



**THE HISTORY OF THE BENEFICIARY ACTION AND THE NEED FOR
REFORM OF THE PARTIES-ONLY RULE IN MALAYSIA**

by

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DECLARATION

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person where due reference is not made in the text.

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BIBLIOGRAPHY

1. A.W.B. Simpson, "A History of the Common Law of Contract", 1975, Oxford University Press
2. A.W.B. Simpson, "An Introduction to the History of Land Law", 1961, Oxford University Press
3. Adam Smith, "Lectures on Jurisprudence" 1978, Oxford University Press

4. Andrew Phang Boon Leong, "Cheshire, Fifoot and Furmston's Law of Contract (2nd Singapore & Malaysian Edition), 1998, Butterworths
5. Arthur L. Corbin, "Corbin on Contracts", 1951, West Publishing
6. Arthur L. Corbin, 1930, 46 L.Q.R. 12
7. Christopher St. German, "Doctor & Student", 1974, Plucknett & Barton, London
8. Crawford D. Hening, "History of the Beneficiary's Action in Assumpsit", 1909, Little, Brown
9. David Hume, "Treatise of Human Nature", 1800, Edinburgh
10. E.R. Hardy Ivamy, "Mozley and Whiteley's Law Dictionary", 1988, Butterworths
11. Ernest H. Scammel, "Privity of Contract", 1955, 8 Current Legal Problems 131
12. Francis B. Tiffany, "Handbook of the Law of Principal & Agent", 1903, West Publishing
13. G.H. Treitel, "The Law of Contract", 1995, Sweet & Maxwell
14. George Spence, "The Equitable Jurisdiction of the Court of Chancery", 1850, Spence & Norton
15. George W. Hegel, "Philosophy of Right", 1942, Knox translation
16. Hening, 1905, 53 Amer. L. Reg. 112
17. Henry Maddock, "A Treatise on the Principles and Practice of the High Court of Chancery", 1822, Cooke
18. J.A. Andrews, "Section 56 Revisited", 1959, 23 Conveyancer and Property Lawyer 179
19. J.H. Baker, "An Introduction to English Legal History", 1979, Butterworths
20. J.H. Baker, "The Use Upon a Use in Equity 1558-1625", 1977, 93 L.Q.R. 33
21. James B. Ames, "Lectures on Legal History", 1913, Harvard University Press
22. Jean Brissaud, "A History of French Private Law", 1968, AALS reprint
23. John Adams and Roger Brownsword, "Privity of Contract—That Pestilential Nuisance", 1993, 56 M.L.R. 722

24. John J. Powell, "Essay Upon the Law of Contracts and Agreements", 1790, Chamberlain & Rice
25. Lord Trayner, "Trayner's Latin Maxims", 1894, W Green & Son
26. P.S. Atiyah, "Promises, Morals and Law", 1981, Oxford University Press
27. P.S. Atiyah, "Rise and Fall of Freedom of Contract", 1979, Oxford University Press
28. Paul Vinogradoff, "Reason and Conscience in the Sixteenth Century Jurisprudence", 1908, 24 L.Q.R. 373
29. Peter Kincaid, "The UK Law Commission's Privity Proposals and Contract Theory", 1994, 8 J.C.L. 51
30. Richard M. Jackson, History of Quasi-Contract in English Law, 1936, Cambridge University Press
31. Robert J. Pothier, "A Treatise on the Law of Obligations", 1853, Small
32. S.F.C. Milsom, "Historical Foundations of the Common Law", 1969, Butterworths
33. S.J. Stoljar, "A History of Contract at Common Law", 1975, Australian National University Press
34. Samuel Livermore, "Law of Principal and Agent", 1813, Baltimore
35. Sir Edward Coke, "A Commentary upon Littleton", 1794, Brooks
36. Sir Frederick Pollock, "Principles of Contract", 1881, Clarke
37. Sir Frederick Pollock and Frederick Maitland, "The History of English Law", 1968, Cambridge University Press
38. Sir John Comyns, "A Digest of the Laws of England", 1822, Strahan
39. Sir William Anson, "Principles of the English Law of Contract", 1887, Callaghan
40. Sir William Blackstone, "Commentaries on the Laws of England", 1858, Tappin
41. The Interpreter, 1607, Cambridge
42. The Law Commission Consultation Paper No. 121, 1991, London, HMSO
43. Theodore F.T. Plucknett, "A Concise History of the Common Law", 1956, Little, Brown

44. Thomas A. Street, "Foundations of Legal Liability", 1906, Thompson
45. Willard T. Barbour, "The History of Contract in Early English Equity", 1914, Oxford University Press
46. William W. Story, "A Treatise on the Law of Contracts Not Under Seal", 1844, Little, Brown
47. Wingate, "Maxims of Reason", 1980, Garland Publishing

CHAPTER 1

INTRODUCTION

Privity of contract is a doctrine that is fundamentally entrenched in the larger part of the common law world. The doctrine has been the cornerstone of English contract law since the House of Lords firmly ingrained the doctrine as part of English common law in the case of Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847.

The doctrine of privity of contract in England encompasses two propositions. Firstly, only a party to a contract can acquire rights under it and consequently, sue to enforce any right under the contract. Secondly, for a contract to be enforced by a person, consideration must have been given by him to the promisor or to some other person at the promisor's request. A person who is neither a party to a contract nor has provided any consideration for it is deemed to be a third party who has no enforceable right in the contract since the law does not admit the a right vested in a third party. Viscount Haldane LC, in his speech in Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847, explained:

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quæsitum 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. A second principle is that if a person with who a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.

It is generally accepted in leading texts and treatises on contract, that the doctrine of privity of contract in England, prior to it being abolished by the Contracts (Rights of Third

Parties) Act 1999, was first established by the case of Tweddle v. Atkinson (1861) 121 ER 762. The law of contract in Malaysia is governed by the Contracts Act 1950. However, the Malaysian Courts have placed great reliance on the principles of common law established in England to supplement the Contracts Act 1950. Although the Contracts Act 1950 makes no mention of the doctrine of privity of contract, the doctrine is applied in Malaysia.

This is evident from the decision of the Privy Council in Kepong Prospecting Ltd & Ors v. Schmidt (1968) 1 MLJ 170, which is a case on appeal from Malaysia. Responding to an argument by counsel that the doctrine does not apply in Malaysia, Lord Wilberforce categorically said:

The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it. In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English law, Schmidt would be unable to enforce it. ... But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of *jus quæsitum tertio*. Their Lordships are of the opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law.

Mohamed Dzaidin J [now CJ (Malaysia)] also in the case of Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang (1988) noted that, "It is clear that the English doctrine of privity of contract applies to our law of contract".

Although the learned judge noted that the English doctrine of privity of contract applies in Malaysia, the doctrine in Malaysia is confined only to the proposition or rule that only a party to a contract may sue to enforce any right conferred by it. The other rule under English law, namely, that for a contract to be enforced by a person, consideration must have been given by him to the promisor or to some other person at the promisor's request does not apply in Malaysia.

Section 2(d) of the Contracts Act 1950 provides that consideration for a promise may move from the promisee or any other party. Thus, a promisee who did not provide any consideration for a promise may sue a promisor on the promise. The scope of Section 2(d) of the Contracts Act 1950 certainly narrows or confines the doctrine to the parties-only rule. There appears to be no rule in Malaysia that a person who is alien to the consideration cannot enforce the contract. In this regard reference could be made to Chinnaya v. Ramaya (1881) 4 Mad 137 where a mother, through a deed of gift, gave a property to her daughter with instructions that the daughter should pay an annuity to her uncle. The mother, had in the past, been paying an annuity to the girl's uncle. The daughter executed a document in favour of her uncle whereunder she agreed to pay the annuity to the latter. When the daughter refused to fulfill her obligation under the agreement, the uncle sued her for the amount due on the agreement. The High Court of Madras, applying Dutton v. Poole (1678) 2 Lev 210, held that consideration had moved *indirectly* from the uncle to the daughter and that he was, consequently, entitled to sue her on the agreement.

