CONTRACT AND BENEFITS FOR THIRD PARTIES

*LOUISE WILSON**

> "To lack privity is to have failed to achieve the requisite state of contractual grace."
>
> —F. Kessler and G. Gilmore, *Contracts and Materials*, (2nd ed. 1970) at 1117.

This article is concerned with the third person upon whom a contract purports to confer benefits. The orthodox premise of our law is that, not being a party to the contract, that person has no standing to bring proceedings to enforce performance of contractual obligations which are beneficial to him. It is only the contracting parties who may have rights conferred or obligations imposed on them by a contract.[1] This is the odd doctrine of privity of contract. It precludes third party enforcement even though it was the intention of the contracting parties that he benefit from their agreement.

Only that part of the privity doctrine which relates to conferral of benefits is the concern of this article. Third party enforcement of exemptions from liabilities is beyond its scope; the focus is performance obligations beneficial to a third party and not exemption obligations.[2]

There has been increasing recognition that where a contract is made for his benefit, a third party should have the right to enforce it. To this end, several exceptions to the privity doctrine have evolved. One, the trust of contractual rights exception, is considered in Part II. A different approach to third party enforcement is taken in the United States. There, as will be seen in Part III, the contract beneficiary doctrine allows a third party to enforce a contract where it is made for his direct benefit. In New Zealand and in two Australian jurisdictions, Western Australia and Queensland, legislation has been introduced which reforms the privity doctrine. These statutory reforms are discussed in Part IV.

I PRIVITY OF CONTRACT

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

---

* B.A., LL.B (Hons.) (A.N.U.)

[1] G. H. Treitel, *The Law of Contract* (5th ed. 1979) at 459.

[2] Consequently, that the Contracts (Privity) Act, 1982 (N.Z.) is immunity-concerned in addition to being benefit-concerned, is not addressed.

> knows nothing of *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*.[3]

Despite this reference to privity of contract as a fundamental principle, it would appear that its consolidation as such did not occur until the Nineteenth Century. Prior to then, third party enforcement was allowed. But only in some instances. It would seem that the cases formed two streams, the distinction between which apparently lay in the status of the third party. Enforcement of a covenant by a third party would be allowed where he was a donee.[4] On the other hand, where the third party was a creditor his enforcement was denied.[5] The cases fail to refer to any overt judicial policy that explains the reason for this differentiation. It is interesting to note that in the creditor cases enforcement was denied, to an extent, not on privity grounds but on consideration grounds.[6]

For modern purposes, the privity doctrine was established in English law in *Tweddle* v. *Atkinson*,[7] a decision the importance of which remains to this day. The plaintiff's father and father-in-law both agreed to pay certain sums of money to the plaintiff. The agreement was evidenced in writing and expressly provided that the third party-plaintiff was to have the right to sue on it. Regardless of this term and notwithstanding that the contract was specifically intended for the third party's benefit, his action failed, apparently for the reason that he had not provided any consideration. There was only a passing reference in the case, made by Crompton, J.,[8] to anything approaching privity:

> It would be a monstrous proposition to say that a person was a party to a contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued.

---

[3] *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847 at 853 *per* Lord Haldane.

[4] Cases decided in the mid-Seventeenth Century illustrate this: *Provender* v. *Wood* (1630) Met. 30; 124 E.R. 318; *Starkey* v. *Mill* (1651) Sty.296; 82 E.R. 723; *Sprat* v. *Agar* (1658) 2 Sid. 715; 82 E.R. 1287; *Hornsey* v. *Dimock* (1672) 1 Vent. 119; 86 E.R. 82; although it is clearly of much earlier origin: *Rookwood's Case* (1588) Cro. Eliz. 164; 78 E.R. 421; *Lever* v. *Heys* (1599) Moo. K.B. 740; 72 E.R. 751; *sub nom Levet* v. *Hawes* Cro. Eliz. 619, 652; 78 E.R. 860, 891; *sub nom Hadves* v. *Levet* (1630) Het. 176; 124 E.R. 433. In some cases the Courts employed an extended notion of consideration: *Dutton* v. *Poole* (1678) 2 Lev. 218; 83 E.R. 523 although this was not a mandatory requirement: *Marchington* v. *Vernon* (1787) 1 B. & P. 101n; 126 E.R. 801n.(c).

[5] *Jordan* v. *Jordan* (1595) Cro. Eliz. 369; 78 E.R. 616; *Bourne* v. *Mason* (1669) 1 Vent 6; 86 E.R. 5; *Crow* v. *Rogers* (1724) 1 Stra. 592; 93 E.R. 719; *Price* v. *Easton* (1833) 4 B. & Ad. 433; 110 E.R. 518. See S. Stoljar, *A History of Contract at Common Law*, (1975) at 138; A. L. Corbin, "Contracts for the Benefit of Third Persons" (1930) 46 *L.Q.R.* 12, at 17.

[6] In each of the cases cited *supra* note 5 the basis of the Court's decision was not lack of privity but that the third party was a stranger to the consideration: cf. *Bourne* v. *Mason* (1669) 1 Vent. 6; 86 E.R. 5 at 6. In *Price* v. *Easton* (1833) 4 B. & Ad. 433; 110 E.R. 518 only Littledale, J. based his refusal to allow the third party to enforce on the fact that he was not privy to the contract. It is worthy of note in passing that despite this he purported to follow *Crow* v. *Rogers*, (1724) 1 Stra. 592; 93 E.R. 719, a case based on failure to provide consideration.

[7] (1861) 1 B. & S. 393; 121 E.R. 762.

[8] *Id.* 764.

It would seem then, that the case "became important, not for what the judges said, but for what the legal profession came to believe the case stood for".[9] Nevertheless, the perceived privity requirement in *Tweddle* v. *Atkinson*[10] was followed repeatedly,[11] the doctrine receiving its reaffirmation and becoming entrenched in English law in 1915 in the House of Lords decision in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[12]

Following *Dunlop* it has become axiomatic that "no one can sue on a contract except those who are contracting parties and (if the contract is not under seal)[13] from and between whom consideration proceeds".[14] A qualification to this, as a result of *Coulls* v. *Bagot*,[15] is that where there are joint promisees there is no need for both to furnish consideration. Provided consideration is supplied by one of them, they will both obtain enforceable rights against the promisor. It should be observed that this is not, strictly speaking, a means of allowing third party enforcement as a joint promisee is obviously in privity because he is a party to the agreement.[16]

The privity doctrine not only denies a third party the right to enforce directly a contract the performance of which was intended for his benefit,[17] but also defeats a purpose for which the contracting parties entered their agreement. This is most apparent when remedies are considered. As the third party has no standing to sue on the contract, there are no remedies directly available to him should the promisor fail to render performance in his favour. He is dependent on the promisee's bringing action on his behalf[18] which, incidentally, the third party cannot compel. Even if proceedings are instituted there is no guarantee that the third party will receive any benefit for, although the contract between promisee and promisor is binding, the provision favouring the third party has a "special" effect on the available remedies.[19]

Specific performance, obviously, is the remedy which would be most effective in securing to the third party his intended benefit. But despite

---

[9] P. S. Atiyah, *The Rise and Fall of Freedom of Contract*, (1979).

[10] *Supra* n. 7.

[11] *In re Empress Engineering Co.* (1880) 16 Ch. D. 125; *Gandy* v. *Gandy* (1885) 30 Ch. D. 57, at 66-67; *Cavalier* v. *Pope* [1906] A.C. 428; *Cameron* v. *Young* [1908] A.C. 176.

[12] [1915] A.C. 847. (Hereafter *Dunlop*)

[13] A contract under seal, or a deed, does not require consideration: *Pinnell's* case (1602) 5 Co. Rep. 117; 77 E.R. 237. The reason for this lies in history—the solemnity of a written promise in times when few were literate was itself held sufficient to import consideration for a gratuitous promise. This rule has remained. However, a stranger who is not named as a party to a deed interpartes cannot sue on it: *Forster* v. *Elvet Colliery* [1908] 1 K.B. 629. This is so even though the deed be expressed to be for his benefit. This rule has been subjected to legislative modification, see s. 36C Conveyancing Act, 1919 (N.S.W.).

[14] *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70, at 79 *per* Lord Wright.

[15] (1967) 119 C.L.R. 460.

[16] Rather it is a qualification to the rule that consideration must move from the promisee, cf. Coote, "Consideration and the Joint Promisee" [1978] *Camb. L.J.* 301.

[17] *Hohler* v. *Aston* [1920] 2 Ch. D. 420.

[18] *Id.*; *Beswick* v. *Beswick* [1968] A.C. 58.

[19] *Chitty on Contracts*, (25th ed. by A. G. Guest, 1983) Vol. I para. 1233.

the general assumption today that it is "particularly appropriate"[20] in third party contract cases (for reasons relating to the inadequacy of damages as will be seen below), it appears to have been granted in only a handful of cases.[21] The decision of the House of Lords in *Beswick* v. *Beswick*[22] may signal a resurgence in its award—although it has been suggested that that decision notwithstanding, its availability in third party cases may remain limited by considerations affecting the remedy (e.g., lack of mutuality, hardship, etc.) which arise out of the promisor-promisee relationship.[23]

Damages has been the remedy sought in the majority of cases. But as the promisee is enforcing his own right under the contract any damages he recovers will represent his loss and not that of the third party. Thus, unless he can prove he suffered substantial damage, only nominal damages are recoverable.[24] Furthermore, the promisee does not hold any damages he may be awarded on trust for the third party,[25] so should he no longer wish to benefit the third party the latter is left out in the cold.

It was non-enforceability of contracts by third parties that formed the premise of *Jackson* v. *Horizon Holidays*[26] where the promisee was held entitled to recover for damages sustained by the third party as a result of the promisor's breach of contract. The decision was founded upon the often quoted passage of Lush, J. in *Lloyds* v. *Harper*[27] that

> Where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.

The use of this passage to avoid the rigors of privity was unanimously rejected in *Woodar Investment Development Ltd.* v. *Wimpey Construction U.K. Ltd.*[28] where the House of Lords opined that Lush, J. was confining his comments to the context of trusts.[29] Lord Wilberforce,[30] however, suggested that some contracts called for "special treatment" in which case

---

[20] See *Jacobs' Law of Trusts in Australia*, (5th ed. by R. P. Meagher and W. M. C. Gummow, 1986) at 22; see also Lindgren, Carter and Harland, *Contract Law in Australia* (1986) at 300.

[21] See *Beswick* v. *Beswick supra* n. 18 and the cases referred to therein at 89 *et seq*; see also *Baig* v. *Baig* [1970] V.R. 833.

[22] *Supra* n. 18.

[23] *Chitty on Contracts, op. cit.*, at paras. 1793-1802.

[24] *West* v. *Houghton* (1879) 4 C.P.D. 197; *Viles* v. *Viles* (1939) S.A.S.R. 164; *Coulls* v. *Bagot supra* n. 15, at 501 *per* Windeyer, J.; *Beswick* v. *Beswick supra* n. 18; *Baig* v. *Baig supra* n. 21, at 837. For situations where substantial damages may be recovered by the promisee see *Coulls* v. *Bagot supra* n. 15 at 501 *per* Windeyer, J., approved in *Beswick* v. *Beswick supra* n. 18 at 88 *per* Lord Pearce. See also *Albacruz (Cargo Owners)* v. *Albazero (Owners) (The Albazero)* [1977] A.C. 774 where the House of Lords held that the promisee could in the situation there recover for the third party's loss. This is, however, a very limited exception.

[25] *Coulls* v. *Bagot supra* n. 15, at 502 *per* Windeyer, J., approved in *Beswick* v. *Beswick supra* n. 18; contra Lord Denning in *Beswick* v. *Beswick* [1966] Ch. D. 538 at 554.

