again refused to find any intention to create a trust because the contracting parties intended to retain their right to vary the terms of the obligation without consulting the beneficiary. The same reasoning is to be found in the judgment of Nicholas J. in Ryder v. Taylor. ⁷⁰ It has been doubted whether, in principle, irrevocability is truly a necessary ingredient. In Wilson v. Darling Island Stevedoring & Lighterage Company Limited ⁷¹ Fullagar J. said:

That the common law rule was a rule which could operate unjustly in some circumstances may be conceded, but equity could and did intervene in many cases by treating the promisee as a trustee of a promise made for the benefit of a third party, and allowing the third party to enforce the promise, making the promisee-trustee, if necessary, a defendant in an action against the promisor. A well known example is Lloyds v. Harper. It is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases. . . . I cannot see why it should be necessary that such a trust should be irrevocable: a revocable trust is always enforceable in equity while it subsists. The such a trust should be increased.

But with respect to Fullagar J. the point surely is that the reservation

⁶⁵ Re Richardson, (1882) 47 L.T. 514; Royal Exchange Assurance Co. Ltd. v. Hope, [1928] 1 Ch. 179; Re Webb, [1941] Ch. 225.

⁶⁶ Re Foster, [1938] 3 All E.R. 357; Re Sinclair's Life Policy, [1938] 1 Ch. 799; Re Engelbach's Estate, [1924] 2 Ch. 348 (doubted by Lord Reid in Beswick's case, [1967] 3 W.L.R. 932, 935).

⁶⁷ See, e.g., Harmer v. Armstrong, [1934] Ch. 65.

^{68 [1938] 1} Ch. 799.

^{69 [1944]} Ch. 83.

^{70 (1936) 36} S.R. (N.S.W.) 331.

^{71 (1956) 95} C.L.R. 43.

^{72 (1880) 16} Ch. D. 290.

^{78 (1956) 95} C.L.R. 43, 67.

of a power of revocation to a settlor not only indicates the absence of any intention to create a trust, but rather evidences an intention to make a dispostion exclusively for the disponor's personal convenience.⁷⁴

The point of departure between the doctrine of privity and the mitigating device of the trust is, however, clearly to be seen in the basic distinction between the two conceptions. A trust once constituted is (generally) irrevocable without the consent of the beneficiary. But a contract may always be varied or indeed discharged by agreement between the parties, without reference to the wishes of the beneficiary. Two problems therefore face a court urged to mitigate the rigour of the third party rule by the acceptance of a trust. First, in order to find the necessary indicia of a trust, the court may have to put a gloss on the agreement which the evidence can barely sustain; and second, if a trust is found, its consequences will be incompatible with the ordinary incidents of the contract between promisor and promisee, so that to enable the third party to be a beneficiary may involve defeating the reasonable expectations of the promisee, rather than compelling a recalcitrant promisor to fulfill his promise.

As Dr Cheshire and Mr Fifoot point out,⁷⁵ the difficulty in reconciling these decisions lies in the fact that, as Lord Wright has suggested, the trust is in this context a 'cumbrous fiction'.⁷⁶ Certainly, it seems to have been discovered as a "fictional" means of evading the strict common law doctrine. Lord Lindley in Keighley, Maxsted & Co. v. Durant⁷⁷ warned that 'care must be taken not to treat a fiction as a fact'. The point of this exhortation is, of course, that once the fiction is treated as a fact, analysis of the concrete factual and legal consequences exposes the fallacy of the fiction. Attempts to use a fiction as a mitigating device often ultimately produce revulsion at the clumsiness and basic implausibility of the means.⁷⁸ The reaction produces either a full stride to reform or the return to orthodoxy. In

⁷⁴ See, e.g., Smith v. Hurst, (1852) 10 Hare 30, and Johns v. James, (1878) 8 Ch. D. 744.

 $^{^{75}}$ Law of Contract 389 (6th ed.).

⁷⁶ See his review of WILLISTON, CONTRACTS, in (1939) 55 L.Q.R. 189, 208.

^{77 [1901]} A.C. 240, 262.