Chinnaya v. Ramaya (1881) 4 Mad 137 would not have been maintainable in England as modern English law, which is based on Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847, does not recognise contracts where the consideration was furnished by a third party. For any such contract to be enforceable in England, it must come within the established common law or statutory exceptions to the doctrine. Nonetheless, in India, as it should be in Malaysia, the courts are partially free from the shackles of Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847. Jenkins C.J. expressed this view in Debnarayan Dutt v. Chunilal Ghose (1914) 41 Cal 137 when he said, “In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience”.

But just because Section 2(d) of the Act provides that a third party can give consideration for a contract, it does not follow that a third party can sue on the contract. As Rankin C.J. in Krishna Lal Sadhu v. Pramila Bala Dasi (1928) 55 Cal 1315, when dealing with Section 2(d) of the Indian Contracts Act, pointed out:

Clause (d) of section 2 of the Contract Act widens the definition of ‘consideration’ so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in s. 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of ‘promisor’ and ‘promisee’.

Consequently, although the definition of consideration under the Act is wider than in English law, the common law doctrine applies in India, as in Malaysia, with the limited effect that only a party to a contract is at liberty to enforce it.

The application of the doctrine of privity often thwarts what the parties to a contract expected or intended, unjustly causes detriment to a third party who has reasonably relied on a contract and rewards a promisor who reneges on his promise. The doctrine of privity of contract, hence, has come under heavy criticism among academicians. Judges, including Lord Diplock, who described it in Swain v. Law Society (1983) 1 AC 598 as, “an anachronistic shortcoming that has for many years been regarded as a reproach to English private law”, have also attacked the doctrine.

Lord Dunedin, in his dissenting opinion in Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847, noted that the doctrine “make(s) it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce”.

The application of the doctrine in Malaysia has also been inconsistent, with statutory exceptions to the doctrine being created by Parliament under the Civil Law Act 1956 and the Road Transport Act 1987. The former circumvents the doctrine through the use of assignment of the benefit of a contract to a third party while the latter makes an insurer liable to indemnify the person or class of persons specified in the policy in respect of any

liability which the policy seeks to give protection against. Common law has also devised its own exceptions to the doctrine by the use of the concept of trust in favour of the third party or by treating the third party as an agent of the promisee. Another notable exception is in the case of restrictive covenants concerning land that are either enforceable as contracts under Malaysian common law or as negative easements under Section 283(1)(b) of the National Land Code 1965.

1.1 Statement of the Problem

It is thus evident that a study of the history of the doctrine is important to decide whether the past should continue to subsist in the present and future in Malaysia. The history of the parties-only doctrine is particularly important for a better understanding of the dogma and rigidity of common law, which is supposed to be free of such fetters, when it comes to the application of a doctrine that has been abandoned in Continental systems¹, in almost all states in America² and recently in England.

The historical basis of the doctrine may also give an insight on why the Malaysian system continues to steadfastly keep hold of it and whether the reasons that led to the conception of the doctrine continue to be relevant today.

Since the greatest bastion of the doctrine of privity of contract, that is England, has recently decided to do away with the doctrine, it is necessary for reassessing whether the Malaysian legal system should continue to adopt the English common law rule as part of Malaysian common law and contract law.

It is timely to consider whether the Malaysian Legislature should step in to abolish the application of the doctrine in Malaysia and, in the process, relieve the system of the numerous exceptions that have been contrived to get around the doctrine.

1.2 Purpose of the Study

The purpose of this study is to examine the origin and basis of the doctrine of privity of contract. The study also looks at whether there is any basis for the continued existence of the doctrine of privity of contract in the Malaysian law of contract. The study also looks at whether Malaysia should follow the English lead and enact a statute to abolish the doctrine and confer rights on third parties to a contract.

¹ Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962); Henri Et Leon Mazeaud Et Jean Mazeaud, *Lecons De Droit Civil*, 6th ed. (Montchrestien 1969), vol. II; E.J. Cohn, *Manual of German Law* (Stationery Office, 1950)

² Restatement of the Law, Second, Contracts 2d, § 302 (1981)

1.3 Significance of the Study

This study is of benefit to both legal practitioners and academicians. For the former, the study provides an in-depth understanding of the genesis of the doctrine of privity of contract and an examination of the different tools that have been used to circumvent the doctrine in Malaysia.

The Attorney General's chambers and the Minister for Law in the Prime Minister's Department will also benefit from this study because it provides them with an understanding on the need to reform this area of Malaysian contract law.

1.4 Limitation of the Study

This study is limited to the historical development of the doctrine of privity of contract in England and the major criticisms that have been leveled against the doctrine in England. Malaysia, being part of the Commonwealth and as such, having inherited a great deal of the English common law in her legal system, is taken to have adopted the doctrine as part of her own common law system. Hence, no attempt is made to study the history of the doctrine in Malaysia.

The law journals are replete with cases relating to the doctrine of privity of contract and its application in various factual situations. Numerous articles have also been written regarding the doctrine and there are many textbooks on the law of contract that devote an entire chapter to the doctrine of privity of contract. The study is limited to a consideration of only the leading texts on the law of contract, both in Malaysia and in England, and leading commentaries of the doctrine in the form of articles.

1.5 Definition of Terms

Jus quæsitum tertio is a Latin phrase that means a right acquired or vested in a third party (Trayner, 1894).

Nudum pactum is used to signify a promise for which no valid legal consideration has been provided, and hence, cannot be enforced under law.

Inter partes is used to signify that which involves two parties.

Assumpsit means, "A voluntary promise, by which a person, for a consideration, *assumed* and took on himself to perform to pay anything to another." (E.R. Hardy Ivamy, 1988)

CHAPTER 2

THE ORIGIN AND MEANING OF PRIVITY

2.1 The Origin of Privity

Tracing the history of privity of contract starts with “the mysterious and undefined term, ‘privity’.” (Corbin, 1951) The noun “privity” is derived from the French “*privé*” and it originally denoted a friend or an acquaintance, instead of a stranger. However, from this original significance of the word, privity was later given a legal connotation, namely, “interest” and “relationship”. The move in this direction is reflected by the statement of John Cowell in 1607 that, “Privie commeth of the French (*privie i. familiaris*) and signifieth in our common lawe, him that is partaker, or hath an interest in any action, or thing.”

There is a striking difference between the present day usage of the word “privity” by the American and English jurists. Present day American jurists use the word “privity” to mean a legal conclusion as opposed to a factual precondition of a duty. It means “nothing more than one person is under an obligation to the other.” (Corbin, 1951)

The English, on the contrary, have never accepted that “privity” is synonymous with “obligation” or “duty”. The privity requirement in an action in *assumpsit* was seen as a part of a duty relationship or what gives rise to a duty or obligation, but it was never viewed as the duty itself. Privity was, consequently, never the only measure of whether a duty existed or a precondition to the imposition of a duty in contract.

The vast difference between the interpretation accorded to the term “privity” by the American and the English only illustrates that the scope and function of the term has changed during the course of history and in the extension of common law to other parts of the world.

2.2 The Meaning of Privity

There are at minimum four functions of the doctrine of privity of contract that can be traced historically in the law of contract. These four functions are:

- i) to signify certain relationships that are necessary to satisfy the requirements of a writ action;
- ii) to provide the scope of the law of contract, separate from other areas of law;
- iii) to provide classification of obligations arising under contract; and
- iv) to regulate the nature of evidence admissible to establish contractual obligations.

2.2.1 Relationships that are necessary to satisfy a writ action

The action in *assumpsit* was not the first to see the use of the doctrine of privity. Privity existed prior to *assumpsit* in actions based on covenant, account and debt. The

development of the doctrine in *assumpsit* was, consequently, influenced to some extent by the earlier actions.

During the reign of Edward I, covenant was formalised and it was established that an action on a covenant would only lie where there was, in support of it, a deed under seal. (Theodore F.T. Plucknett, 1956) There were two categories into which covenants could be classified, namely, covenants *inter partes* and unilateral covenants, for example a deed poll.

Covenants *inter partes* was a formal reciprocal contract that contained a clause in which all the parties were identified. A person who is not identified in the covenant was deemed to be a stranger who could not sue as decided in Gilby v. Copley (1684) 3 Lev. 138 and Lowther v. Kelly (1723) 8 Mod. 115. The right of a person to sue did not depend on the use of that person's seal, as long as that person was named in the clause identifying the parties. This was established in Scudamore v. Vandestene (1586) 2 Inst. 673 and Clement v. Henley (1643) 2 Rolle Ab. 22.