[26] [1975] W.L.R. 1468.

[27] (1880) 16 Ch. D. 290 at 321.

[28] [1980] 1 W.L.R. 277.

[29] Similar comments are found in *Coulls* v. *Bagot supra* n. 15, at 501 *per* Windeyer, J., approved in *Beswick* v. *Beswick supra* n. 18, *per* Lord Pearce at 88 and Lord Upjohn at 101. The basis of this opinion is that Fry, J. at first instance in *Lloyds* v. *Harper* (1880) 16 Ch. D. 290 saw the case as a trust case.

[30] *Supra* n. 28 at 283, and see Lord Russell at 293.

the promisee may recover for the third party's loss. He illustrated such contracts as ones where a taxi is hired for a group, meals ordered in restaurants for a party,[31] and where a family member booked a holiday on behalf of this family.[32] While mitigating the asperity of the rule that, in general, only nominal damages are recoverable, these instances do not ameliorate the denial of direct third party enforcement of contracts; the third party here is no less reliant on the promisee bringing the action.

The parlous position in which the privity doctrine places the third party is exacerbated by the ability of the contracting parties to mutually agree to vary or revoke their contract at any time.[33] However, unilateral revocation of their contract is not possible.[34] Thus, if the promisor is willing to perform his promise, the promisee cannot intercede and direct the benefit of the contract be performed in his favour, nor can he direct the third party to hold any benefit he has already received on the promisee's behalf.[35] But the benefit can be claimed by the promisee, his trustee in bankruptcy[36] or personal representative[37] where an interpretation of the contract indicates that the promisee did not intend another to have a better claim to the benefit of the contract than he does:[38] that is, where the "destination" of the benefit to be conferred by performance of the contract is a matter of indifference to the promisee.[39]

The harshness of the privity doctrine in overriding contractual intention was recogised in 1937 by the English Law Revision Committee.[40] The Committee recommended the enactment of legislation that would provide:

> . . . Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name provided that the promisor shall be

---

[31] See *Lockett* v. *A. & M. Charles Ltd.* [1938] 4 All E.R. 170 where the plaintiff was held entitled to recover damages for a meal which gave her food poisoning that was paid for by her husband. Tucker, J. implied a contract between the restaurant proprietor and the wife which he said the former breached by providing the sub-standard food. An alternative analysis of this case is that the plaintiff and her husband were joint promisees.

[32] The latter formed the fact situation of *Jackson* v. *Horizon Holidays supra* n. 26.

[33] *Cathels* v. *Commissioner of Stamp Duties* [1962] S.R. (N.S.W.) 455 at 457 *per* Sugarman, J.

[34] This follows from the rule that the promisor is "entitled as well as bound to perform his promise according to its terms": *Cathels* v. *Commissioner of Stamp Duties* [1962] S.R. (N.S.W.) 455; *In re Schebsman; Ex parte Official Receiver* [1943] Ch. 366 at 371-372 *per* Uthwatt, J., at first instance.

[35] *In re Stapleton-Bretherton, Weld-Blundell* v. *Stapleton-Bretherton* [1941] Ch. 482; *In re Schebsman; Ex parte Official Receiver* [1944] Ch. 83; *Cathels* v. *Commissioner of Stamp Duties supra* n. 34.

[36] *In re Schebsman; Ex parte Official Receiver supra* n. 35.

[37] *In re Stapleton-Bretherton, Weld Blundell* v. *Stapleton-Bretherton supra* n. 35.

[38] *Id.* at 486 *per* Simonds, J.; *In re Schebsman; Ex parte Official Receiver supra* n. 34 at 371 *per* Uthwatt, J.; *Cathels* v. *Commissioner of Stamp Duties supra* n. 34 at 459 *per* Sugarman, J., and at 475 *per* Else-Mitchell, J.; *Beswick* v. *Beswick supra* n. 18 at 71 *per* Lord Reid, and at 96 *per* Lord Upjohn.

[39] *In re Stapleton-Bretherton, Weld Blundell* v. *Stapleton-Bretherton supra* n. 35 at 486 *per* Simonds, J.; *Cathels* v. *Commissioner of Stamp Duties supra* n. 34 at 459 *per* Sugarman, J.

[40] Sixth Interim Report: "Statute of Frauds and the Doctrine of Consideration", 1937, Commd 5449, para 48. The Committee also recognised the failure of the doctrine to keep pace with commercial reality, particularly in the area of bankers' commercial credits. For a discussion see G. W. Bartholomew, "Relations Between Banker and Seller Under Irrevocable Letters of Credit" (1959) 5 *McGill L.J.* 89; M. C. Gutteridge and Megrah, *The Law of Bankers' Commercial Credits* (1979) at 24-28.

> entitled to raise against the third party any defence that would have been valid against the promisee. The rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.

As stated by the Committee,[41] the recommendation's implementation would grant the third party a contract right, not a trust right. This would permit direct enforcement of the contract by the third party and would remove the stringent intention test applied in the trust cases.[42] As these advantages would only be enjoyed by beneficiaries of contracts which complied with the recommendation the privity doctrine would not be abolished but simply suspended in certain cases.[43] As will be seen in Part IV this is precisely what has occurred in those jurisdictions that have legislated to allow third party enforcement of contracts. The recommendation leaves open the question of how direct the benefit to be conferred on the third party must be before he will be entitled to enforce a contract. This, as will be seen in Part III, has been a most controversial question in United States law.

Despite the limited scope of the recommendation, the expectation of its implementation may explain judicial inaction in the law of third party enforcement. Equally influential, however, may have been the acceptance by judges of privity as a basic principle of English contract law. Judicial exasperation with Parliamentary delay remained unexpressed for 30 years.[44] Lord Denning was not so patient. In 1949 he launched an assault on privity which he maintained for nearly twenty years. His efforts to allow third party enforcement were uniformly unsuccessful.[45]

Recent years have seen an increase in judicial expressions of dissatisfaction with the privity doctrine which are often accompanied by

---

[41] English Law Revision Committee Report *supra* n. 40 at para. 49.

[42] See Part II.

[43] This was highlighted by Mr Justice Myers, writing extrajudicially, when he said the recommendation would merely result in "the addition of another class of contract", "Third Party Contracts" (1953) 27 *A.L.J.* 175, at 177.

[44] This was not until *Beswick* v. *Beswick supra* n. 18 at 72 *per* Lord Reid: " . . . if one had to contemplate a further long period of parliamentary procrastination, this House might find it necessary to deal with this matter".

[45] Three different attacks on privity were made by Lord Denning. The first was founded upon the view that as there were pre-Nineteenth Century cases which had allowed third party enforcement, privity should not form part of modern contract law: *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500 at 514-515; *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [1954] 1 Q.B. 250 at 272. This view was criticised in *Green* v. *Russell McCarthy (Third Party)* [1959] 2 Q.B. 226 at 239-40; *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446 and in *Coulls* v. *Bagot supra* n. 15 at 496-499 *per* Windeyer, J. Lord Denning's second attack centred on an interpretation of s. 56(1) of the Law of Property Act, 1925 (England): *Smith & Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board supra* at 517; *Drive Yourself Hire Car Co. (London) Ltd.* v. *Strutt supra* at 274; *Beswick* v. *Beswick supra* n. 25. This was rejected by the House of Lords in *Beswick* v. *Beswick supra* n. 18 and had been previously rejected in Australia: *Bohn* v. *Miller Brothers Pty. Ltd.* [1953] V.L.R. 354, at 358; *Bird* v. *The Trustees, Executors and Agency Co. Ltd.* [1957] V.R. 619 at 622-23; *Cathels* v. *Commissioner of Stamp Duties supra* n. 34. The third attack was that a third party's right was one recognised by law and that if the promisee refused to bring the action the third party could do so himself joining the promisee as a defendant: *Beswick* v. *Beswick supra* n. 25 at 554, 557. This was rejected in *Beswick* v. *Beswick supra* n. 18.

suggestions that the Courts will act to overrule it if the legislature does not.[46] It can only be hoped that reform eventuates. Denial of third party enforcement in Anglo-Australian law has been condemned as "an anachronistic shortcoming"[47] and a "blot on the administration of justice".[48] As was stated by J. G. Starke nearly forty years ago[49] "one is driven to the conclusion that it owes its survival principally to tradition". As will be seen, difficulties in the way of achieving either judicial or legislative reform should not be underestimated.[50]

II TRUSTS OF CONTRACTUAL RIGHTS

Despite privity's entrenchment, several exceptions have been evolved that admit of third party enforcement.[51] That of present concern, is the trust of contractual rights. Reference to this trust as an exception to privity is a misdescription. It had been employed as a means of third party enforcement as early as 1756,[52] more than one hundred years before *Tweddle* v. *Atkinson*.[53] Third party creditors who, unlike third party donees, could not then enforce a covenant[54] were in some cases saved by the use of the trust device.[55] Thus, the trust device could really be said to have been an amelioration of the harsh stance taken in the early creditor cases.

A trust of contractual rights arises (a) where a party to an agreement which is intended to benefit a third party, contracts as trustee of the "benefit of the promise",[56] or (b) later declares himself trustee of the contractual rights. If such a trust is found to exist, the third party intended to benefit is seen as the beneficiary of the trust and is, consequently, conferred with rights enforceable in equity.[57]

Enforcement is, however, indirect only. While the third party action is in substance on the contract, it is in form taken through the medium of the trustee. Although the beneficiary is commonly referred to as having "the benefit of a promise",[58] or an equitable right in the subject of the

---

[46] *Beswick* v. *Beswick supra* n. 18, at 72 *per* Lord Reid; *Woodar Investment Development Ltd.* v. *Wimpey Construction U.K. Ltd. supra* n. 28 at 291 *per* Lord Salmon, 297-8 *per* Lord Keith, 300-301 *per* Lord Scarman. See also *Olsson* v. *Dyson* (1968) 120 C.L.R. 365 at 393 *per* Windeyer, J.

[47] *Swain* v. *Law Society* [1892] 2 All E.R. 827 at 832 *per* Lord Diplock.

[48] *Home Insurance Co.* v. *Ipec Holdings Ltd.*, unreported, N.S.W. Supreme Court, 25 Nov. 1983, at 15-16 *per* Rogers, J., a comment he repeated in *Oakeley Vaughan* v. *Ipec Holdings Ltd.* unreported, N.S.W. Supreme Court, 22 March 1984. These comments are similar to that of Dillon, J. in *Forster* v. *Silvermore Golf and Equestrian Centre* (1981) 125 *Sol. Jo.* 397.

[49] "Contracts for the Benefit of Third Parties" (1948) 21 *A.L.J.* 382, 422 at 426.

[50] See Parts III and IV.

[51] For example, the law of undisclosed principals, restrictive covenants relating to land.

[52] *Tomlinson* v. *Gill* (1756) Amb. 330; 72 E.R. 221.

[53] *Supra* n. 7.

[54] *Supra* n. 5.

[55] *Tomlinson* v. *Gill supra* n. 52; *Gregory & Parker* v. *Williams* (1817) 3 Mer. 582; 36 E.R. 224; *McFadden* v. *Jenkyns* (1842) 1 Phil. 153; 41 E.R. 589. *Wallwyn* v. *Coutts* (1815) 3 Mer. 707; 36 E.R. 272 represents an exception, however, there a trust was not found because the agreement was revocable.

[56] The nature of this benefit is discussed below.

[57] *Gregory & Parker* v. *Williams supra* n. 55; *Lloyds* v. *Harper supra* n. 29; *Gandy* v. *Gandy* (1885) 30 Ch. D. 57; *Les Affreteurs Reunis Societe Anonyme* v. *Leopold Walford (London) Ltd.* [1919] A.C. 801.