⁷⁸ It is worth considering upon this point the remarks of Dixon C.J. in Commissioner for Railways (N.S.W.) v. Cardy, (1960) 104 C.L.R. 274, 280:

But it is plain that to say that they come in fact with the licence of the Commissioner or any of his servants with authority in the matter is quite unreal. It is rather to impute than to imply a licence, and it is a course I am not prepared to take . . . unless the licence be treated rather as a legal or fictional than a factual conclusion.

the present case, the second of these possibilities is the consequence which has ensued.

5. COMMERCIAL EXCEPTIONS

The custom of merchants and the demands of businessmen, and the development of sophisticated commercial techniques, have produced a number of true exceptions to the third party rule, explicable only upon teleological grounds.

(i) The Undisclosed Principal

The rule entitling an undisclosed principal to come in and sue in his own name upon a contract made by his agent appears to be a clear exception to the doctrine of privity. But the courts, labouring under the domination of the third party rule, have sought to find a means of legitimating the undisclosed principal by adopting him within the doctrine of privity, rather than permitting him to remain splendidly aloof. Yet it is difficult to accept the assertion that the basis of his rights are that the contract is really made with him, when the agent also is both liable and entitled under the same contract.

It is more probable that this is a true exception to the third party rule, forced by the exigencies of commercial convenience.

(ii) Commercial Letters of Credit

Until the development of commercial letters of credit, the financing of foreign export trade involved difficulties for both buyer and seller. A buyer paying by cash or banker's draft with his order, stood out of his money until he received and paid for the goods: and had, moreover, to rely upon the commercial probity of a possibly unknown seller. If the goods were to be paid for upon receipt, the seller similarly stood out of his money and he had to take his chance with the commercial integrity of the buyer. The possibility of a fluctuating market and the risk of either party's insolvency constituted further problems which unsophisticated means of finance were unable to solve.

However, the letter of credit by which the buyer agrees with his bank that the bank will open a credit in favour of the seller, to be drawn on when the seller presents the shipping documents, overcomes the problem of capital, solvency and commercial morality: leaving perhaps only the possibility of dispute as to the quality of the

⁷⁹ See Treitel, The Law of Contract 487; Bowstead, Agency 199 et seq. (12th ed.); Carberry v. Gardiner, (1936) 36 S.R. (N.S.W.) 559, 573-5.

goods sold. The main advantage is that there is introduced into the transaction a party of unimpeachable solvency.

The theoretical problem, however, is the right of the seller if the bank refuses to honour the drafts drawn by the seller on the letter of credit. There is no doubt that the buyer has an enforceable contract with his bank supported by consideration, but the seller is a stranger to this contract. Accordingly, if the seller sues the bank, he might well be met with a defence based upon the doctrine of privity. It is unlikely that any bank would raise such a point in support of its refusal to honour a seller's draft, but as the Law Revision Committee has pointed out⁸⁰ any liquidator of the Bank (himself a somewhat unlikely personage) might be obliged to set up any defences, however technical, which were available to him.

It is undesirable, therefore, 'that established business practice should lack clear legal sanction'. 81 The exigencies of commercial men have often stimulated the law to reform. Commercial practice is often ahead of legal theory. 82 But the English authorities on the point demonstrate reluctance to recognize that this aspect of commercial law forms an exception to the third party rule. The judges have sought rather to fit commercial practice into the well recognized principles of consideration. Accordingly, in *Urquhart Lindsay & Co. Ltd. v. Eastern Bank Limited*83 Rowlatt J. dealing with the legal position of the seller and the bank said:

There can be no doubt that upon the plaintiffs' acting upon the undertaking contained in this letter of credit, consideration moved from the plaintiffs, which bound the defendants to the irrevocable character of the arrangement between the defendants and the plaintiffs.⁸⁴

This statement was adopted by Greer J. in Dexters Limited v. Schenker & Co.85 But as Davis points out,86 it is by no means clear what Rowlatt J. meant by 'acting upon the undertaking'. Upon the facts of that cases, acting upon the undertaking was probably the commencement of manufacture, not the tendering of the documents by the plaintiff.