As far as deed polls were concerned, there was no clause identifying the parties and as such, the person seeking enforcement of the deed had to establish that the deed was directed to him. This, however, did not mean that the person had to be named in the deed but rather that the person seeking enforcement was a party interested in the subject matter. [Sunderland Marine Ins. Co. v. Kearney (1851) 16 Q.B. 925]

An action of account involved, for example, cases where X delivers money to Y for Z's use. If Y refuses to pay the money over to Z, Z's remedy would be to bring an action of account against Y. The action of account did not require a contractual relationship between Y and Z to be established. (Richard M. Jackson, 1936)

Although there was no need to establish a contractual relationship to succeed in an action of account, it does not follow that there was no requirement for privity. As Edmund Wingate pointed out, "An action of accoupt (sic) must be grounded upon privity; for without privity no action of accoupt can be maintained ...". The "privity" requirement that Wingate says must be the foundation of an action of account is the proof of a fiduciary relationship between the plaintiff and the defendant. This means that the plaintiff must establish that the defendant accepted the money for the plaintiff's use and in modern day context, would be regarded as a trustee of the funds received for the benefit of the plaintiff.

In an action in debt, the plaintiff would sue a defendant to recover a payment or performance rendered to or for the benefit of a third person at the defendant's request. Even if the defendant had promised to pay the plaintiff or recompense him for his performance, the defendant would still not be liable in debt because the debt was raised by the transaction and not by the defendant's agreement to pay or compensate the plaintiff. (S.F.C. Milsom, 1969) This position continued until the courts recognised the defendant's liability in these category of cases and decided that, "whatever would constitute a *quid pro quo* if rendered to the defendant himself would be none the less a *quid pro quo* though furnished to a third person, provided it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff." (James B. Ames, 1913)

Assumpsit was not regarded as an action based on contract. On the contrary, assumpsit was considered as an action based on promises. Only when assumpsit was expanded to encompass actions of covenant and debt was the term “contract” related to the term “promises”. When assumpsit expanded to encompass actions of covenant and debt, the interest-based and the benefit-based rules developed in the earlier actions was absorbed into the doctrine of consideration. The doctrine that only a party to a contract could seek enforcement of it thereafter arose in assumpsit, unrelated to the consideration theory.

2.2.2 Providing the scope for contract

Privity of contract also plays a part in the area of torts and trusts. In the field of torts, privity’s significant entry was in the case of Winterbottom v. Wright (1842) 10 M. & W. 109. The privity rule was initially brought into the field of torts in order to control concurrent actions in both torts and contracts. Subsequently, when the tort of negligence was developed with impetus from the decision in Donoghue v. Stevenson (1932) A.C. 562, privity was used as a restraint on the expansion of the action in negligence.

Privity’s appearance on the scene of trusts began with the creditor’s trust. In cases such as Purefoy v. Purefoy (1681) 1 Vern. 28 and Dunch v. Kent (1684) 1 Vern. 260, the creditor’s trust was enforceable so long as it did not amount to an undue preference given to the creditor. Later, however, the courts held that the creditor was only a volunteer who had not provided any consideration and that the creditor could not enforce the agreement as he was not a party to the deed. [Wallwyn v. Coutts (1815) 3 Mer. 707] This evolution came about because both debtors and trustees arranged for the payment of debts to creditors by using the same legal forms and terminology.

2.2.3 Classification of contractual obligations

In the 17th century, four types of privity recognised at common law were recorded, namely, privies in estate, in blood, in representation and in tenure. (Sir Edward Coke, 1794). It was mainly used as a tool for classification of the various legal duties recognised by common law.

2.2.4 Regulating evidentiary requirements

The law of evidence in the early days contrived objections on admissibility of evidence based on privity objections. For example, there was the rule that the parties to an action and interested persons cannot give evidence in an action based on the presumption that their testimony would be tainted by bias. Hence, in an action by a promisee to enforce a promise made for the benefit of a third person, the promisee would be barred from being a witness.

During medieval times, trial by jury presupposed that the facts of the action were sufficiently infamous that the entire State could know of them, and not solely the litigants. Wager of law, on the contrary, was an appeal to the supernatural under the threat of eternal punishment, and as such, it demanded certainty of knowledge of the facts, which could

only be satisfied through direct dealings with the plaintiff. It was noted that, “The rule itself depends, first, upon the maxim that no stranger to a contract real or personal, shall by his own pleading derive directly or indirectly any advantage from it ...; he is regarded as having no legal knowledge, the only knowledge that can be useful to him of its existence.” (Sir John Comyns, 1822)

Privity, as a result, played an important role in the mode of process to be adopted in the medieval courts.

2.3 Present-day Debate

Professor Hening’s study of the doctrine of privity of contract concludes that the recognition given to beneficial rights in an action in debt declined over time when assumpsit expanded to include actions in debt and account. (Crawford D. Hening, 1909)

S.J. Stoljar, on the contrary, advances the argument that cases in assumpsit in the 17th century showed a plain advancement towards recognising beneficial right until the decision in the case of Bourne v. Mason (1669) 1 Vent. 6. After that decision, Stoljar argues, the beneficiary’s right in contract was shrouded. (S.J. Stoljar, 1975)

Stoljar’s conclusion that there was a “clear and confident progression” in the 17th century cases toward recognising beneficial rights is difficult to accept since common law rarely develops in “clear ... progression”.

Lord Denning, one of the most eminent English judge of the last century, in the case of Drive Yourself Hire v. Strutt (1953) 2 All E.R. 1475 made an observation of the development of the doctrine of privity that accords greater with the authority, when he said:

I wish to assert, as distinctively as I can, that the common law in its original setting knew no such principle. Indeed it said quite the contrary. For the two hundred years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract.”

Lord Denning was of the view that prior to 1861, common law recognised and permitted a third party to enforce a contract that was designed to benefit him. J.A. Andrews also agrees with the observation made by Lord Denning. He wrote of the doctrine of privity:

“As a rule it has no great history. In fact it is a modern and largely academic rationale for a group of cases running from Bourne v. Mason to Tweddle v. Atkinson that were decided wholly on the principle that consideration must move from the promisee.”

Ernest H. Scammel has, however, dissented from Lord Denning’s views and argued that the historical account of the development of the rule does not support Lord Denning’s conclusions. (Ernest H. Scammel, 1955) Many who argue about the genesis of the present-

day doctrine, in my view, have either overlooked or given little regard to the distinction between the rule that consideration must move from the promisee and the rule that only parties to a contract may seek to enforce it.

J.A. Andrews recognised this distinction. He noted that the doctrine of privity was the rationale given by the academic world for common law decisions starting with Bourne v. Mason (1669) 1 Vent. 6 to Tweddle v. Atkinson (1861) 121 E.R. 762, though these cases “were decided wholly on the principle that consideration must move from the promisee”; a mistaken rationale that has caused many legal writers to advocate that the present-day doctrine in Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847 was the vindication of a rule that was first positively stated in Tweddle v. Atkinson (1861) 121 E.R. 762.

The history behind the rise of the doctrine of privity of contract involves a study of 3 different periods in English history: the Development in the Common Law Courts; the Development in the Court of Chancery; and the Emergence of the Doctrine of Privity of Contract between 1800-1890.

CHAPTER 3

THE DEVELOPMENT IN THE COMMON LAW COURTS

3.1 The Interest Principle

Under the interest theory, a person who had an interest in a promise had a right of action to enforce it. Hadvys v. Levit (1632) Het. 176 is a case where the interest theory was applied. In that case, the father of a bride (the defendant in the action) promised the groom’s father (the plaintiff) that he would pay £200 to his son-in-law after the marriage. This promise was made in expectation of the marriage of their children. The plaintiff reciprocated by consenting to the marriage and promising to pay his daughter-in-law £200. After the marriage had taken place, the defendant failed to pay £200 to his son-in-law. Consequently, the plaintiff brought an action in assumpsit to claim for damages, arguing that as a result of the defendant’s breach of promise, he was compelled to give the married couple greater maintenance that would have been necessary had the defendant kept his promise.