[58] *Tomlinson* v. *Gill supra* n. 52; *Gregory & Parker* v. *Williams supra* n. 55; *Robertson* v. *Waite* (1853) 8 Ex. 299; 155 E.R. 1360; *Les Affreteurs Reunis Societe Anonyme* v. *Leopold Walford (London) Ltd. supra* n. 57; *Bird* v. *The Trustees Executors and Agency Co. Ltd.* [1957] V.R. 619; *Green* v. *Russell, McCarthy (Third Party)* [1959] 2 Q.B. 226.

contract,[59] the trust is of the contractual right itself. This being a chose in action, confers no more on the third party than a right to sue on the contract, through the trustee.[60] Nonetheless, if the trustee will not sue on the third party's behalf the third party may bring the action. It, ordinarily, must be brought in the name of the trustee but if he is unwilling to support proceedings he must be joined as a co-defendant.[61] The requirement that the trustee be a party is necessitated because the third party's rights are equitable only. The person with the legal entitlement to the subject of the action, the promisee-trustee, must be before the Court[62] if only to bar him from bringing a subsequent action against the defendant.[63] This complicated procedural rule has been criticised, justifiably, as cumbersome[64] and clumsy.[65] It stands in contrast to the United States contract beneficiary doctrine, discussed in Part III, which recognises the creation in third parties of contract rights and permits their direct enforcement regardless of whether the promisee is joined. Nevertheless, the American Courts have developed a rule which will prevent double suit against the promisor.

The main advantage of a trust of contractual rights over a mere contract for the benefit of a third party is remedial. Should a trust of contractual rights be found substantial damages, representing the third party's loss, may be recovered[66] or specific performance of the contract ordered, if it is available.[67] This is so irrespective of whether the trustee brings the action himself or is merely joined as a party. Where the trustee does sue, any damages he recovers are held on trust for the third party.[68]

Intention

Through the gradual development of rigid rules noted below, the

---

[59] *Gregory & Parker* v. *Williams supra* n. 55; *Gandy* v. *Gandy supra* n. 57; *Edmison* v. *Couch* (1899) 26 O.A.R. 537; *Ryder* v. *Taylor* (1935) 36 S.R. (N.S.W.) 31.

[60] *Lloyds* v. *Harper supra* n. 29, at 309 *per* Fry, J.; *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; *Edmison* v. *Couch supra* n. 59.

[61] *Lamb* v. *Vice* (1840) 6 M. & W. 467; 151 E.R. 495; *Gandy* v. *Gandy supra* n. 57; *Edmison* v. *Couch supra* n. 59 at 537; *Royal Exchange Assurance* v. *Hope* [1928] Ch. 179; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70; *Harmer* v. *Armstrong* [1934] Ch. 65; *Ryder* v. *Taylor supra* n. 59; *Re Gordon, Lloyds Bank & Parratt* v. *Lloyd & Gordon* [1940] Ch. 851; *Purves* v. *Smith* (1944) 50 A.L.R. 269; *In re Schebsman; Ex parte Official Receiver supra* n. 35; *Concrete Constructions Pty. Ltd.* v. *Government Insurance Office of N.S.W.* [1966] 2 N.S.W.R. 609.

[62] It appears that prior to the Judicature Act 1873 (U.K.), 36 & 37 Vic. c. 66, the Equity Courts placed little significance on whether the trustee was before the Court: *Tomlinson* v. *Gill supra* n. 52 where the third party brought the action in his own name. However, with the fusion of common law and equity this indifferent attitude disappeared. *Les Affreteurs* v. *Walford supra* n. 57 represents an exception as the alleged trustees were not joined, however, the parties there agreed to proceed as if they were co-plaintiffs.

[63] *Performing Right Society* v. *London Theatre of Varieties* [1924] A.C. 1 at 14 *per* Lord Cave; *Harmer* v. *Armstrong supra* n. 61 at 82 *per* Lord Hanworth, M.R. at 93 *per* Romer, L.J.

[64] Lord Wright, "Williston on Contracts" (1939) 55 *L.Q.R.* 189 at 208.

[65] English Law Revision Committee, *Sixth Interim Report*, 1937 para. 43.

[66] *Lamb* v. *Vice supra* n. 61; *Robertson* v. *Wait supra* n. 58; *Pugh* v. *Stringfield* (1858) 4 C.B. (N.S.) 364; *West* v. *Houghton* (1879) 4 C.P.D. 197; 140 E.R. 1125; *Lloyds* v. *Harper supra* n. 29; *In re Parkin* [1892] 3 Ch. 510; *Re Cavendish Browne's Settlement Trusts, Horner* v. *Rawle* (1916) 61 *Sol. Jo.* 27; *Viles* v. *Viles* (1939) S.A.S.R. 164; *Prudential Staff Union* v. *Hall* [1947] K.B. 685.

[67] *Harmer* v. *Armstrong supra* n. 61.

[68] *Lamb* v. *Vice supra* n. 61; *Robertson* v. *Waite supra* n. 58; *Lloyds* v. *Harper supra* n. 29; *Gandy* v. *Gandy supra* n. 57; *Les Affreteurs Reunis Societe Anonyme* v. *Leopold Walford (London) Ltd. supra* n. 57; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York supra* n. 61.

Courts have become reluctant to hold that a trust of contractual rights has been constituted.[69] Although it is well established that there is no requirement that specific words be used to create a trust,[70] the Courts will not be astute to discover indicators of an intention to do so in this context.[71] "The intention to constitute the trust must be affirmatively proved" and will not necessarily be inferred.[72] Before the consolidation of this view the cases fluctuated as to whether there was a distinctive intention requirement. Some, for example, would allow a trust where the only intention present was that the third party benefit.[73] This attitude finds no place in modern Anglo-Australian law.

The initial indication that a distinct intention was required was in *Richards* v. *D'Elbridge*[74] where it was said that to declare a trust the settlor must employ words which clearly convey that that was his intention. This was followed in the context of trusts of contractual rights in *In re Caplen's Estate*[75] and in *In re Empress Engineering Company*[76] where, because it was said such words had not been used, it was held no trust had been created. It is interesting to note in passing that the latter two cases are similar factually to the third party creditor cases which, prior to *Tweddle* v. *Atkinson*,[77] denied third party enforcement of contracts,[78] but in which, until then, the judiciary had not shown any reluctance to infer an intention to create a trust.[79] Significantly, the initial restriction by the Courts of their lenient attitude towards finding trusts of contractual rights coincided with the establishment of privity.

The presence of the necessary "affirmative intention" is today determined by a construction of both the agreement between the contracting parties and the circumstances surrounding their entry into it.[80] The trust doctrine may be confined to a narrow compass but it at least looks to surrounding circumstances to divine intention.[81] The object of the

---

[69] *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.* (1955) 95 C.L.R. 43 at 67 *per* Fullagar, J.

[70] Equity looks to intention and not form: *Kekewich* v. *Manning* (1851) 1 De. G.M. & G. 176; 42 E.R. 519; *Page* v. *Cox* (1852) 10 Ha. 163; 68 E.R. 882; *Richards* v. *D'Elbridge* (1874) L.R. 18 Eq. 11; *In re Caplen's Estate* (1876) 45 L.J. Ch. 280; *In re Schebsman; Ex parte Official Receiver supra* n. 35.

[71] *In re Schebsman; Ex parte Official Receiver supra* n. 35 at 104 *per* Du Parcq, L.J.; *Tobin Tractor (1957) Ltd.* v. *Western Surety Co.* (1963) 40 D.L.R. (2d) 231, at 238 *per* Disbery, J.

[72] *Vandepitte* v. *Preferred Accident Insurance Corporation of New York supra* n. 61 at 79-80 *per* Lord Wright.

[73] *McFadden* v. *Jenkyns* (1842) 1 Phil. 153; 41 E.R. 589; *Moore* v. *Darton* (1851) 4 De. G. & Sm. 517; 64 E.R. 938; *Paterson* v. *Murphy* (1853) 11 Hare 88; 68 E.R. 1198; *Robertson* v. *Wait supra* n. 58.

[74] *Supra* n. 70 at 14 *per* Jessell, M.R.

[75] *Supra* n. 70.

[76] *Supra* n. 11.

[77] *Supra* n. 7.

[78] See *supra* notes 4 and 5.

[79] *Tomlinson* v. *Gill supra* n. 52; *McFadden* v. *Jenkyns supra* n. 73; *Moore* v. *Darton supra* n. 73; *Paterson* v. *Murphy supra* n. 73.

[80] *Gandy* v. *Gandy supra* n. 57; *Goodwin* v. *Goodwin* (1916) 16 S.R. (N.S.W.) 503; *Royal Exchange Assurance* v. *Hope supra* n. 61. *In re Sinclair's Life Policy* [1938] Ch. 799; *In re Gordon, Lloyds Bank and Parrat* v. *Lloyd and Gordon supra* n. 61. *In re Webb; Barclays Bank Ltd.* v. *Webb* [1941] Ch. 225; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York supra* n. 61; *In re Schebsman; Ex parte Official Receiver supra* n. 35; *Bird* v. *Trustees, Executors and Agency Co. Ltd. supra* n. 58; *Green* v. *Russell, McCarthy (Third Party) supra* n. 58; *Tobin Tractor (1957) Ltd.* v. *Western Surety Co.* (1963) 40 D.L.R. (2d) 231.

[81] As will be seen in Part IV the statutory reforms of privity are deficient in this respect.

inquiry is to ascertain first whether the words of the contract not only benefit a third party but also are capable of creating a trust, and secondly whether the contracting parties, or one of them,[82] intended that the words should have that effect. A mere beneficial intention toward the third party is insufficient.[83] It is as a result of this stringent intention test that many third parties who were intended in fact to benefit have been denied that advantage, irrespective of the strength of the beneficial intent. It can thus be said that the "trust intention" is an artificial limitation on the real intention of the contracting parties. Notably, it is only an intent to benefit that is required to confer standing on a third party under the United States contract beneficiary doctrine.

A class of case which aptly demonstrates the limiting effect of the trust intention involves policies of insurance and endowment. These cases have held repeatedly that, in the absence of a statutory trust being imposed,[84] the mere fact that an insurance or endowment policy is taken out for the benefit or on behalf of a third party does not create a trust in his favour, nor does the fact that any monies payable under the policy are expressed to be payable to him.[85] Thus, even where a third party is clearly intended to benefit that intent is of no consequence unless the additional intention to create a trust is also proved.

In re Sinclair's Life Policy[86] exemplifies this. A took out an endowment policy on his own life but on behalf of his godson, B. While acknowledging that A intended to benefit B in making provision for him by means of the policy, Farwell J. held that this was not sufficient to constitute a trust and, therefore, B had no entitlement to the policy money.[87] It belonged to A's estate. Under the United States contract beneficiary doctrine the issue would be whether the beneficial intention toward B was sufficient to enable him to enforce the policy directly,[88] so focussing on the true intent, that B benefit, and not on something to which the mind of A would only be addressed if he sought legal advice—the creation of a trust.

Insistence on the trust intent has also had the consequence that inconsistent decisions so abound that the outcome of a case cannot be

---

[82] In the cases involving a trust of the benefit of an insurance or endowment policy, the relevant intention is that of the "person who directed the insurance to be effected": *Vandepitte* v. *Preferred Accident Insurance Corporation of New York supra* n. 61 at 77 *per* Lord Wright.