⁸⁰ Sixth Interim Report, p. 28 (1937).

⁸¹ CHESHIRE & FIFOOT, LAW OF CONTRACT 540 (Australian ed.).

⁸² See Davis, The Law Relating to Commercial Letters of Credit 57 (2nd ed.).

^{83 [1922] 1} K.B. 318.

⁸⁴ Id. at 321.

^{85 (1923) 14} Ll.L. Rep. 586, 588.

⁸⁶ op. cit., n. 82 above, at 66.

There have been propounded a number of alternative theories as to the basis of the seller's right to sue. The problem common to all of them is that they do not accord with the probable facts of a typical commercial transaction involving a letter of credit. To attempt, therefore, to squeeze the facts of a transaction into some legal pigeon hole is to refuse to recognize the very fact which initiated the problem—namely, that there are well recognized commercial transactions with obligations well understood and invariably followed which gain their force not from some established legal doctrine but from commercial practice or custom. It would be as well, therefore, to adopt the custom itself as a rule of law. Jenkins L.J., indeed, in *Malas v. British Imex Industries Ltd.* 87 has offered such a solution:

It seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this Court in the present case to interfere with that established practice.⁸⁸

(iii) The Insurance of Limited Interests

A person with a limited interest in goods may insure them to the full value on behalf of others interested, and the names of the persons on whose behalf the contract of insurance is made need not be inserted in the policy nor disclosed to the insurers. It may be otherwise in the case of insurance of real property, if the Life Assurance Act 1774 (Imp.) applies in Australia. The nominal assured may sue, and if he does, he holds the balance of the proceeds (after recouping his own interest) for the other persons interested; or those other persons (although not named in the policy) may themselves sue. It

The person with a limited interest in goods most often encountered is a carrier, warehouseman, broker or the like, for whose commercial convenience the floating cover insuring interests other than his own

^{87 [1958] 2} Q.B. 127.

⁸⁸ Id. at 129.

⁸⁹ McGillivray, Insurance Law s. 479 (5th ed.); Waters v. Monarch Life Insurance Co. Ltd., (1856) 5 El. & Bl. 870.

⁹⁰ See Davjoyda Estates Pty. Ltd. v. National Insurance Company of New Zealand, (1967) 85 W.N. (Pt. 1) (N.S.W.) 184.

⁹¹ See McGillivray, op. cit., n. 89 above, s. 479.

has been developed. It may be that the legal protection afforded to the nominal assured (and extended to the wider interests) owes something in principle both to the trust and the doctrine of agency. But the expressed rationale in *Waters'* case (one of the earliest on the topic) was, refreshingly enough, business convenience.⁹²

(iv) Options

A person named as nominee of an optionee may exercise the option in his own favour and enforce the contract resulting from the exercise of the option against the optioner. Conflict with the third party rule has been resolved in such a case by regarding an option as an offer directed to the nominee and accepted when the nominee exercises the option.⁹³

In Clark v. Lonergan⁹⁴ Wallace J. expressed the view that an agent (who was the party to the agreement) could exercise the option contained therein on behalf of the nominee (unidentified in that case) who could enforce the contract as principal. But the theory propounded by Danckwerts J. is vulnerable if an option is to be regarded as a conditional contract of sale, rather than as 'an offer to sell coupled with a contract not to revoke the offer'. The is submitted that on the authorities the view of the option as an offer is to be preferred. But if it is coupled with a contract not to revoke, that contract must be made with the optionee in the circumstances in question, who alone could sue for breach of it, unless Wallace J.'s analysis extends to treating the nominee principal as having a right of action even before acceptance of the offer by his agent.

6. SOME STATUTORY EXCEPTIONS

(i) Section 56(1) of the Law of Property Act 1925 (U.K.)

Lord Denning has sought to support his attempts to liberalise the third party rule by arguing for a wide construction of s. 56(1) of the Law of Property Act 1925 (U.K.) which is substantially reproduced in s. 36C of the Conveyancing Act 1919 (N.S.W.). The attempt has recently been resoundingly defeated by the House of Lords in *Beswick's*

⁹² See per Lord Campbell C.J., (1856) 5 El. & Bl. 870, 881.