The action was dismissed by the Court of Common Pleas on the ground that the action should have been brought by the son, as according to Richard J, he was the person “in whom the interest is.” Hutton J, who arrived at the same conclusion, noted that:

there is a difference when the promise is to perform to one who is not interested in the cause and when he hath an interest. In the first case he to whom the promise is made shall have the action, and not he to whom the promise is to be performed.

The learned judge illustrated a beneficiary without an interest with this example: “If A. promise B. to pay J.S. \$10 (upon a consideration) which is not done, B. shall have the action, and not J.S.” Of a beneficiary with an interest, Hutton J gave two illustrations.

Firstly, “If there be two joint [owners] of a horse, and the one condition with the other to go to the market to sell it, who does it and appoints the payment [by the purchaser] to be made to another [the other co-owner]; in this case he only to whom the payment is to be made [the other co-owner] shall have the action.”

Secondly, “...if my servant, by my command, sell my horse: the money is to be paid to me; I shall have the action, and not my servant, for the interest is in me.”

The case of Hadves v. Levit (1632) Het. 176 therefore laid down the principle that an interested beneficiary had the right of action and can oust even a promisee claiming for damages against a promisor for breach of promise.

The interest theory was also applied in the case of De La Bar v. Gold (1662) 1 Keb. 44. In that case, the plaintiff’s representative leased a share of a vessel to Wood, who in turn subleased it to Gold. Wood failed to pay the rent and the plaintiff’s representative sought to recover the sum due from Wood’s assets that were at the time held by the defendant. Based on the defendant’s promise to pay Wood’s debt, the plaintiff’s representative agreed to forbear. The plaintiff later filed a suit for breach of promise, and Windham J who heard the case, noted:

If the promise were in consideration that A. hath sold goods to B. he promiseth to C. £10, C. hath no remedy because he is but an attorney of A. to receive for his use; and A. only can have an action upon the case against B. for not paying the money to C. But if A. sells to B. and B. promiseth in consideration thereof to pay to C. £10 which A. owed C., in this case C. shall have an action because it appeareth the interest was his: ...

The interest theory was premised on the fact that the interested beneficiary being the person who suffers a loss or detriment as a result of the breach of promise, should properly be the person entitled to claim damage. This theory relates to the compensatory function of assumpsit.

The interest principle was later absorbed into the consideration theory because of two events, namely, the nexus between interest and use was lost and, the courts ruled out “natural love and affection” as consideration for an assumpsit. “Use” was an external and proprietary right in the beneficiary and could also arise upon consideration, but common law ceased to exercise jurisdiction over the use when it became an exclusive realm within the Court of Chancery.

As regards a use arising from natural love and affection, the courts held that it was not sufficient to ground an assumpsit. The interest principle was recast to permit an action by a beneficiary only if he has sacrificed his interest or provided valuable consideration. Hence the Court of Common Pleas stated in the case of Brett v. J. S. (1600) Cro. Eliz. 756

that, “natural affection of itself is not a sufficient consideration to ground an assumpsit, for although it be sufficient to raise an use, yet it is not sufficient to ground an action without an express *quid pro quo*.”

3.2 The Benefit Principle

The benefit principle originates from the term “use” or “oeps”. These terms were used in an action of debt or account to connote “benefit” and formed part of assumpsit when it took over actions of debt and account. The benefit theory in debt or account did not signify the concept of trust that later flourished in the Court of Chancery, or the division between legal and equitable title, or the civil law of “usus”. (Pollock and Maitland, 1968) Professor Hening similarly noted:

What is here contended is that in case of debt and account in the Year Books or in Rolle the word “oeps” or “use”, etc. is used in the then familiar and common everyday meaning of benefit. The beneficiary recovered in debt or account, not because he was a cestui qui trust, that later protegé of Chancery, but because the primary obligation known as debt or receivership had been created for the plaintiff’s benefit ...”

Provender v. Wood (1628) Het. 30 was one of the early cases in which the benefit principle was applied. The defendant had promised the plaintiff’s father the payment to the plaintiff the sum of £20 upon marriage to the defendant’s daughter. The plaintiff brought an action in assumpsit against the defendant for breach of promise. Yelverton and Richardson J.J. allowed the plaintiff to recover on the basis that “the party to whom the benefit of the promise accrews (sic), may bring his action.”

The principle was later applied again in the case of Disborne v. Denabie (1949) Rolle Ab. 30. In that case, A and B were obliged to pay C £20 when C reached the age of 21. Before A died, he named B as his executor. B, as executor, assigned assets to D in exchange for D’s promise to pay C £20 when C reached the age of 21. Chief Justice Rolle held, applying the benefit principle, that C (who had attained the age of 21) could bring an action against D and noted, “it matters not from whom the consideration moveth, but who hath the benefit thereby.”

The benefit principle was applied a third time in the case of Starkey v. Mylne (1651) Cremer Ms. 105. In an action *indebitatus assumpsit*, the declaration by the plaintiff (Alice) stated that her grandfather, during his lifetime, gave goods worth £80 to the defendant (Alice’s brother). The defendant had promised the grandfather that he would pay the plaintiff £20 after the grandfather’s death. The plaintiff’s declaration made the plaintiff appear as a party or co-promisee in a tripartite agreement. The declaration read:

Whereas the grandfather did order and appoint that the defendant in lieu of the said goods should pay £20 to the said plaintiff after the death of the grandfather who in consideration that the said Alice at the instance of the defendant would accept of the said promise for the payment of the said £20 defendant then promised to pay after

the death of the grandfather. And plaintiff averred that the grandfather died such a day and the defendant was indebted to the plaintiff such the same day in the said £20 which the defendant undertook and was to pay to the plaintiff according to the special agreement between the grandfather and the plaintiff and defendant in lieu of certain goods to the value of £80 given by the grandfather to the defendant for the payment of the same and that the defendant *Sic indebitatus assumpsit*.

The plaintiff was not a party or a co-promisee though the declaration made her appear as one. The subsequent references to the plaintiff as a “stranger” made it clear that she was not a party to the promise. The defendant’s counsel, in his motion in arrest of judgment, argued that there was no action on a promise in law without establishing a particular debt out of which the promise can arise. The report of the case states:

Lach moved in arrest of judgment that an indebitatus assumpsit generally does not lie upon a promise in law without showing a particular debt or duty out of which the promise might arise, but in our case there’s not any precedent debt or duty of the plaintiff which is in the third person ...

The plaintiff’s counsel argued that the debt to the plaintiff was created by the bailment of goods to the defendant and consequently, an assumpsit lies concurrently. Chief Justice Rolle accepted this argument. The case report states:

And Rolle deemed that the gift of goods here to the defendant for the payment of the £20 for the plaintiff tantamount as if he had delivered the £20 to the defendant to be paid over to the plaintiff. So he held that if A sells a horse to B to pay £20 for him to C (to whom A is indebted £20) C may have an action of debt for the £20 tho [sic] he be a Stranger.

The Chief Justice then went on to state that, in his view, a beneficiary can bring an action upon a promise in law in the case of marriage money. The judge said:

If two fathers agree that the father of the daughter shall pay to the son of the other father so much money for a marriage portion, the son who is a stranger shall have a debt or a special action of the case upon this agreement between the two fathers.

The case report shows that Chief Justice Rolle did not restrict the application of the benefit theory to the proprietary features of an action in debt but rather held the view that it could be extended to promises that did not involve the bailment of goods or money to the promisor, and to cases where there was no prior indebtedness to the beneficiary or a use in his favour.

The extension of the benefit theory to the situations identified by Chief Justice Rolle in Starkey v. Mylne (1651) Cremer Ms. 105 is evidenced by the later case of Sprat v. Agar (1658) Cremer Ms. 380. This case was an action in assumpsit by Sprat against the executrix of John Agar. The declaration stated that John Agar promised Sir Thomas Lockier that he would settle certain lands after his death to the plaintiff in consideration of Sir Thomas Lockier consenting to the marriage between the plaintiff and Sir Thomas

Lockier's daughter. Sir Thomas consented to the marriage and the marriage, thereupon, took place. Agar, made a will in which he devised all his lands to his wife and heirs, in breach of his promise to Sir Thomas. Agar's wife was named executrix of the will. The plaintiff brought an action and recovered judgment for the sum of £1300. On the defendant's motion in arrest of judgment, the court held:

That though the promise was made to Thomas Lockier yet because it was to the benefit of the plaintiff he may well have the action. These ... points were resolved without argument.