[83] *Vandepitte* v. *Preferred Accident Insurance Corporation of New York supra* n. 61 at 77, 79-80 *per* Lord Wright; *Ryder* v. *Taylor supra* n. 59 at 48 *per* Nicholson, J.; *In re Schebsman; Ex parte Official Receiver supra* n. 34, at 89-90 *per* Lord Green, M.R.

[84] For example, s. 11 Married Women's Property Act, 1882 (U.K.) for s. 94 Life Insurance Act 1945 (C'th) which provide for a deemed trust of insurance policy money in favour of the spouse or children of the grantee where the policy is said to be for their benefit.

[85] See *Re Foster's Policy, Menneer* v. *Foster* [1966] 1 All E.R. 432 at 436 *per* Plowman, J.; *Cleaver* v. *Mutual Reserve Fund Life Association supra* n. 60; *Re Policy 6402 of Scottish Equitable Life Assurance Society* [1902] 1 Ch. 282; *Re Burgess' Policy; Lee* v. *Scottish Union and National Insurance Company* [1915] 113 L.T. 433; *In re Englebach's Estate; Tibbetts* v. *Englebach* [1924] 2 Ch. 348; *Re Webb; Barclay's Bank Ltd.* v. *Webb supra* n. 80; *In re Green Deceased; Green* v. *Green* [1949] Ch. 333.

[86] *Supra* n. 80.

[87] *Id.* 802,804.

[88] See Part III.

predicted with certainty:[89] "When the Courts wish to enable the beneficiary to sue they make the promisor (sic) a trustee, and when they wish to prevent him from doing so they fall back on the shibboleth of privity of contract."[90] In consequence, cases with similar fact situations often have different outcomes. *Williams* v. *Baltic Insurance Association of London*[91] and *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*[92] both involved a claim that an insurance policy covered a third party for damage sustained whilst the third party was driving the car of the insured. In both cases the policy contained a clause relating to third party risks. In the former but not in the latter a trust was found—the reluctance to find a trust in the latter being given no apparent explanation.[93]

The affirmative intention requirement has, of course, resulted in the maintenance of the stranglehold of the privity doctrine. Had the Courts continued to allow third party enforcement through use of the trust device when the only intent present was that the third party benefit, the argument that the device itself was fictitious had obvious justification.[94] By requiring the trust intent, the objection that privity was being eroded was rendered innocuous[95] and the possibility of Anglo-Australian law following the United States example where a third party was intended to benefit, was put to rest.

The limited scope that the trust has for aiding third parties, has been further restricted by an additional requirement emphasised in many—though not all—cases: a trust can only be found if the contractual rights, the subject of the trust, are not capable of variation or revocation without the third party's consent.[96] Irrevocability has here developed a significance not previously ascribed to it, for as Fullagar, J. indicated in *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.*[97] a trust, ordinarily, is no less a trust because it can be revoked. And there are, predictably, cases littered throughout the law reports where the ability of contracting parties to revoke their agreement without consent has been

---

[89] G. Williams, "Contracts for the Benefit of Third Parties", (1943) 7 *M.L.R.* 123, at 131; See *In re Garbett; Garbett* v. *Commissioner of Inland Revenue* [1963] N.Z.L.R. 384 at 393-395 *per* Leicester, J.

[90] Winfield, *Province of the Law of Tort* at 107, cited in G. Williams, *Id.* 131. The reference to promisor is an obvious error—it should be a reference to promisee.

[91] [1924] 2 K.B. 282.

[92] *Supra* n. 61.

[93] *Supra* n. 69 at 67 *per* Fullagar, J. In the three cases relied on in *Vandepitte* to support the affirmative intention requirement, *Robertson* v. *Wait supra* n. 58; *Lloyds* v. *Harper supra* n. 29, and *Les Affreteurs* v. *Walford supra* n. 57, proof of intention to create a trust was found in the fact that the contract was made "for the benefit and on behalf of the third party": *Lloyds* v. *Harper supra* n. 29 at 309 *per* Fry, J., endorsed on appeal *per* Lush, L.J. (See also *Tomlinson* v. *Gill supra* n. 52 at 222 *per* Lord Hardwicke.) There was no additional requirement that a trust be intended.

[94] A. L. Corbin, "Contracts for the Benefit of Third Persons", (1930) 46 *L.Q.R.* 12.

[95] *Id.* 20; see S. M. Waddams, *The Law of Contracts*, (1984) at 204.

[96] *Paterson* v. *Murphy supra* n. 73; *In re Caplen's Estate supra* n. 70; *In re Empress Engineering Company supra* n. 11; *Lloyds* v. *Harper supra* n. 29; *In re Flavell* (1883) 25 Ch. D. 89; *Gandy* v. *Gandy supra* n. 57; *Cleaver* v. *Mutual Reserve Fund Life Association supra* n. 60; *Foster* v. *Genowlan Shale* (1895) 16 L.R. (N.S.W.) Eq. 59; *Edmison* v. *Couch supra* n. 59; *Re Englebach's Estate* [1924] 2 Ch. 348; *Ryder* v. *Taylor supra* n. 59.

[97] *Supra* n. 69 at 67.

immaterial to the decision that there was a trust.[98] It is tempting to reject as wrong the significance attributed to the contractors' right to vary or rescind.[99] But it identifies, it is suggested, an important consideration.

If one finds a trust of contractual rights the ordinary, practical consequence will be that the contract will be incapable of revocation from its inception—not because of any rule of contract law, but because the promisee-trustee (as the third party's fiduciary) could only properly agree to a revocation where this is in the third party's interests. Given this consequence it is not surprising that irrevocability has commonly enough, been treated as a test of sufficiency of intention to create a trust; if a trust is found the contractors (but particularly the promisee) will have, in effect surrendered their "common law right to vary consensually" the agreement they have made.[100] And so the question whether a trust was intended can properly be said to be linked directly to the question whether the contracting parties intended to keep alive their "common law right". That question, as the insurance cases illustrate, would seem to be answered by asking whether the parties (but again particularly the promisee) have retained, or would have intended to retain, an interest in the contract, its subject matter, its terms or its duration—and hence have intended that they would be able to vary or revoke if so minded.[101] The insurance cases suggest that it was only if at some stage in the duration of the policy that the person taking it out lost the right to vary or revoke it or if the power of revocation or variation could only be exercised on the third party's behalf, that a trust would be found.[102] Otherwise, the policy, in order to create a trust for the third party, had to be irrevocable from its inception,[103] meaning that from that time the contracting parties had no interest in it.

It is necessary that a balance be maintained between the ordinary contractual freedoms of the parties and the interests of the third party to be benefitted. It is proper that if the promisee in particular retains an interest in the contract he should be able to protect it. Under the United States contract beneficiary doctrine and in the Queensland, West Australian and New Zealand statutory schemes, the contractors' right to revoke or vary freely is not lost simply by their entry into the contract. They retain this mastery over their agreement at least until the third party accepts or relies upon it.[104] In other words, they do not by the mere act

---

[98] *Page* v. *Cox supra* n. 70; *Vandenberg* v. *Palmer* (1858) 4 K. & J. 204; 70 E.R. 85; *Re Gordon, Lloyds Bank & Parratt* v. *Lloyd & Gordon supra* n. 61; *Re Webb, Barclay's Bank Ltd.* v. *Webb supra* n. 80.

[99] See e.g. *op. cit., supra* n. 20 at 26.

[100] Cf. *In re Schebsman supra* n. 35 at 104 *per* du Parcq, L.J.

[101] *Ibid.*

[102] *Re Webb, Barclay's Bank Ltd.* v. *Webb supra* n. 80; *Re Foster's Policy, Menneer* v. *Foster supra* n. 85.

[103] *Cleaver* v. *Mutual Reserve Fund Life Association supra* n. 60; *In re Englebach's Estate supra* n. 96; *Re Clay's Policy of Assurance* [1937] 2 All E.R. 548; *Green* v. *Russell, McCarthy (Third Party) supra* n. 58; *Cathels* v. *Commissioner of Stamp Duties supra* n. 34.

[104] There is some variation in this under the statutory schemes: see Part III.

of contracting surrender "their common law right" to vary their agreement.[105] The balance referred to above has thus been struck.

It is questionable, though, whether so much should be made to turn on the revocability or otherwise of the contract. But, perhaps, the true criticism is not of the emphasis placed upon revocability, but of the limitations of the trust device itself as an effective instrument for securing third party enforcement while at the same time reserving to the contracting parties some power to reconsider the arrangement they have made for the third party. The problem of revocation is returned to below in the discussion both of the United States contract beneficiary doctrine and of the statutory schemes. It is not a problem unique to trusts of contractual rights.

The longstanding concern of the Anglo-Australian Courts to restrict the application of the trust device to situations where an affirmative intention to create an irrevocable trust is demonstrated, suggests an adherence to a general policy that third party enforcement by means of the trust device is undesirable. But recently, in two decisions by Rogers, J. of the New South Wales Supreme Court[106] a more relaxed attitude was indicated. The cases arose out of common fact situations and are strikingly similar to *Lloyds* v. *Harper*.[107] Ipec wished to enter the reinsurance business in England. To avoid certain requirements of the English Board of Trade, it established a reinsurance company in Bermuda called Southlands. In order to give Southlands the appearance of being a secure company which would attract business from insurance brokers, Ipec had another company, B.F.L. Ltd., give all brokers considering reinsurance business with Southlands, a guarantee from Ipec. The third party seeking to enforce the guarantee was, in each case, the reinsured on whose behalf the brokers had acted as agents. It was held that as the admitted intention of the parties to the reinsurance transaction was to benefit the third party by the guarantee,[108] and as the commercial realities of the situation demanded that the benefit be conferred, a trust of the contractual right existed.[109] There are those who will restrict the *Ipec Cases* to their commercial context, arguing that they are simply other examples of a *Lloyds* v. *Harper*[110] situation. However, they may herald a greater preparedness to hold that a trust exists where an intention to benefit only is manifest.

The question remains, though, whether the trust device, in any event, is adequate to the third party problem. For as long as the "affirmative intention" requirement is retained the answer must be no. But if it is relaxed

---

[105] Cf. *In re Schebsman supra* n. 35 at 104 *per* du Parcq, L.J.

[106] *Home Insurance Co.* v. *Ipec Holdings Ltd. supra* n. 48; *Oakeley Vaughan* v. *Ipec Holdings Ltd. supra* n. 48.

[107] *Supra* n. 29.

[108] *Home Insurance* v. *Ipec Holdings Ltd. supra* n. 48 at 16; *Oakeley Vaughan* v. *Ipec Holdings Ltd. supra* n. 48 at 13.

[109] *Home Insurance* v. *Ipec Holdings Ltd. supra* n. 48 at 26-7; *Oakeley Vaughan* v. *Ipec Holdings Ltd. supra* n. 48 at 26.

[110] *Supra* n. 29.

in favour of a mere intention to benefit, one is confronted immediately with the question raised in United States law as to when such an intention should give standing to sue. While this question has everything to do with contractual intention it seems an inappropriate one to cast in terms of intention to create a trust. Furthermore, to be effective, third party enforcement should be direct and not merely indirect; the third party intended to benefit should be able to enforce that benefit without resort to "juristic subterfuges".[111] Again, as the following two parts will show, the stance taken in the trust cases to revocability is too crude to balance adequately the various interests of the contractors and of the third party.