⁹⁸ See Stromdale & Ball Ltd. v. Burden, [1952] 1 All E.R. 59, 65, per Danckwerts J. In that case the offer was clearly made to the plaintiff but in an instrument to which the plaintiff was not a party.

^{94 [1961]} N.S.W.R. 313, 316. Cf. Sidney Eastman Pty. Ltd. v. Southern, [1963] N.S.W.R. 815.

⁹⁵ per Williams J. in Ballas v. Theophilos (No. 2), (1957) 98 C.L.R. 193, 207.

⁹⁶ See Helby v. Matthews, [1895] A.C. 471.

case. The argument may be somewhat academic to a lawyer practising in Western Australia because so far as I am able to ascertain, no equivalent of s. 56(1) exists in this State. The predecessor of that subsection was s. 5 of the Imperial Real Property Act 1845, still in force in Western Australia by dint of Act 12 Vict. No. 21. But since the argument rejected in *Beswick's* case is of interest in this general context, I propose to give a short account of it.

Deeds are, of course, traditionally of two designs, either polled, that is, cut smooth at the edges, or indented. Furthermore, a deed might be executed by the unilateral act of one party or it might be made between two or more parties. Normally a deed executed unilaterally will be polled and a deed inter partes will take the form of an indenture. Where the deed was inter partes, each party would have a copy whose indented edges should properly tally with the other party's copy.⁹⁷

The common law rule was that a grantee or covenantee, though named as such in an indenture under seal expressed to be made inter partes, could not take an immediate interest as grantee nor the benefit of a covenant as covenantee unless named as a party to the indenture But the rule did not apply to a deed poll (although it did apply not only to real estate but to personal grants and covenants) and since an indenture not expressed to be made inter partes was construed as a deed poll, the strict rule applied only therefore to deeds inter partes. In Beswick's case Lord Upiohn deals in some detail with the common law rule and the genesis of section 5 of the Real Property Act 1845 and points out that even by the seventeenth century, the 'ancient doctrine' that you must be named as party to the indenture to take an immediate benefit by grant or as a covenantee was regarded as archaic and was very strictly construed.98 But, as His Lordship goes on to explain, the rule was nonetheless given full effect in circumstances where no restricted interpretation of it could avail: and, in 1826, it was applied in the case of Berkeley v. Hardy, 99 a decision which, with the leisurely pace which statutory reform of law normally pursued in those (and perhaps in other) days, may have led to the enactment of section 5 of the Real Property Act, nineteen years later. That section was in these terms:

⁹⁷ The Real Property Act 1845, s. 5, enacted, inter alia, that a deed executed after 1st October 1845 purporting to be an indenture should have the effect of an indenture although not actually indented. See generally Andrews, 23 THE CONVEYANCER, 179 et seq.

^{98 [1967] 3} W.L.R. 932, 961 et seq. See also Cooker v. Child, (1673) 2 Lev. 74. 99 (1826) 5 B. & C. 355.

That, under an indenture, executed after October 1st 1845, an immediate estate or interest, in any tenements or hereditaments, and the benefit of the condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture. . . .

The effect of this provision was to overrule the old common law doctrine but only insofar as concerned indentures inter partes whose subject matter was an immediate estate or interest in a tenement or hereditament, unless the third party could show that he was a beneficiary under a trust.

Then, the Real Property Act 1925, which was a consolidating Act, repealed section 5 of the Act of 1845 and replaced it by section 56(1). That subsection is in these terms:

A person may take an immediate or other interest in land or other property, for the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

The definition section of the same Act provides:

- (1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:
 - (xx) Property includes any thing in action, and any interest in real or personal property.