In deciding the case, the court addressed also the question of consideration. The court observed that the right to sue the defendant also rested with Thomas Lockier, the promisee, since "part of the consideration moved from him." He was prevented from bringing an action simply because the plaintiff had already sued for breach of promise. Aside from the benefit theory, it is implicit in this part of the court's decision that the plaintiff also had the right to sue on the basis that he had provided part of the consideration for the promise, namely, the marriage itself.

In Bourne v. Mason (1669) 1 Vent. 6, the case of Sprat v. Agar (1658) Cremer Ms. 380 was reviewed. The court in Bourne v. Mason (1669) 1 Vent. 6 explained the decision in the earlier case on the basis that consideration had moved from the plaintiff. This explains how and when the consideration principle replaced the benefit theory as the rationale for the beneficiary's right to sue.

3.3 The Agency Principle

In order to connect the beneficiary action in assumpsit with the early principles of agency, six underlying features must be examined.

3.3.1 Incapacity to contract

Common law denied capacity to infants, married women and monks to enter into contracts. The denial of capacity by common law became the catalyst for the recognition of these people as agents. Monks, for example, though withdrawn from the secular world, nevertheless had to purchase necessities and enter into other transactions with the secular world. This was accomplished by permitting a monk to enter into a contractual state as an agent for the sovereign. (A.W.B. Simpson, 1879)

3.3.2 Instrumentalist illusion

This illusion partially provided an escape from the problems arising from lack of capacity. Francis B. Tiffany in his writing noted, "Throughout the law of agency, we are continually met with the notion that the constituent and representative are one and the same person, and that the rights and liabilities of the constituent are not other than they would be were he actually present and acting in person."

What Tiffany said was that throughout the law of agency, there is the fiction or illusion of the identity of principal and agent. It did not matter whether the agent had capacity to contract or not since he was not the contracting party. He was only an instrument or medium through which the principal contracted.

3.3.3 Primeval agency received into assumpsit

The growth of modern agency was neither hastened nor revolutionized by the rise of assumpsit. Assumpsit had taken over the older rules that had been applied in actions of debt. In an action in debt, a plaintiff who sought to hold a principal responsible must establish that the principal had received a benefit or a *quid pro quo*. This was done by establishing either that the principal, by his command, had directed or ordered the agent to enter into a contract, or that the principal had obtained a benefit in that he had notice that he had received something to his own use. The liability of the principal, hence, was limited to whether he had issued a command or obtained a benefit.

This was, however, unsuited in mercantilist England and consequently, the liability of the principal was extended without discarding the instrumentalist illusion. The extension of the principal's liability was, however, in tandem with extensions of the principal's right to enforce contracts. In Seignor v. Wolmers (1624) Godbolt 360, a servant was sent by his master (the plaintiff) to compose a debt with the defendant. The defendant promised the servant that he would pay a certain amount to the master. In an action by the master to enforce the promise, an objection was raised that the master could not sue since the promise was not made to him. Dismissing the objection, Dodderidge J said that in assumpsit, the master and servant constituted a single person (the instrumentalist illusion). The judge said:

An assumpsit to the servant for the master is good to the master: an assumpsit by appointment of the master of the servant shall bind the master, and is his assumpsit. ... for whatever comes within the compass of the servants service, I shall be chargeable with, and likewise shall have the advantage of the same.

Dodderidge J's statement "the compass of the servants service" was a brilliant improvement of the manner in which the scope of the master's liability was understood and was the channel through which the doctrine was later developed.

3.3.4 Instrumentalist illusion used to solve privity problem

Although the principle of agency is an excepted present-day exception to the privity rule in modern contract law, agency was not viewed as such during its development in the common law court between the period of 1500 and 1680. The instrumentalist illusion was utilised to overcome two objections to the principal's suit in assumpsit, namely, that the promisee (or party to the contract) was the agent but the principal was the plaintiff, and, that consideration for the contract was provided by the agent and not the principal but the principal was the one bringing the action. If not for the instrumentalist illusion, it would have been more difficult for the principal to succeed on a suit in his own name as there

would have been objections that the plaintiff (principal) was neither a party to the contract nor had he provided any consideration for it.

The instrumentalist illusion can be seen at work in the case of Sadler v. Paine (1582) Sav. 24. In that case, the plaintiff's uncle, Ducket, got a promise from the defendant to transfer some land back to the plaintiff upon being paid a sum of £50. When the defendant failed to honour the promise, the plaintiff brought an action in assumpsit and the defendant raised the two objections stated in the foregoing paragraph. Baron Shute, applying the instrumentalist fiction, said:

It seems to me to the contrary, that *qui per alium facit per seipsum [sic] facera videtur*³: and although the agreement for the reassurance was between Ducket and Paine the defendant, still it is alleged in the court that it was done at the request of the plaintiff and that will be understood to be his act: ... all will be understood by the agreement of the plaintiff where it is done by another; when if all had been agreed between the plaintiff and defendant and the defendant says to Ducket, do you wish to give your promise for him? And he says ... everything is done in the behalf of the plaintiff.

3.3.5 Principals included as third party beneficiary

There was no need to devise an exception to the rules of assumpsit to include an action brought by a principal to enforce a promise made to his agent because of the instrumentalist theory. Apart from the theory, the courts also viewed the principal as an interested third party beneficiary. This is evident in the case of Hadves v. Levit (1632) Het. 176 where Hutton J gave as one of the examples where an interest exists the situation of a servant (agent) who enters into a contract at the command of his master (principal). The learned judge observed that the master would have the action for any money to be paid pursuant to the contract because the interest is in him.

Since the courts viewed the principal as a person interested in the contract made by his agent, this was yet another reason for not creating an exception to the rules of assumpsit.

3.3.6 Agency evolves into an exception to privity

Agency was not formally viewed as an exception to the privity requirement until the late 18th or early 19th century. With the growth of commercial contracts and the involvement of various professional intermediaries in them, it was only a matter of time before agency broke out from the confines of the privity requirement in assumpsit. The rules in assumpsit could not cater to opposed interests, as in the case of undisclosed agency, and it required severance from the instrumentalist illusion.

The evolution of agency as an exception was slow since it was not until the late 18th or early 19th century that it was recognised as an exception to contractual privity. Three reasons may be attributed to the slow growth. First, the courts viewed the principal as a

³ Where one does something through the instrumentality of another, he is held to have done it himself.

third party beneficiary under a contract in the 17th century. Until the rise of the consideration objection in 1680 and the parties-only objection in the 19th century, there was not much need to change the approach taken by the 17th century courts.

Second, the Statute of Westminster forbade vicarious liability in a criminal-law trespassory action. A master could not be made liable and punished for the wrongs of his servant. This in turn was an impediment to contractual enforcement as it would have been unreasonable to limit the principal's liability when sued as defendant and yet permit the principal to bring an action as plaintiff simply by reason of an instrumentalist illusion.

The third reason was the difficulties that lay in the question of legal title as between the principal and agent. The ownership of money that passed between principal and agent was initially thought impossible to trace. Consequently, cases such as Core's Case (1537) 1 Dyer 20a held that the agent received title upon delivery. It was not until the courts of equity divided the question of ownership by reference to legal and equitable title, thereby recognising an equitable title remaining in the principal and imposing a constructive trust on the agent, could the prevailing system of direct agency be developed.

Commercial realities pressed for a continual extension of the relief granted in principal's contracts. Since agency had not become a subject by itself until the 19th century when Samuel Livermore wrote the first treatise on it in 1813, agency's embryonic state allowed it to be kept more flexible and liberal than it otherwise would have been. Had the exception been developed sooner, third party actions in assumpsit may have failed sooner.

3.4 The Consideration Concept

Consideration was not the determinant factor that regulated beneficiary actions in assumpsit in the early days. Consideration only became an important criterion in beneficiary actions towards the end of the 17th century, and before it the concept of interest, benefit and agency played a greater role in regulating beneficiary actions. The consideration concept emerged with a line of cases after Bourne v. Mason (1669) 1 Vent. 6 that dealt only with the situation of one debtor being replaced by another. Essentially this means, if X owes Z £10 and Y owes X £10, could Z sue to enforce a promise made by Y to X that Y would pay £10 directly to Z in satisfaction of his debt to X?