III THE UNITED STATES CONTRACT BENEFICIARY DOCTRINE

Since the 1859 decision of the New York Court of Appeals in *Lawrence* v. *Fox*[112] the law in the United States relating to third party contracts parted company from that of England. It came gradually to recognise the ability of contracting parties to create an enforceable right[113] in a third person.[114] Today, in general, a third party in whose favour a contract is made may bring an action to enforce the contract in his own name, or to seek damages for its breach as if he were a promisee of the contract.[115] The third party is not required to be in privity with the contracting parties nor does he need to furnish consideration for the promise.[116] *Lawrence* v. *Fox*,[117] itself exemplifies this. A, who was indebted to C lent the amount of his indebtedness to B, B promising that he would discharge A's debt to C. When B failed to make any payment to C, C was held entitled to sue on the promise between A and B. Interestingly, this foundation case involved a third party creditor. It stands in contrast to the English case law before *Tweddle* v. *Atkinson*[118] which while allowing third party enforcement by a donee denied it to a creditor.[119]

Recognition of third party contract rights has been a gradual process, facilitated through either judicial decision or legislation.[120] Some States,

---

[111] *Supra* n. 47.

[112] (1859) 20 N.Y. 268, handed down two years prior to the decision in *Tweddle* v. *Atkinson supra* n. 7. References to American authorities will be cited in the orthodox English manner.

[113] The nature of this right is discussed below.

[114] See A. L. Corbin, "Contracts for the Benefit of Third Persons" (1918) 27 *Yale L.J.* 1008; A. L. Corbin, "Third Parties as Beneficiaries of Contractors Surety Bonds", (1928) 38 *Yale L.J.* 1 at 2.

[115] *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1951) Vol. 4 at 230-231, A. L. Corbin. Hereafter cited as 4 *Corbin on Contracts*; s. 304 of the *Restatement of the Law of Contracts (Second)*: "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce that duty".

[116] *Cory* v. *Troth* (1951) 170 Kan. 50; 223 P.2d 1008 *per* Thiele, J. at 1011; *Anderson* v. *Rexroad* (1954) 175 Kan. 676; 266 P.2d 320; *Peters Grazing Association* v. *Legerski* (1975) 544 P.2d 449 at 457 *per* Roper, J.

[117] *Supra* n. 112.

[118] *Supra* n. 7.

[119] See *supra* notes 4 and 5.

[120] *Seaver* v. *Ransom* (1918) 224 N.Y. 233; 2 A.L.R. 1187 *per* Pound, J. at 1190; see S. Williston, *A Treatise on the Law of Contracts*, (1959), Vol. 2 at 797 (hereafter cited as 2 *Williston on Contracts*) for a list of the legislation.

including New York, the birthplace of the third party contract rule,[121] had insisted initially on proof of what could be termed artificial or fictitious privity[122] between the third party and the contracting parties before third party enforcement would be permitted. This privity had its roots in various theories, one of which is notable for present purposes.[123] It involved the utilisation of the trust device so as to allow third party enforcement although only a mere intent to benefit was present.[124] However, growing acceptance of the third party or contract beneficiary doctrine has seen the demise of artificial notions of privity[125] and the evolution of the dominant view that "the absence of 'privity' is not sufficient reason for denying a remedy . . . . The mystery of privity remains, but it is no longer of much interest because court action is not much influenced by it."[126]

An early argument advanced against third party enforcement was the possibility that both the promisee and the third party would sue the promisor separately on the contract.[127] Proponents of this view considered it unfair that the promisor should be subjected to double suit when he only promised one person.[128] This notwithstanding, third party enforcement did develop but with the qualification that in the event of two actions being brought on the promise, there could be only one recovery.[129] If the promisee brings an action and recovers damages the promisor has a right to have them applied in favour of the third party.[130] Both Corbin[131] and Williston[132] have suggested that to avoid the possibility of double suit the promisor should ensure that all interested persons are joined in the suit. It is noteworthy that the problem of joinder of parties has also plagued the use of the trust device in Anglo-Australian law. It seems clear that to abandon privity and to allow third party suit

---

[121] It seems that for some time the doctrine of *Lawrence* v. *Fox, supra* n. 112 was severely restricted in New York in relation to donee beneficiaries by the requirement that there be some form of legal or moral obligation or duty owed to the third party by the promisee. *Pond* v. *New Rochelle Water Co.* (1906) 183 N.Y. 330; 76 N.E. 211; *Seaver* v. *Ransom* (1918) 224 N.Y. 233; 2 A.L.R. 1187. Recognition that this duty requirement has all but disappeared from New York law is found in *Lait* v. *Leon* (1963) 40 Misc. 2d 60; 242 N.Y.S. 2d 776, and was suggested in 1932: see Annot. 81 A.L.R. 1285.

[122] 4 *Corbin on Contracts*, para. 778 at 29-30.

[123] For a brief summary of the various theories see G. W. F. Dold, *Stipulations For a Third Party*, (1948) at 76-82.

[124] See 4 *Corbin on Contracts*, para. 794, at 137-139; Dold, *op. cit.*, 77.

[125] *Terry* v. *James* 140 Cal. Rptr. 201 at 206, although recognising that such was not the law in California.

[126] 4 *Corbin on Contracts* para. 778 at 29; and see 2 *Williston on Contracts*, para. 347 at 797. See also Corbin, "Third Parties as Beneficiaries of Contractors Surety Bonds", *supra* n. 114 at 3; Annot. 81 *A.L.R.* 1285. The last state to adopt the contract beneficiary doctrine was Massachusetts in 1969, see *Choate, Hall & Stewart* v. *S.C.A. Serv. Inc.* (1979) 392 N.E. 2d 1045; *Rae* v. *Air Speed Inc.* (1982) 435 N.E. 2d 628. Its law till then reflected that of Australia in its privity requirement.

[127] 4 *Corbin on Contracts* para. 824 at 286.

[128] 2 *Williston on Contracts* para. 392 at 1057. This argument lacked force as the attitude of many Courts has been that this possibility is not a cause of injustice to the promisor: 4 *Corbin on Contracts* para. 392.

[129] 2 *Williston on Contracts* para. 392.

[130] 4 *Corbin on Contracts* para. 824 at 288. This ensures, unlike under Anglo-Australian privity, that the third party will benefit from the contract even if the promisee decides he no longer wishes this. It is somewhat similar to, though not identical with, the Australian trust rule in its securing of the benefit for the third party.

[131] 4 *Corbin on Contracts* para. 810 at 235.

[132] 2 *Williston on Contracts* para. 400 at 1081.

without clarifying the enforcement procedure may still leave undesirable problems for all parties concerned. The proper solution may lie in the legislative regulation of suits on third party contracts which would allow only the third party to take proceedings.

The contract beneficiary doctrine is founded solely on contractual notions. It requires "a contract in which the promisor engages to the promisee to render some performance to a third person".[133] It is essential that this contract between the promisor and promisee be a valid, binding contract[134] supported by consideration.[135] And it is the contract itself which creates the third person's right.

Recognition of the contractual foundation of the third party's right is found in s. 309 of the *Second Restatement of the Law of Contracts* in its acknowledgement that "The right of a third person for whose benefit a promise is made is effected with all the infirmities of the agreement as between the parties thereto".[137] In other words, in any action on the contract by the third party, the promisor may raise any available defences that effect the validity or enforceability of the contract.[138] As will be seen in Part IV, in those jurisdictions where legislation has been enacted allowing third party enforcement of contracts, the third party's right is also vulnerable to the promisor's defences.[139]

In United States law the contract beneficiary's right is described as being both legal and equitable,[140] although it is seen as equitable simply

---

[133] *Sutherland* v. *Pierner* (1947) 24 N.W.2d 8833 at 886 *per* Rosenberry, C.J.; see 2 *Williston on Contracts* para. 347 at 792.

[134] *Cory* v. *Troth supra* n. 116 at 1011 *per* Thiele, J.; *United States* v. *Inorganics* (1953) 109 F.Supp. 576 at 580 *per* Taylor, J.

[135] *Myerson* v. *New Idea Hosiery Co.* (1928) 55 A.L.R. 1231, at 1236 *per* Brown, J.; *Re Quantius' Will* (1955) 277 P.2d 306. Without such contractual validity there can be no enforceable right created in the third party: 4 *Corbin on Contracts* para. 779J; 2 *Williston on Contracts* para. 364A.

[136] A view Williston resisted for some time. He originally resorted to an artificial privity as explanation for third party recovery. This is exemplified by his early view that a third party creditor's right to sue on a contract made for his benefit derived from his status as creditor of the promisee: 2 *Williston on Contracts* para. 364; see A. J. Waters, "The Property in the Promise: A Study of the Third Party Beneficiary Rule", (1985) 98 *Harv. L.R.* 1109, at 1165-1171 for a detailed analysis of Williston's transition from founding third party enforcement on privity notions to the view propounded by Corbin that it is the contract which creates the third party's right.

[137] *Myerson* v. *New Idea Hosiery Co., supra* n. 134 at 1236 *per* Brown, J. S. 309 of the *Second Restatement* provides:

> (1) A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.
>
> (2) If a contract ceases to be binding in whole or part because of impracticability, public policy, non-occurrence of a condition, or a present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.

[138] *United States* v. *Inorganics supra* n. 134 at 580 *per* Taylor, J.; *Rogue Valley Stations Inc.* v. *Birk Oil Co. Inc.* (1984) 568 F.Supp. 337; *Kennedy Associates Inc.* v. *Fisher* (1984) 667 P.2d 174. See 4 *Corbin on Contracts* para. 818 and 2 *Williston on Contracts* para. 394 for defences that may be raised. The rule that the promisor may raise such defences may be displaced if the third party can show he was induced to act in reliance on the contract and thereby raise an estoppel against the promisor: *Simmons* v. *Western Assurance Co.* (1953) 205 F.2d 815; *Aetna Insurance Co.* v. *Eisenburg* (1962) 294 F.2d 301. But it is worthy of note that if the contracting parties do not intend that the third party's right be subject to defences, the Court will give effect to this: *Schneider Moving & Storage* v. *Robbins* (1984) 104 S.Ct. 1844.

[139] This was also incorporated in the English Law Revision Committee's 1937 Recommendation, discussed in Part I.

[140] *Bush* v. *Upper Valley Telecable Co.* (1974) 524 P.2d 1055; *Peters Grazing Association* v. *Legerski* (1975) 544 P.2d 449; 4 *Corbin on Contracts* para. 779K.

for the purpose of his entitlement to specific performance and other equitable remedies. It is not equated with the right of a trust beneficiary whose right is proprietary.[141] Notions found in trust law did, however, influence the development of the third party rule.[142] But the orthodox view has for many years been that a third party's right is contractual, arising from the existence of a valid contract and not, as a trust analysis would suggest, from property.[143]

A recent contrary analysis in the context of an upsurge in actions brought to secure the benefit of statutory welfare programs through the medium of the contract beneficiary rule, described the third party's right as "a restitutionary right to intangible property—the benefit of a promise".[144] In these cases so it is argued the legislation is a contract capable of enforcement by those intended to benefit from the programs the Act introduces. This argument circumvents the rule that a plaintiff may succeed in establishing breach of statutory duty only if a cause of action is intended by the legislation. Curiously enough, that rule developed in American and Anglo-Australian law from the view that Acts of Parliament "were in effect contracts between the authority procuring the Act, on the one hand, and the legislature acting on behalf of the interested public on the other".[145] It is portentous that this notion of the contractual nature of legislation is now employed in America to avoid the very barrier it created. This has important implications for statutory regimes where similar developments in the law seem inevitable, although their desirability is a matter of debate.[146]

Third Party Standing

Despite the obvious justice and apparent simplicity of the contract beneficiary doctrine, inconsistent judicial decisions, both within and between states, have given rise to confusion and uncertainty.[147] The area in which this confusion has been most prevalent is in the determination of who is a third party contract beneficiary with the requisite standing to sue.

---

[141] 4 *Corbin on Contracts* para. 779A.