In the Smith and Snipes Hall Farm case¹ and in Strutt's case² Lord Denning, having stated his opinion that a third party can sue on a contract to which he is not a party, referred to section 56 as a clear statutory recognition of the principle. Of this assertion, their Lordships made short but perhaps not very persuasive work. At first sight, one might well conclude that, reading section 56(1) with the definition section, there is every ground for concluding that the plain result, upon any reasonable canon of construction, is to confer upon a person not a party to an agreement respecting any property, a right to enforce in his own name any benefit conferred upon him by the agreement. But, the consequence would then follow that, by a side wind, as it were, (because there is nothing in the legislative context which suggests that the Law of Property Act had been concerned to deal with a matter such as this) the rule so firmly established in Dunlop v. Selfridge had been entirely abrogated. Their Lordships

^{1 [1949] 2} K.B. 500.

² [1954] 1 K.B. 250.

could not credit the Legislature with any such intention. Lord Upjohn was somewhat less incredulous than his brethren, but his conviction that Parliament, whatever it may have wrought in section 56, did not intend to alter 'the fundamental rule laid down in Tweddle v. Atkinson' was sufficient to lead him to reject the argument that the beneficiary was entitled by the Section to maintain an action in her own name. Since the beneficiary (but in the guise of the deceased promisee's executrix) was, their Lordships held, entitled to an order for specific performance, the opinions expressed upon the application of section 56 were obiter. But the matter had been fully argued, and their Lordships expressly approved earlier decisions supporting what Lord Upjohn described as 'the narrow view . . . of section 56'.3 The same view has been expressed in Australian cases concerning the equivalent provision.4

It seems clear, therefore, that Lord Denning's construction of the section cannot stand in the face of the authorities.

(ii) Section 6(b) of the Motor Vehicle (Third Party Insurance)
Act 1943 (W.A.)

This provision by extending the benefit of the indemnity to the driver whether a party to the contract or not, gives statutory recognition to the construction adopted in Williams v. Baltic Insurance Association of London Ltd.⁵

(iii) Section 18(3)(a) of the Workers' Compensation Act 1926 (N.S.W.)

This provision requires that the statutory employer's indemnity policy shall provide that the insurer, as well as the employer, shall be directly liable to any worker insured by dint of the policy.

In Devine v. Devine⁶ the provision was interpreted as conferring upon the worker a right to enforce the contract of insurance. And section 49A of the Act extends the worker's protection by prescribing that upon the death of the employer (or, in the case of a corporation, upon its ceasing to exist) there is a statutory assignment to the worker of the employer's right to indemnity from the insurer against the worker's claim.

^{3 [1967] 3} W.L.R. 932, 964.

⁴ See Bohn v. Miller Bros. Ltd., [1958] V.L.R. 354; Baird v. Trustees, Executors & Agency Co. Ltd., [1957] V.R. 619; Clark v. Lonergan, [1961] N.S.W.R. 313; Cathels v. Commissioner of Stamp Duties, (1962) 79 W.N. (N.S.W.) 271.

⁵ [1924] 2 K.B. 282.⁶ (1928) 28 S.R. (N.S.W.) 503.

Moreover (and this is contrary to the recommendation of the Law Revision Committee referred to below) the insurer cannot raise against the worker all the defences which might be available to him against the employer. Provided that the policy was valid and in force at the date of the injury, the worker can enforce his claim against the insurer notwithstanding that by reason of the breach of some condition subsequent the insurer is entitled to repudiate liability to the employer. But a breach by the employer of a condition precedent to the insurer incurring any liability under the policy entitles the insurer to repudiate as against the worker.

VI. PROPOSALS FOR REFORM

The assertion that the third party rule tends to defeat reasonable expectations is valid only on the assumption that an acceptable system of contract should emphasise agreement rather than bargain. To those who support the idea of contract as bargain, or to those who in endeavouring to separate the two doctrines found upon privity of promise, it is perhaps wholly unreasonable to expect performance of a promise made originally to someone other than the beneficiary and for which the beneficiary has not paid the price. Logically, therefore, any enquiry as to the desirability of reform should commence by asking whether a jus quaesitum tertio is justifiable in Australian law, first, as socially desirable, and, second, as consistent with the fundamental principal of the law of contract. Whatever the answer to the first point, a negative answer to the second might require the continued exclusion of a frankly conceded doctrine of third party rights, leaving the more serious injustice and the more pressing necessities to be catered for within the existing complex of exceptions.