In Bourne v. Mason (1669) 1 Vent. 6, the creditor was not allowed to enforce the promise for two reasons that appear in different reports of the case. The substantial ground for the court's decision appears from Ventris' report to be that the no consideration, either by forbearance to sue or by discharging the original debtor, had been given by the creditor for the promise. The court said, "here the plaintiff did nothing of trouble to himself or benefit to the defendant, but is a meer [mere] stranger to the consideration."

The second reason for the court's decision appears in Keble's report at (1669) 2 Keb. 527. It can be gleaned from the report that the creditor failed in his action also because the promise had not been made to him. The report states, "the action lieth not by the plaintiff in regard the defendant doth not promise to discharge the plaintiff, and he is a stranger to

the plaintiff, the promise being made to one Patty he to whom the promise was made must bring the action, and the plaintiff hath still remedy against him [the original debtor].”

The main ground of objection in Bourne v. Mason (1669) 1 Vent. 6 was not only that the plaintiff was a stranger to the consideration. The case of Clypsam v. Morris (1669) 2 Keb. 401 shows that a correlating objection was whether the defendant was a stranger to the consideration. In that case, a volunteer promised a creditor that he would pay the debt of a third party. The creditor, based on the promise, agreed not to sue the original debtor for two weeks. The court held that the plaintiff creditor could not succeed in the action, as the consideration for the promise had not moved to the defendant volunteer personally. Twisden J emphasised that since the defendant volunteer was not in the first place obliged to pay the debt, the plaintiff creditor’s forbearance was of no benefit to him since he was not the original debtor. In essence, the objection in the case was that the defendant volunteer was a stranger to the consideration.

It cannot be concluded from in Bourne v. Mason (1669) 1 Vent. 6 and Clypsam v. Morris (1669) 2 Keb. 401 that the third party beneficiary was denied an action because of the rule that consideration must move from the promisee or from the plaintiff. In the former case, the promisee provided the consideration to the defendant promisor but the plaintiff creditor failed because he did not provide any consideration for the promise. In the latter case, the plaintiff creditor provided consideration for the promise, but that consideration was not given to the defendant promisor. Hence, it cannot be surmised from these cases that the rule applied by the courts to restrict a third party action was simply that consideration must move from the promisee or from the plaintiff, since such a rule would not have prohibited the beneficiary action in the two cases.

The two cases were probably also decided based on two factors that featured in the back of the court’s mind. First, the assignment of a chose in action, as in Bourne v. Mason (1669) 1 Vent. 6, was prohibited by common law because it amounted to the assignment of the burden of an obligation from one debtor to another. To have allowed this would directly challenge the trite rule in Hurford v. Pile (1616) Cro. Jac. 483 that an obligation cannot be revoked or discharged by an obligor without the consent of the obligee. Second, common law did not allow a creditor to hold a person liable for the debt of another unless the creditor has discharged the original debtor because of the inherent danger of double recovery by the creditor. If the creditor has not discharged the original debtor, he would effectively have two debtors and therein lay the danger of a double recovery by him. The courts overcame these two possible problems by using the doctrine of consideration to disallow the beneficiary action.

3.4.1 Consideration closes the door to beneficiary actions

Bourne v. Mason (1669) 1 Vent. 6 came quickly to be regarded as the watermark that paved the way for future development of the consideration concept. The courts used this case and the concept of consideration propounded therein to explain and reconcile earlier cases that permitted beneficiary actions to succeed based on the interest and benefit concepts.

The synchronization of the rival interest and benefit concepts with the consideration theory was subsequently applied in the leading case of Dutton v. Poole (1678) 2 Lev 210. In that case, a son persuaded his father not to disfigure a land to which he [the son] was heir by cutting down the oaks. The father had wanted to cut down the trees to raise a dowry for his daughter who was to be married to Sir Ralph Dutton. In consideration of the father not cutting the oaks, the son promised to pay to his sibling £1000 after her marriage. After her marriage, the father died and the son failed to pay the promised sum to his sister. His sister and her husband brought an action in assumpsit in their own name as beneficiary for non-payment of the sum. An objection was leveled against this on the ground that the sister was neither privy to nor interested in the consideration, and that the promise had been made to her father and not her.

Scroggs CJ, in allowing the claim, said: “There was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children.” Wilde J is reported in 1 Freem. 471 to have said that the sister’s marriage could be seen as a “meritorious act” given for her brother’s promise. Ventris’ report of the case at 1 Vent. 318 states that the case was decided on the ground that the “nearness of relation between Father and Child” justified the vicarious extension that Scroggs CJ spoke of. Levinz report at 2 Lev. 211 explains that the court’s decision was based on actual benefit and detriment, “and so judgment was given for the plaintiff, for the son hath the Benefit by having the Wood; and the daughter hath lost her portion by this means.”

Dutton v. Poole (1678) 2 Lev 210, in the final analysis, is a case where natural love and affection was sufficient consideration to ground an assumpsit on a use established through such consideration. Although natural love and affection was, in the earlier cases such as Sharrington v. Strotton (1565) Plowden 298 and Collard v. Collard (1594) Popham 47, sufficient to raise a use, it was prior to Dutton v. Poole (1678) 2 Lev 210, insufficient to ground an action in assumpsit.

After Dutton v. Poole (1678) 2 Lev 210, no other case of significant importance has been reported in the common law courts, save for Crow v. Rogers (1724) 1 Strange 592. The factual matrix of that case was somewhat similar to Bourne v. Mason (1669) 1 Vent. 6 and the court, relying on Bourne v. Mason (1669) 1 Vent. 6 and Dutton v. Poole (1678) 2 Lev 210, dismissed the plaintiff’s action on the ground that the plaintiff was “a stranger to the consideration”.

The conclusion that can be drawn from the sudden cessation of beneficiary actions in the common law courts is that the courts of the day interpreted Bourne v. Mason (1669) 1 Vent. 6 and Dutton v. Poole (1678) 2 Lev 210 as cases that required a plaintiff to have provided consideration for a promise before being allowed to enforce the promise. Furthermore, natural love and affection ceased to be regarded as good consideration subsequent to the decision in Dutton v. Poole (1678) 2 Lev 210 and the extension allowed by Scroggs CJ in that case became inapplicable in future cases.

The sudden end of the beneficiary action at common law could probably also be attributed to such actions being channeled to the Courts of Chancery. The Courts of

Chancery, that had sole influence over the administration of equity, allowed non-material matters to be regarded as sufficient consideration. Furthermore, these courts had allowed direct actions against third parties, for instance, in the case of Pollard v. Downes (1683) 2 Chan. Cas. 121. As Willard T. Barbour noted, the Courts of Chancery may have been enforcing contracts for the benefit of third parties for over 200 years. These are the factors that, in conclusion, led to the collapse of the beneficiary action at common law.

CHAPTER 4

THE DEVELOPMENT IN THE COURT OF CHANCERY

4.1 The Shift to Consideration

The Courts of Chancery absorbed the concept of valuable consideration, as it was understood in the common law action of assumpsit, between the late 17th century and the middle of the 18th century. Only in the 18th century did the courts of equity acknowledge the general rule that all contracts needed consideration, beginning with the case of Mitchell v. Reynolds (1711) I P. Wms. 181. There were three different notions of consideration in equity, namely, the civilian doctrine of cause/consideration, the doctrine of consideration that was applied in the law of uses, and the concept of valuable consideration that was applied in the common law action of assumpsit.

The doctrine of cause was the earliest test in the courts of equity for the enforcement of promises. “Consideration” was often used synonymously with “*causa*” to explain why bare or naked contracts could not be enforced. An edition of “Doctor & Student” explains:

But yf hys promyse be so naked that there is no maner of consyderacyon why yt shoulde be made than I thynke hym not bounde to perfourme it for it is to suppose that there wa som errour in the makyng of the promyse.