[142] Cf. *Lawrence* v. *Fox supra* n. 112 where Gray, J. overcame the objection that the third party there lacked privity by basing his recovery upon a principle of law previously applied in trust cases: "The principle illustrated by the example so frequently quoted (which concisely states the case in hand) that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach, has been applied to trust cases, but because it was a principle of law, and as such applicable to those cases"; cited in 4 *Corbin on Contracts* para. 779A at 34 n. 55. This passage should be compared with that of Lush, L.J. in *Lloyds* v. *Harper supra* n. 27.

[143] This view was propounded by Corbin as early as 1918: Corbin, "Contracts for the Benefit of Third Persons" *supra* n. 114. Although Gray, J. in *Lawrence* v. *Fox supra* n. 112 focussed on the unjust enrichment of the promisor, this notion did not have any significant influence on the contract beneficiary doctrine.

[144] Waters, *supra* n. 136 at 1201.

[145] P. D. Finn, "A Road Not Taken: The Boyce Plaintiff and Lord Cairn's Act; Part I" (1983) 57 *A.L.J.* 493 at 497.

[146] See R. H. Newman, "The Doctrine of Privity of Contract: The Common Law and the Contracts (Privity) Act 1982" (1980-83) 4 *Auck. Uni. L.R.* 339 at 347.

[147] *Tweeddale* v. *Tweeddale* (1903) 116 Win. 517; 93 N.W. 440 at 442 *per* Marshall, J.; 4 *Corbin on Contracts* para. 772; 2 *Williston on Contracts* para. 347.

Section 133 of the *First Restatement of the Law of Contracts* (1932)[148] delineated three categories of third parties—creditor,[149] donee[150] and incidental[151] beneficiaries, only the first two of whom could enforce a contract made for their benefit.[152] This categorisation of beneficiaries was an attempt to arrive at a formula that would permit ease and consistency of decision. It was a failure. A major problem was its inconsistent adoption by the judiciary. In the result third parties clearly intended to benefit from the contract were, in some Courts, denied any remedy on the basis that they were neither donee nor creditor beneficiaries. Other Courts allowed third parties to enforce the contract if they were intended to benefit although they fell within neither category.[153] This itself led to further confusion as to what were the criteria for determining a contract beneficiary and added to the wealth of contradictory decisions. In an attempt to resolve this the *Second Restatement of Contracts* (1979)[154] abandoned the tripartite categorisation and replaced it with the categories of intended and incidental beneficiaries. To these it applied an intent to benefit test. This in effect provides that in order to obtain enforceable rights under a contract, the onus is on the third party to prove that he was intended to benefit directly from performance of the contract. This intention is decisive in distinguishing incidental and intended beneficiaries; without a direct benefit the third party will be merely an incidental beneficiary and, therefore, have no enforceable rights.[155]

The intention test itself has not been effective in producing consistent decisions. It has not been assisted by the lack of guidance in the *Second Restatement* as to how it should be applied.[156] There have, thus, been divergent views as to what may be looked to in determining whether the requisite intent is there—the contract alone, or surrounding circumstances—and in determining whose is the relevant intention—the promisee's or

---

[148] *American Law Institute*, 1932.

[149] A creditor beneficiary is one who is owed an obligation by the promisee, or another, which would be discharged by performance of the contractual provision in his favour, cf. *Lawrence* v. *Fox supra* n. 112.

[150] A donee beneficiary exists where the promisee intends to confer a benefit on the third party by way of gift, cf. *Seaver* v. *Ransom supra* n. 121. This, for example, includes beneficiaries of life insurance policies, see 2 *Williston on Contracts* at 902.

[151] An incidental beneficiary does not stand to benefit directly from performance of the contract. "A typical case is where A promises B to pay him money for his expenses. Creditors of B are not generally allowed to sue A": 2 *Williston on Contracts* at 1088.

[152] 2 *Williston on Contracts* at 828. These distinctions are still referred to in the cases but not as a test of standing, merely as a means of identifying the type of promise in issue.

[153] 2 *Williston on Contracts* para. 356A at 839-40; D. M. Summers, "Third Party Beneficiaries and the Restatement (Second) of Contracts" (1982) 67 *Cornell L.R.* 880, H. G. Prince, "Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts" (1984) 25 *Boston College L.R.* 919.

[154] *American Law Institute*, 1979.

[155] *Smith* v. *Wilson* (1926) 9 F.2d 51; 4 *Corbin on Contracts* 53; H. G. Prince *supra* n. 153 at 933. S. 315 of the *Second Restatement*: "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee". The new terminology of the *Second Restatement* was suggested by A. L. Corbin in his 1951 Treatise on Contracts, vol. 4, para. 774, and the use of the test of intention in determining contract beneficiaries had been employed by the Courts as early as 1872: *Garnsey* v. *Rogers* (1872) 47 N.Y. 233; 7 Am.Rep. 940 cited in 4 *Corbin on Contracts*, para. 776 n. 21 and see other cases there cited; *Pennsylvania Steel Co.* v. *Cook* (1913) 198 F.721; *Johnson Farm Equipment* v. *Cook* (1956) 230 F.2d 119; *Camco Oil Corp.* v. *Vander Laan* (1955) 220 F.2d 897; Annot. 81 A.L.R. 1286.

[156] Summers, *supra* n. 153 at 891-892.

both parties. Surprisingly, the Courts have failed to address effectively these questions.

As to the first of these, forceful arguments have been advanced supporting the view that to confine to the contract alone the search for an intention that the third party benefit directly is too restrictive an approach that does not necessarily result in divining the true intention.[157] In contrast, some cases have held that this is exactly the test of intention that should be employed.[158] It is submitted that to look solely to the contract is an unreliable test and the view that surrounding circumstances should also be examined is preferable.[159] The trust doctrine, though limited, at least does this. A contract may not in its terms expressly purport to confer a benefit directly on a third party, yet this may be precisely what the contractors intended. In *Beckman Cotton Company* v. *First National Bank of Atlanta*[160] the third party plaintiff was not referred to in the contract (contained in a letter of credit) and yet it was the plaintiff who stood to gain from its performance. The United States Court of Appeals[161] was of the opinion that it was apparent from all the circumstances that the third party was an intended beneficiary. By way of contrast, the terms of a contract may give the appearance of an intention to confer a benefit on a third party. But if reference is made to surrounding circumstances it may become clear there is in fact no such actual intention.[162]

If the intention to benefit test is to be effective both in allowing third party enforcement and in minimising inconsistent decisions it is crucial that the true intention be implemented in each case. To insist on that intention being found in an express term of the contract can as the American experience demonstrates result in an actual intent to benefit being defeated. It is this requirement of an expressed benefit that may well prove to be a deficiency of the West Australian legislation discussed in Part IV. Furthermore, as has already been seen,[163] a strict insistence on a particular intention is what has caused the trust device to be viewed as a most unreliable and now seldom utilised means of third party enforcement.

The second major ground of uncertainty in determining third party standing is whose intention is relevant.[164] It is generally agreed that it is

---

[157] Note, "The Third Party Beneficiary Concept: A Proposal", (1957) 57 *Col. L.R.* 406; Summers, *supra* n. 153 at 898; Prince, *supra* n. 153 at 928-930. See also *Julian Johnson Construction Corp.* v. *Parranto* (1984) 352 N.W. 2d 808 at 811 *per* Leslie, J.; *Metro East Sanitary District* v. *Village of Sarget* (1985) 475 N.E.2d 1327.

[158] *Lake Havasu Resort Inc.* v. *Commercial Loan Insurance Corp.* (1983) 678 P.2d 950; *Bartley* v. *Augusta Country Club Inc.* (1984) 322 S.E.2d 749.

[159] Prince, *supra* n. 153 at 930.

[160] (1982) 666 F.2d 181.

[161] Fifth Circuit.

[162] See Prince, *supra* n. 153 at 929 where he compares *Beckman Cotton, supra* n. 160, with *Kary* v. *Kary* (1982) 318 N.W.2d 334, a case where, had the contract alone been examined to assess intention, the third party would have recovered.

[163] Part II.

[164] Much of the confusion in this aspect of the intention problem may have arisen from the view held by both Corbin (4 *Corbin on Contracts* para. 776) and Williston (2 *Williston on Contracts* para.

the promisee's intention that should prevail[165] as the promisor is often motivated to enter the contract by the consideration offered for his performance and not by a desire to benefit the third party.[166] Nevertheless, some jurisdictions insist on proof of both parties' intention before a third party will have standing. This view is supported by s. 302(1) of the *Second Restatement*.[167] Other jurisdictions require that the promisee intend the third party to benefit directly and that the promisor assent to that intention.[168] Recent juristic writings favour this view[169] on the basis that it requires that the promisee's intention must be clearly manifested as well as alerting the promisor to the possibility of enforcement of the contract by a third person.

A question a negative answer to which, for the most part, has been assumed in the United States is whether, in order to benefit the third party directly, it is necessary that a term of the contract provides that he is to have a right to sue on it. Some jurisdictions do so require.[170] This has some similarity with the tests of third party standing under the New Zealand and Queensland legislation discussed in Part IV. It is, however, in direct contrast with the foundation English case *Tweddle* v. *Atkinson*[171] in which the Court disregarded the expressed intention of the contracting parties that the third party should have a right to sue on the contract.[172]

A distinct test of third party standing to sue that has caught the critical eye of several commentators[173] is that contained in comment *d* to s. 302 of the *Second Restatement*. It provides, in part, that "if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him he is an intended beneficiary". What is unclear in the application of comment *d* is from whose perspective the reasonableness of the reliance is judged. It cannot be merely that of the third party. He should not be able to create rights in himself simply by relying on the contract.[174] The decisive factor is the intention to benefit

---

[164] *continued*
356A) that the promisee's intention was relevant only in donee beneficiary cases and of little consequence in third party creditor cases for the reason that in the latter the promisee's aim was to release his own obligation to the third party rather than to benefit him.

[165] *Goodman Marks Associates Inc.* v. *Westbury Post Associates* (1979) 420 N.Y.S. 2d 26; 4 *Corbin on Contracts* para. 776; 2 *Williston on Contracts* para. 356A.

[166] 4 *Corbin on Contracts* para. 776 at 16; Summers, *supra* n. 153 at 896.

[167] " . . . a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties . . ." Although the Restatements do not have the force of law, their impact on judicial decisions is enormous. Consequently, this view will find support for some time.

[168] *Lucas Han* (1961) 364 P.2s 685 cited in *Peters Grazing Association* v. *Legerski* (1975) 544 P.2d 449; see H. G. Prince, *supra* n. 153 at 931.

[169] Summers, *supra* n. 153 at 897; Prince, *supra* n. 153 at 932.

[170] K. S. Bruce, "Martinez v. Socoma Companies: Problems in Determining Contract Beneficiaries' Rights", (1975) 27 *Hastings L.J.* 137 at 145.

[171] *Supra* n. 7.

[172] 4 *Corbin on Contracts* para. 777 at 27 n. 41.

[173] C. L. Knapp, "Reliance in the Revised Restatement: the Proliferation of Promissory Estoppel", (1981) 81 *Col. L.R.*, 52; Summers, *supra* n. 153; Prince, *supra* n. 153

[174] 4 *Corbin on Contracts* para. 777B at 38-39; *Beverly* v. *Macy* (1983) 702 F.2d. 931 at 941 *per* Lanier Anderson, J.

the third party. The reliance test of comment *d* cannot be taken as suggesting that one ignores that intention, so determining third party standing, hence the effect of the contract, simply by reference to the reliant action of the third party.[175]

Variation or Discharge of the Promise

Can contracting parties revoke their agreement without the consent of the third party? While one would not wish to deprive them of the freedom enjoyed by other contracting parties, their ability to exercise their "common law right" must at some point at least be affected by considerations relating to the position of the third party. They should be able to revoke or vary freely the provision they have made when, for example, the third party is totally unaware of the provision in his favour. But the difficulty, of course, lies in determining when the third party has become so implicated in the agreement that it can be said that his right has vested irrevocably. Farnsworth[176] points to three different stances taken in the American cases as to when this should occur:

- the third party's right vests immediately the contract for his benefit is complete;[177]
- the third party obtains no irrevocable right until he has assented to the contract;[178]
- the third party must act in reliance on the contract before his rights vest.[179]

The first of these mirrors the situation which arises de facto in Anglo-Australian law where a trust of contractual rights is found. The second would seem to be premised on the idea that assent would have the effect of bringing the third party within the contract, thereby making him a necessary party to its revocation. The third of the above is essentially founded on principles of estoppel.