What, then, is the fundamental principle of our law of contract? Professor Pound's jural postulate for contract is that men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence will make good reasonable expectations which their promises or other conduct reasonably create. But this is scarcely the received doctrine. The basis of the English common law is very much closer to this statement: 'Every

⁷ Coleman v. Mercantile Mutual Insurance Co. Ltd., [1933] W.C.R. (N.S.W.) 240.

⁸ Findlay v. Queensland Insurance Co. Ltd., (1939) 39 S.R. (N.S.W.) 260; Timber Trade Mutual Insurance Ltd. v. Schritt, (1964) 64 S.R. (N.S.W.) 324.

⁹ Pound, Outlines of Jurisprudence 168 et seq. (5th ed.).

valid contract (except contracts under seal and contracts of record) is reducible to the form of a bargain that if I do something for you, you will do something for me.'10

It would certainly seem desirable that if A promises B (for consideration furnished by B) to benefit C, and C knows of the promise and as a reasonable man would expect performance, the law should aid C to enforce it. Even if the strict bargain theory of contracts is perforce accepted, once A has been paid for his promise, why should not C as well as B be entitled to enforce it? It is arguable that it is the purchase of the promise, rather than the source of the price, which is logically the most essential ingredient of any bargain theory. The doctrine of privity is fundamentally based on the technical rule of the old procedure of assumpsit that consideration must move from the plaintiff. But there is ground for suggesting that the origin of simple contract was in recognition of the principle of what is now called injurious reliance. Prior to Pasley v. Freeman¹¹ the cause of action was often based upon the claim that the plaintiff had, to his detriment, altered his position in reliance on the defendant's undertaking which the defendant should make good, or else provide compensation for the detriment.¹² A principle of this sort—a type of what might now be called promissory estoppel of an offensive rather than defensive kind—would certainly not lack its own problems.

Yet it remains valid to argue, it is submitted, that even if bargain is to remain paramount, a promise, once purchased, should be enforceable at the suit of the beneficiary who has not himself furnished the price. And it must be emphasized that, notwithstanding the availability of the remedy of specific performance (but in certain cases only), the promisee might in any case refuse to sue.

The Law Revision Committee in 1937 in its Sixth Interim Report stated:

The common law of England stands alone among modern systems of law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract, even though the sole object may be to benefit him.

The Committee recommended that:

Where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third

¹⁰ SALMOND, JURISPRUDENCE 392 (11th ed.).

^{11 (1789) 3} Term Rep. 51.

¹² STONE, THE PROVINCE AND FUNCTION OF LAW 537-8 (1946 ed.); STREET, THE LAW OF TORTS 381 (2nd ed.).

party in his own name subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provides it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.¹³

This proposal is advocated in "Law Reform Now" published in 1964 and edited by the present Lord Chancellor, and is among the subjects in Item III of the first programme of the English Law Commission of July 1965.

It is doubtful whether the Law Revision Committee's recommendation provides the whole answer. There are many problems, some of which are discussed by Myers J. in the Australian Law Journal.¹⁴ In particular, these difficulties present themselves:

- (a) What express provision would be required in the contract sufficient to amount to an intention to benefit a third party?
- (b) Should such an expression of intention suffice to entitle the third party—
 - (i) Whether he is aware of the contract or not;
 - (ii) only where he has notice;
 - (iii) only where he has "adopted it";
 - (iv) and what constitutes "adoption"?
- (c) Should the promisee be entitled to raise against the third party any defences available to him against the promisor?
- (d) Is it practicable or desirable to limit the class of potential third party beneficiaries by restricting or defining the kind of benefits which a third party contract can confer?

It is submitted, however, that legislative consideration of some doctrine of third party rights is eminently desirable.

GORDON SAMUELS*

^{13 § 48.}

^{14 (1954) 27} A.L.J. 175.

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