The second strain of consideration, that is in relation to the creation, vesting and revocation of uses, was developed by the late 15th century. Three forms of consideration were covered by this strain, namely, the payment of money, marriage, and natural love and affection. A.W.B. Simpson states that the doctrine of consideration as regards uses, which related to land law, was utilised to rebut the equitable presumption that arose when a feoffee gave nothing of value to the feoffor. While a conveyance for consideration passed the use to the feoffee, a conveyance that lacked consideration caused the use to result back to the feoffor. Natural love and affection was admitted as consideration sufficient to create and vest a use in The Duke of Buckingham’s Case Y.B. (1504) 20 Hen. VII, M.P. 10, pl. 20 and this early view was settled in equity by Sharrington v. Strotton (1566) Plowden 298. The effect of these cases was to enable the courts of equity to enforce family settlements of immovable property, which was usually done in consideration of marriage, which in itself was deemed to be sufficient consideration to create and vest a use in the case of Collard v. Collard (1594) Popham 47.

The third strain was the doctrine of valuable consideration that had been developed by judges in the common law courts. The cases of Hartford v. Gardiner (1587) 2 Leon. 30 and Brett v. J.S. (1600) Cro. Eliz. 765 had been settled that consideration must be something that had a tangible value, as opposed to mere love, affinity or friendship. As was pointed out in the former case, “Neither love nor friendship will ground an assumpsit to pay money.” The transition to the doctrine of valuable consideration in the Courts of Chancery entails a study of the development in the courts of equity between the period 1550 and 1800.

4.1.1 The Initial Phase between 1550 and 1630

Save for a few short references in the cases of Perriman v. Gorges (1627) Nels. 3 and Alexander v. Cresheld (1631) Tothill 21, there is no evidence that consideration was used in Chancery as a test to determine the enforceability of promises. During this period, the courts of equity applied the canon-law notion of *causa*. The use of this canon-law concept led the courts of equity to enforce all promises save those without good cause. The Chancellor applied the canon law notion of *causa fidei laesionis* during this phase. That notion prescribes that to renege on one’s sworn promise is a sin.

4.1.2 The Shift between 1630 and 1700

During this phase, there was still no general rule that all contracts require consideration in order to be enforced in the courts of equity. Despite increased number of references to the doctrine of consideration, promises in favour of donee beneficiaries were still enforced by the courts of equity without reference to any consideration rule. Cases such as Chamberlain v. Chamberlain (1678) 2 Freem. 34 and Oldham v. Litchford (1705) 2 Freem. 284 during the later part of the 17th century and early 18th century were treated simply as cases of breach of promise, without any reference to rules of consideration.

In Chamberlain v. Chamberlain (1678) 2 Freem. 34, a father, who could foresee that there would not be enough in the estate to pay a legacy to his younger son (the plaintiff), wanted to alter his will. The older son persuaded the father not to do so and in return, promised that he would pay the legacy to the younger son even if there were insufficient assets in the estate to do so. When the younger brother sued his brother to get payment of the legacy, Lord Nottingham said that it was “the constant course of this court to make such decrees upon promises that the testator would not alter his will” and decreed that the brother pay the legacy as he had promised to the father, regardless of the sufficiency of the assets in the estate.

Although it is a given possibility that the courts of equity in granting relief in these cases were guided by the fact that the beneficiaries were related by blood, but this conclusion is negated by the cases of Chamberlain v. Agar (1813) 2 V. & B. 259 and Drakeford v. Wilks (1747) 3 Atk. 539 where the beneficiaries were not kin-related to the donor. The most plausible explanation for the courts of equity enforcing third party beneficiary rights is the prevention of fraud. The Courts of Chancery operated on the underlying principle of equity and justice and enforcing a third party beneficiary action

was merely enforcing, according to good conscience, promises that should properly be enforced.

4.1.3 Third party rights in the sphere of good conscience

In Oldham v. Litchford (1705) 2 Freem. 284, the testator was making a will in which he was going to include an annuity of £40 a year as a gift to the plaintiff (the testator's wife's nephew) in order to pay for the plaintiff's education at Cambridge. The defendant persuaded the testator not to include the gift in the will, promising that he would ensure payment. The court decreed that the defendant must pay the plaintiff the annuity.

Professor Atiyah advances the proposition that the case of Chamberlain v. Chamberlain (1678) 2 Freem. 34 and Oldham v. Litchford (1705) 2 Freem. 284 were the precursor to the doctrine of secret trusts, or alternatively, they were cases that were decided based on the duty of an executor to pay a legacy. The Professor argues that the courts of equity decreed in the plaintiff's favour in those cases and enforced the duty to execute the testator's will because the defendant (promisor) was already under a pre-existing obligation either as trustee or executor. The promise itself was only evidence of this pre-existing duty and not the main reason for the courts' decisions.

The basic reason for enforcement of a trust, according to the Professor, is not the promise itself but rather the prevention of unjust enrichment and detriment brought on by reliance. If the duty of a trustee were not enforced, the trustee would simply enrich himself by keeping the trust property, and the testator in those cases would have suffered a detriment by relying on the promise and not altering his will. The Professor explains the basis of an executor's duty to pay legacies as follows:

The executor is liable, not because he promised, but because he received assets earmarked for a legacy. The promise is evidence of that fact; but it is not the promise which creates the obligation.

The proposition advanced by Professor Atiyah that promises were only evidence of the reason for which the property was transferred underplays the principle of conscience and the tie between that principle and keeping one's promise. Professor Simpson noted that conscience was concerned primarily with preventing danger to the respondent's soul through unconscionable conduct, and not with the injurious reliance of the petitioner. Paul Vinogradoff identified two principles as regards trusts and promises that surfaced, namely, that promises should be enforced despite legal formalities not having been complied with, and, that transactions that were based on confidence should be protected.

The importance of promise cannot be simply explained by relegating the Chancery cases to those that were decided based on unjust enrichment and injurious reliance. Both these principles are elements of contractual morality and good conscience was offended if either principle was violated. A trustee's enrichment was deemed unjust not because he was treating the trust property as his own, but rather because he was doing so in breach of his promise to hold the property to the use of another. Preventing injurious reliance was

also not in itself a ground for liability since the Courts of Chancery enforced trusts in favour of third parties who did not even know of the creation of the trust as in the cases of Bale v. Newton (1687) 1 Vern. 464 and Fletcher v. Fletcher (1844) 4 Hare 67. The promise itself was, consequently, central as grounds for liability.

It is not clear how long the principle of conscience was applied with rigour in the Courts of Chancery, but it was not abandoned during the period between 1630 and 1700. The principle was, however, narrowed by Chancellor Nottingham who sought to apply the principle of conscience in an objective manner by leaving private conscience to private judgment and to decide Chancery cases based on the general conscience of the realm.

4.1.4 The merger of conscience and consideration

During the middle of the 17th century, the rule that a contract could only be enforced in equity if there was valuable consideration began to be developed as evidenced by cases such as Pickering v. Keeling (1640) 1 Ch. R. 147. The rule that had long been established in actions of assumpsit was, nevertheless, not yet settled in the Chancery as there were still cases such as Frank v. Frank (1667) 1 Chan. Cas. 84 and Beard v. Nutthall (1686) 1 Vern. 427 where the Chancellor decreed specific performance of written promises though there was no consideration in support of it.

Lord Nottingham is credited with introducing the doctrine of valuable consideration into the law of contract applied in the Courts of Chancery. In the case of Stukely v. Cooke (1671) 3 Ch. R. 71, Lord Bridgman, who was Nottingham's predecessor, sustained the argument that there was no consideration to enforce a promise by a creditor. Bridgman decreed that the promise was not supported by consideration and was *nudum pactum*, "for the Release [of money] was no more than what by Law and Conscience ought to be." Nottingham, however, in his cases that involved commercial contracts, borrowed from the technical doctrine applied in assumpsit and searched for detriment to the promisee or benefit to the promisor.

In Honywood v. Bennett (1675) 73 Seld. Soc 214, a son gave a written promise to his father's creditors that he would settle his father's debts. Lord Nottingham refused to enforce the son's promise and said:

...if this note were voluntary and without consideration, though it did bind the son in honor and private conscience, with which I had nothing to do, it could not bind him in legal and regular equity, but if the father settled anything on the son in consideration of this note or forebore to cut off anything which he might otherwise have cut off if he had not rested on this note, then I would hold that son to a strict performance.

Nottingham's statement illustrates that a more technical rule had been embraced in the Courts of Chancery by the late 17th century. The earlier concept of good conscience had been moderated by the doctrine of valuable consideration and the type of promises that were enforceable became restricted. Be that as it may, the question of whether or not to enforce a promise was very much a matter left to the Chancellor's discretion during this period

since the doctrine of valuable consideration was not yet fully settled in the courts of equity.