After a remarkably unsuccessful attempt in the *First Restatement* to identify when the third party's right should become irrevocable[180] the *Second Restatement* in its s. 311(3) has formulated tests which, in essence, embody the latter two situations (assent and reliance) identified by Farnsworth. Both of these, it is suggested, have clear justifications. Assent to the third party benefit can be seen as in effect an acceptance of the contractual provision that has been made and as such makes the irrevocable vesting of the third party's right rest upon principles analogous to those

---

[175] Summers, *supra* n. 153 at 894. For a contrary analysis see Note, "Third Party Beneficiaries and the Intention Standard: A Search for a Rational Contract Decision-Making" (1968) 54 *Virg. L.R.* 1166. A further criticism of comment d is that it is inconsistent with s. 90 of the *Second Restatement*, a provision concerned with the enforcement of voluntary promises: Knapp, *supra* n. 173 at 61 n. 59; Prince, *supra* n. 153 at 989.

[176] Farnsworth, *Contracts* (1982) at 738.

[177] *Tweeddale* v. *Tweeddale* (1903) 116 Win. 517; 93 N.W. 440.

[178] *Hughes* v. *Gibbs* (1960) P.2d 475; *Copeland* v. *Beard* (1928) 211 Ala. 216; 115 So. 389.

[179] *Morstain* v. *Kircher* (1933) 250 N.W. 727.

[180] See s. 142 *First Restatement*; 4 *Corbin on Contracts* para. 184.

already accepted in contract law,[181] i.e., offer and acceptance. The reliance basis for irrevocability has a quite different but nonetheless equally cogent justification. Having represented to the third party that a benefit is to be conferred upon him the contractors should not be allowed to resile from the representation where the third party has changed his position materially in justifiable reliance on it.[182]

But if justifications exist in these two situations there is not in the writer's view any like justification for the first of the three positions identified by Farnsworth. A third party who has neither accepted nor relied upon the provision in his favour has no such obvious immediate interest in that provision as would justify the contractors' loss of their right to vary. As was seen in Part II, in the context of trusts the Courts have been most reluctant to allow this situation to arise unless it was very clearly intended by the contractors themselves.

Any statutory modification of the privity doctrine, it is suggested, should as a matter of policy acknowledge that both assent and reliance provide proper and necessary justifications for when the third party's right should become irrevocable. Neither alone, it is suggested, is sufficient. But as will be seen in the following Part, the Australian and New Zealand legislative schemes for no apparent reason do not go thus far. In this all are defective.

The experience of the United States contract beneficiary doctrine indicates that third party enforcement does not destroy the entire fabric of contract law; as between the contracting parties the sanctity of the essentials for a valid contract, privity and consideration, is not undermined. Conferral on a third party of standing to enforce directly a contract made for his benefit effectuates the intention with which the contract is entered, surely a desirable result. While there are uncertainties in third party enforcement in the United States there is, nonetheless, a simplicity which stands as a shining example of how third party enforcement can be achieved.

IV STATUTORY REFORM OF THE PRIVITY DOCTRINE

Although the judiciary have criticised the privity doctrine,[183] they have left to the legislature the task of devising how third party enforcement should be achieved. Statutory reforms have taken place in West Australia, Queensland and, most recently, New Zealand.[184] Common to all three jurisdictions is the legislative purpose that a third party intended to benefit from the contracting parties' agreement may enforce that agreement directly in his own name.[185] However, third party standing to enforce a

---

[181] Comment h to s. 311(3) of the *Second Restatement*.

[182] Comment g to s. 311(3) of the *Second Restatement*.

[183] See Part I.

[184] S. 11 Property Law Act, 1969 (W.A.); s. 55 Property Law Act, 1974 (Qld.); Contracts (Privity) Act, 1982 (N.Z.).

[185] S. 11(2) Property Law Act, 1969 (W.A.); s. 55(1) Property Law Act, 1974 (Qld.); s. 4 Contracts (Privity) Act, 1982 (N.Z.).

contract varies between them, being dependent in each on the fulfilment of different conditions. In none has the privity doctrine been abolished outright.[186] It has merely been qualified to the extent that third party enforcement is allowed.

Enforcement by the Third Party

The Contracts (Privity) Act, 1982 (N.Z.) addresses third party enforcement of contracts or deeds[187] in a more systematic and comprehensive manner than the other two statutes. The provision most indicative of this is the definition of "benefit" in s. 2: it includes not only an advantage to the third party but also an immunity or limitation of his liability, an extension not made by the West Australian or Queensland legislation.[188] Apart from this provision and the New Zealand sections relating to discharge or variation of the promise,[189] the New Zealand and Queensland Acts are quite similar and deal with third party enforcement more systematically than the West Australian Act.

Queensland and New Zealand expressly provide that a third party intended to have enforcement rights need not be specifically named in the contract but may be described.[190] Both make provision for enforcement of either written or oral promises[191]—the West Australian Act is silent as to this.[192] And both allow third party enforcement by imposing an obligation on the promisor in favour of the third party—but only where the contracting parties intend that the third party be able to enforce the provision made in his favour.[193] This is, of course, a statutory reversal of the holding in *Tweddle* v. *Atkinson*.[194] The oddity of these Acts is that while third party standing is tied directly to intention, there would seem, nonetheless, to be a dual or at least two tiered intention requirement; the

---

[186] *Supra* n. 146 at 340; G. D. Pearson, "Privity of Contract: Proposed Reform in New Zealand" (1983) 5 *Otago L.R.* 316 at 331.

[187] Para. 7.2 of the New Zealand Contracts and Commercial Law Reform Committee, *Report on Privity of Contract* (1981) states that contracts and deeds should be within the ambit of the legislation. The Report refers to the Queensland legislation as "deficient" in not extending to deeds because of the requirement in s. 55(1) Property Law Act, 1974 (Qld.) that the promisee provide consideration. It should be noted, however, that s. 55(6)(c) defines 'promise' to include promises made by deed.

[188] The possibility of a third party invoking the aid of s. 55 of the Property Law Act, 1974 (Qld.) to take advantage of an exemption clause in a contract was acknowledged by the Queensland Law Reform Commission in its Working Paper No. 10. However, they did not expressly provide for such enforcement.

[189] Discussed below.

[190] S. 55(6)(b) Property Law Act, 1974 (Qld.); s. 4 Contracts (Privity) Act, 1982 (N.Z.). Both these sections countenance that contracts may be made for the benefit of unborn children or for the future holder of a particular office or status, however, the Queensland provision does require that the third party must be identified and in existence at the time of his acceptance of the contract. Section 4 of the New Zealand Act is unique in expressly stating that the third party to benefit may be referred to as a class although it is arguable that s. 55(6)(b) of the Queensland Act is equally extensive as it provides that a beneficiary includes a "person identified"; see Vroegop, "The New Zealand Contracts (Privity) Act 1982", (1984) 58 *A.L.J.* 5 at 6.

[191] S. 55(6)(c)(ii) Property Law Act, 1974 (Qld.); s. 2, definition of 'contract', Contracts (Privity) Act, 1982 (N.Z.).

[192] However, the requirement in s. 11(2) of an expressed benefit may mean that only written contracts are enforceable there: see Vroegop, *supra* n. 190 at 6.

[193] Ss. 55(1) and 55(6)(c)(ii) Property Law Act, 1974 (Qld.); ss. 4 and 8 Contracts (Privity) Act, 1982 (N.Z.).

[194] *Supra* n. 7.

agreement must be intended for the third party's benefit and it must also be intended that he be entitled to enforce that benefit. Absence of either will mean the privity doctrine will apply.

The dual intention test contrasts starkly with the test of third party standing employed in the United States contract beneficiary doctrine. Courts there have generally assumed that an enforcement intent is not necessary; an intention to benefit directly suffices. Even this has not been free from difficulty in application. One can only question why the Queensland and New Zealand legislatures have exacted more complex intention requirements—the more so when it cannot be assumed that contracting parties, though intending to benefit a third party, would necessarily (or ordinarily) advert to the matter of enforcement at all. The prospect of inconsistent and of arbitrary decisions seems inevitable.[195]

It should be noted in passing that s. 55 of the Queensland Act requires that before enforcement by the party can occur he must have accepted the contract.[196] The third party has no right at all until he has done so and communicated his acceptance to the promisor. It is odd that an acceptance requirement converts an initial contract intent into a contractual obligation.

Again in contrast with United States law, and for that matter with the trust doctrine, both Queensland and New Zealand restrict the inquiry as to intention to the contract alone. Surrounding circumstances thus being disregarded, the prospect of ascertaining the true intent is accordingly diminished—a situation compounded, if as suggested above, the "enforcement" as opposed to the "benefit" intent will have to be inferred in many instances.[197] The West Australian legislation is similarly defective in requiring that the intention to benefit the third party be expressed in the contract.[198] However, it more closely approximates with United States law in that proof only of intention to benefit the third party directly is necessary to confer standing on him. There is no additional enforcement intention required.

It is suggested that the West Australian direct benefit requirement will in all probability involve the Courts in that jurisdiction in an inquiry similar to that raised in the United States under the intended beneficiary doctrine.[199] But it is also probable that the question of who is an

---

[195] *Supra* n. 146 at 344.

[196] S. 55(6)(b) defines acceptance as "assent by words or conduct by or on behalf of the beneficiary to the promisor or to some person authorised on his behalf".

[197] In the absence of an express term allowing enforcement, the Court must construe the contract to find the requisite intents: implicit in s. 55(6)(c)(ii) Property Law Act, 1974 (Qld.); proviso to s. 4 Contracts (Privity) Act, 1982 (N.Z.). See also the New Zealand Contracts and Commercial Law Reform Committee, *Report on Privity of Contract*, 1981.

[198] S. 11(2) Property Law Act, 1969 (W.A.). This section obviously adopts para. 48 of The English Law Revision Committee's Recommendation *supra* n. 40.

[199] Thus far, there has been no indication of what will be within the spectrum of an express direct benefit. In *Westralian Farmers Co-operative Ltd.* v. *Southern Meat Packers Ltd.* [1981] W.A.R. 241, the only case to interpret s. 11(2), the contract was in writing and the benefit to the named third party, clear and unequivocal. Thus the Court did not address the directness problem. For a discussion of the case see J. Longo, "Privity and the Property Law Act: *Westralian Farmers Co-operative Ltd.* v. *Southern Meat Packers Ltd.*" (1983) 15 *W.A.L.R.* 411 and A. Siopsis, Note, (1983) 57 *A.L.J.* 640.

intended beneficiary will be an issue in Queensland and New Zealand.[200] Although there is no express requirement in those jurisdictions for a direct benefit, simply because a contract benefits a third party does not necessarily mean he will have automatic standing to enforce. The Courts will undoubtedly employ a test of remoteness of the benefit so that those who stand to benefit only remotely will be held to be outside the bounds of the Acts. This remoteness test may, in fact, give meaning to the two intention tests. If so, they could produce *de facto* the same outcome as the United States contract beneficiary doctrine, thereby rendering the United States experience in this aspect relevant to all three statutory regimes.

As with the situation in the United States, all the Acts fail to answer specifically the question of whose intention is relevant. It would seem that provided the contract confers a (direct) benefit on a third party, from whom this beneficial intention emanates is largely irrelevant.[201] The United States experience suggests this is a matter which the legislation should have addressed.

Variation and Discharge

Certain restrictions are placed on the ability of the contracting parties to vary or discharge the third party provision and thereby defeat the right acquired by the third party. Each Statute deals with this differently.

In Queensland, on the third party's acceptance of the contract, the power of the contracting parties to vary or discharge the provision without the third party's consent ceases.[202] Thus, acceptance has the dual effect of giving an enforceable right[203] and of making it irrevocable. In West Australia it is with the third party's adoption of the contract that the power to vary ceases.[204] Significantly, adoption does not need to be communicated to the promisor.[205]

It is surprising that these two jurisdictions have opted for single tests of the time at which a third party's right becomes irrevocably vested, particularly as the United States contract beneficiary doctrine utilises several which incorporate variously both the idea of acceptance of the contract and that of reliance upon it without the need for acceptance.[206] The restrictive approaches of Queensland and Western Australia may have detrimental effects on third party rights if 'adoption' and 'acceptance' are

---

[200] *Supra* n. 146 at 346.

[201] Although s. 55(1) of the Queensland Act implicitly indicates that it is the intention of the promisee only that matters.

[202] Ss. 55(2), 55(3)(d).

[203] See *supra* n. 196 and accompanying text.

[204] S. 11(3).

[205] In *Westralian Farmers supra* n. 199, the promisor-buyer argued that by his direct payment of the promisee-seller their contract had been varied by their mutual consent prior to any act of adoption by the third party-agent. The Court rejected this, holding that third party adoption of the contract occurred by conduct when he credited the promisee-seller's account with the purchase price less commission; *per* Burt, C.J. at 246; *per* Kennedy, J. at 251. Kennedy, J. added that the third party may have adopted the contract at the moment he entered it as the promisee's agent.

[206] Part III.

interpreted narrowly. Third parties who, aware that the contract is made for their benefit, act in reliance on it, stand to lose their right completely or have it varied if their reliance is not held to fall within the scope of the terms employed in the Acts. There is, however, a possibility that West Australia's 'adoption' will be given a sufficiently wide interpretation to include all the United States alternatives. The Queensland requirement of 'acceptance' being communicated to the promisor may preclude this.

The New Zealand Act provides a more comprehensive scheme relating to variation or discharge of the contract. It is quite similar to the United States model.[207] Sections 5, 6 and 7 attempt to ensure that neither the contracting parties nor the third party are disadvantaged in this respect. Section 5 provides that the contracting parties may vary or discharge the promise giving rise to the obligation of the promisor, imposed by s. 4, without the consent of the third party at any time until:

(a) the third party materially alters his position by reliance on the promise or as a result of another's reliance on the promise;[208]
(b) the third party obtains judgement against the promisor on the promise;
(c) the third party obtains the award of an arbitrator against the promisor on the promise.

The Act further provides for variation with consent[209] or on certain conditions, under an express contractual provision.[210]

One of the most unusual features of the New Zealand Act is the ability of either of the contracting parties to apply to the Court for an order authorising variation or discharge of the promise or obligation or both, where otherwise such variation would breach s. 5(1)(a) or it is uncertain whether it would.[211] What makes this provision unusual is the power of the Court to impose any terms and conditions it thinks fit—an inroad into contractual freedom, although obviously designed to protect the contracting parties.[212] The New Zealand Contracts and Commercial Law Reform Committee[213] was of the opinion that s. 7 would be invoked when the third party could not be located. Section 7 could also be utilised where factors affecting performance of the contract change thus making performance by the promisor more onerous.[214]

---

[207] See discussion of s. 311 of the *Second Restatement* (1979) in Part III.

[208] Such a situation could be where the third party or his spouse spend their money freely in the knowledge that when X dies the third party will benefit from an insurance policy on X's life. For the purposes of the other two situations, s. 5(2) clarifies that it is not the sealing of an order, for example, but the actual delivery of the judgment that is the time at which contracting parties lose their right to vary. Injustice may occur as a result of para. 5(1)(b). See Pearson, *supra* n. 186 at 333. An obvious solution would be to follow the United States example whereby the actual bringing of suit on the promise by the third party terminates the contracting parties power to vary.

[209] S. 6(a).

[210] S. 6(b).

[211] S. 7(1). The Court will only make such an order if it is just and equitable to do so.

[212] For a contrary analysis see *supra* n. 146 at 355.

[213] *Report on Privity of Contract* (1981) at 63.

[214] A and B contract that B will send $100.00 to C in Australian currency. The exchange rate changes such that for B to perform his promise he would have to expend $175.00.

Section 7(2) protects the third party's interest. In the event that the third party or another has injuriously relied on the promise prior to the application to the Court. It provides that the Court shall make it a condition of its order that the promisor is to compensate the third party "such sum as the Court thinks just". This power of the Court to order compensation for the third party's injurious reliance highlights the underlying purpose of the variation rule, protection of the third party interest.

Two final points should be noted about the legislation of the three jurisdictions. First, following both the English Law Revision Committee's Recommendation[215] and the United States contract beneficiary doctrine, all Acts while giving the third party an enforceable right, do not deprive the promisor of defences he might have which would defeat enforcement of the contract.[216] Secondly, the statutory enforcement right has exactly the same effect as under the American beneficiary doctrine; the promisor is subject to two duties, each of which may be enforced against him.[217] Only the West Australian legislation expressly requires joinder of both contracting parties in any action on the promise,[218] thus removing the possibility of several actions being brought. That prospect remains in New Zealand and Queensland whose Acts fail to address the issue of joinder of parties.

The Acts stand as recognition that third party enforcement should be allowed; that in this respect contract law has been defective. But despite the positive step they take towards effectuating contractual intention, it is obvious that the legislative steps taken are limited,[219] are in some respects arbitrary,[220] and are not without their own difficulties.[221] It can only be hoped that future legislative reform of privity improves upon these deficient attempts and in so doing considers more closely the lessons to be learned from United States law.

---

[215] *Supra* n. 40.

[216] S. 11(2) Property Law Act, 1969 (W.A.); s. 55(4) Property Law Act, 1974 (Qld.); s. 9 Contracts (Privity) Act, 1982 (N.Z.). In this respect all the Acts are similar in not restricting the nature of defences that may be raised to only those arising out of the contract, cf. Vroegop, *supra* n. 190 at 6. Interestingly though, in New Zealand the promisor may raise against the third party set-offs or counterclaims arising out of the contract: ss. 9(2), 9(3) Contracts (Privity) Act, 1982 (N.Z.). See also *Westralian Farmers supra* n. 199 where the promisor sought to raise the statutory saving of defences in s. 11(2)(a) Property Law Act, 1969 (W.A.) by arguing that although s. 11(2) reformed privity it did not remove that requirement that a person must provide consideration before he can enforce a contract. The Court rejected this, *per* Burt, C. J. at 245; *per* Kennedy, J. at 251 thereby reinforcing the view that it is privity and not lack of consideration that is the bar to third party enforcement despite the view of the pre-*Tweddle* v. *Atkinson* cases: *supra* n. 7.

[217] See *supra* n. 146 at 342.

[218] S. 11(2)(b). Nevertheless, joinder of parties does not solve the problems that can arise from the promisor's wrong performance: see *Westralian Farmers supra* n. 198 and Siopsis *supra* n. 199 at 641. Because in the statutory environment the promisor's duty to the third party remains alive where he renders wrong performance he may have to perform twice. To avoid this consequence the promisor should look for remedies in restitution, in particular, payment of money or rendering of services under mistake: See Goff and Jones, *The Law of Restitution*, (2nd ed. 1978) at 69-77.

[219] C.f. the requirement of an expressed intention of direct benefit in West Australia: s. 11(2).

[220] C.f. the different circumstances when the third party's right becomes irrevocable in Queensland and West Australia.

[221] E.g. finding of an enforcement intent in Queensland and New Zealand.

Conclusion

The American contract beneficiary doctrine has allowed direct third party enforcement in a simple manner which implements contractual intention. It is an example to be followed in Anglo-Australian law. The question is how this would best be achieved.

Privity is regarded in our contract law as a kind of "mystical absolute".[222] Judicial exasperation with the doctrine has been expressed for many years but attempts to remove it have been rejected.[223] It seems that we must look to the legislature for change. The prime objective of any legislation must be the implementation of contractual intention that a third party benefit. United States law demonstrates that this is best achieved by conferral on the third party of a contract right which will allow him to enforce the contract directly. Indirect third party enforcement is not a viable solution.

As the United States experience has shown, the third party benefit is often immaterial to the promisor. He is, more often than not, motivated to enter the contract by the consideration offered. It is, thus, submitted that there be a requirement that only the promisee intend the third party to benefit; to the extent that the promisor's intention is relevant it should only be necessary to show that he has assented to that intention. Of course, the directness of the benefit is crucial. Automatic standing to enforce a contract should not be granted to a third party who will benefit only remotely. Accordingly, a test similar to the United States intended beneficiary doctrine should be employed in order to filter out mere incidental beneficiaries. There should not, however, be a requirement that the direct benefit be expressed in the contract as is the situation under s. 11(2) Property Law Act, 1969 (W.A.). Such a restrictive test of standing may well defeat the actual intention of the contractors, so undermining the Act's purpose. Surrounding circumstances must be open to examination. The American contract beneficiary doctrine and the law of trusts of contractual rights allow for this. There is no reason why Anglo-Australian third party contract law should not.[224] Determination of whether a benefit will be direct will necessarily involve questions of judicial interpretation of the place of the third party in effectuation of contractual purpose. Some interpretative flexibility is necessary, as too prescriptive an approach will deprive the Court of freedom "to identify and evaluate for itself the relevant factors";[225] a balance of judicial creativity and rigid statutory guidelines is desirable. Furthermore, the possibility of double suit against the promisor should be addressed specifically. The legislation should require joinder to the action of all contracting parties.[226]

---

[222] Treitel, *op. cit.*, 1117.

[223] See Part I.

[224] Though this may result in some changes to the ordinary rules of construction of written contracts.

[225] Sir Anthony Mason, "Themes and Prospects" in *Essays in Equity*, P.D. Finn (ed.) (1985) at 224.

[226] As does s. 11(2)(b) *Property Law Act*, 1969 (W.A.).

Recognition of third party contract rights should not be to the detriment of contractual freedom. But equally as important, contracting parties should not be at liberty to destroy totally the third party's right whenever they choose. There must be a point, stipulated in general terms, at which third party action on the contract renders variation or revocation of the promise impermissible without his consent. The United States and New Zealand models illustrate that this is best achieved by the utilisation of several tests that determine when that point is reached. Whether these tests of when a third party's right is irrevocably vested should be incorporated in legislation or left to the judiciary to determine through the application of estoppel and contract notions is an open question. The latter has been successful in the United States but there guidelines provided in the *Restatements* have been influential. The solution may be in legislation which adopts the *Second Restatement*'s tests.[227]

Where there is a manifest intention in a contract that a third party benefit, his standing to enforce that contract should surely be recognised. But in achieving that end one must have criteria that will achieve consistency of decision. Simplicity is the linchpin. Although it, itself, is limited by the requirements that the benefit be found in the contract, the West Australian Act is closest to my view. It is not as problematic as the Queensland and New Zealand legislation.

---

[227] S. 311—see Part III.