4.1.5 Valuable Consideration recognised between 1700 and 1800

Lord Parker recognised consideration as a general rule of contract law in the Courts of Chancery in the case of Mitchell v. Reynolds (1711) 1 P. Wms. 181. He said that every “...contract must have a consideration either expressed as in Assumpsits or implied as in bonds or covenants.” The rule was applied swiftly in cases such as Brownsmith v. Gilborne (1727) 2 Strange 738, with Chancellors refusing to decree performance of voluntary agreements that were not backed by consideration. The reference by Lord Parker to “assumpsits” leaves little doubt that the rule that was adopted in the Courts of Chancery was modeled on the rule that had been established in common law.

Another reference to common law assumpsits was made in the case of Oldfield v. Appleyard (1720) 2 Eq. Ca. Abr. 390. That case involved a defendant who made a voluntary promise to a woman about to be married that he would be a surety on a marriage settlement. The Chancellor, in that case, held:

...there was sufficient Consideration for this Promise of Mr. A; viz. The Marriage; and such a Consideration is good at Law; for tho no Profit accrues to the Promisor, yet the other Party, without this Promise, would be liable to a Loss or Damage, and that is a sufficient Consideration to support an Assumpsit at Common Law.

The rule reached its zenith in the case of Reech v. Kennegal (1748) 1 Ves. Sen. 123. In that case, an executor made a promise to pay a legacy to the testator’s nephew. Lord Hardwicke, refusing to hold the executor liable, found that the promise was made during the course of a conversation with “strangers” and that there was “no consideration arising” for the promise. The Chancellor said:

At law if an executor promises to pay a debt of his testator, a consideration must be alleged; as of assets come to his hands; or forbearance; or if admission of assets is implied by the promise; otherwise it will be but *nudum pactum*, and not personally binding upon the executor.

The reception of the rule of consideration in equity hence resulted in neither the Common Law Courts nor the Courts of Chancery enforcing a contract that lacked consideration.

4.1.6 Two Categories of Consideration in the Chancery

John J. Powell in his essays on contract wrote that the Chancellors recognised two distinct types of consideration, namely, valuable consideration and good or meritorious consideration. Good or meritorious consideration, Spence wrote, was enough to support any promise or benefit that may move from a next of kin. Good or meritorious consideration, however, could not support an action of assumpsit since near relation was not recognised as “valuable consideration” by common law. Good consideration also

could not support a settlement that contravened statutes that were passed to protect creditors and purchasers.

Of the two categories of consideration, valuable consideration had priority over good consideration. Lord Hardwicke in Wright v. Wright (1749) 1 Ves. Sen. 409 made it clear that good consideration was “consideration ... in the second degree” when he said:

This is a claim by an heir at law against the act of his ancestor, done for what this Court calls a valuable consideration in the second degree, by way of provision or advancement for younger child ... it is a consideration and only made so in the second degree, where the question is with a creditor who is a purchaser.

Lord Northington in the case of Wycherley v. Wycherley (1763) 2 Eden. 175, likewise indicated that the Courts of Chancery weighed valuable consideration against good consideration, when he said:

The court will ... attend to slight considerations for confirming family settlement ... they will not weigh the value of the consideration. They consider the ease and comfort and security of families as a sufficient consideration.

The superiority of valuable consideration of the two categories of consideration that were recognised by the Chancellors meant that commercial consideration given by purchasers, creditors or parties to a bargain took priority over family beneficiaries. If, however, purchasers, creditors or parties to a bargain were not involved in the dispute and the parties to the dispute were only family members, then the plaintiff in the action, according to Lord Hardwicke in Stephens v. Trueman (1747) 1 Ves. Sen. 73, need only bring himself “within” the consideration of the agreement.

The two categories of consideration in the Courts of Chancery, however, did not admit an action by a complete stranger. A non-related beneficiary (i.e. not related by blood) would not be able to bring himself “within” the consideration of the agreement and would, consequently, be deemed a stranger who could not be given any relief. The divergence of consideration into two distinct categories did not open the door to third party beneficiaries, but was used to grant relief to plaintiffs who could bring themselves within the sphere of consanguineous relationship.

Historically, good consideration, prior to the introduction of the common law rule of valuable consideration, was predominant in the Courts of Chancery with Chancellors deciding to enforce promises on the ground that the promisor, should in conscience, be made to perform his promise. Third party beneficiary actions in equity diminished with the inception of valuable consideration in the Courts of Chancery, which directly challenged good consideration and ultimately replaced it.

4.2 The Development of Trusts

The concept of passive trusts thrived after 1560 with the decision in Katharine, Duchess of Suffolk v. Herenden, an unreported case referred to by J.H. Baker in an article he published in the Law Quarterly Review. The passive trust or then known as the “use upon a use” was recognised by the Courts of Chancery whose Chancellors held that the Statute of Uses did not enforce the “use upon a use” and that, consequently, the Courts of Chancery would enforce it. J.H Baker identifies four types of uses that the Statute of Uses did not enforce, namely, the use upon a use, active uses, a use in favour of a purpose and not a person, and uses in respect of properties that were not freehold. Lord Nottingham in Grubb v. Gwillim (1676) 73 Seld. Soc. 347 explained the doctrine as follows:

If an use be limited upon an use, though the second use be not good in law nor executed by statute, it amounts to a declaration of trust and may be executed in Chancery.

When Lord Nottingham was Chancellor, there was a change in attitude towards trusts and the Courts of Chancery recognised that the beneficiary as the equitable owner of trust property. This change essentially meant that trusts created personal rights against the trustee as well as real rights against the trust property that were intact even after transfer or introduction of third party rights. The recognition of an equitable property right in the beneficiary diminished the objection at common law that there was no privity between the beneficiary and the defendant. When the Chancellor used constructive trusts as a privity-creating device, the chance of raising the common law objection further diminished. The recognition by the Chancellor of the beneficiary’s equitable ownership suggests that this development in Chancery led plaintiffs to no longer bring beneficiary actions in *assumpsit*.

4.2.1 The original idea of use

Use originally was nothing but an unenforceable moral obligation. Use was a confidence that did not come within the sphere of law. In land law, the feoffee to uses was the absolute owner and a beneficiary to whom a use had been promised had no legal remedy. If the beneficiary was allowed to have possession of a land, he enjoyed that possession at the pleasure of the feoffee. Daelamere v. Barnard (1567) Plowden 346 illustrates that the beneficiary could be ousted by the feoffee at any time and be sued by the feoffee for any profits that the beneficiary had derived from his possession of the land. The beneficiary neither could prevent being thrown out of the land nor raise any defense at common law to the claim for profits.

Although common law did not afford any remedy to the beneficiary, the Courts of Chancery protected the beneficiary’s interest, according to George Spence, as early as the 15th century. The Chancellor protected the use since most lands in England were in that day enfeoffed to uses. As Periam J noted in Chudleigh’s Case (1589-95) Popham 70, the use “overshadow all the possessions of the whole realm.” Hence, there was a strong moral reason to protect the beneficiary and provide him with some remedy, and consequently, trusts were utilised to provide this protection since trusts, in essence, were made up of promises that men, in good conscience, should fulfill.

Originally, the beneficiary or *cestui que trust* only had rights that could be enforceable through and against the feoffee since the beneficiary’s claim was only upon the conscience

of the feoffee as a person and did not attach to the land itself. Hence, in Y.B. (1468) 8 Edw. IV 6, it was stated that: "...if my feoffee dies, and the land descend to his heir, I have no remedy against him [the heir]." The feoffee's duty was personal to him and could not be transmitted to a second feoffee that took a transfer in good faith without notice of the use. In such a case, the beneficiary's recourse was to sue the feoffee that had breached the confidence.

According to George Spence, the heir of a feoffee was held to the use granted by his ancestor in the Courts of Chancery by the late 15th century. The extension was premised on the Chancellor's desire to prevent the heir from being unjustly enriched. In order to achieve the extension, the Chancellor relied on a presumption that the heir had notice of the use. Notice meant that the heir had prior knowledge of the use and had consented to it, and this in turn would attach to the heir's conscience.

The rights of beneficiaries were further extended when subpoenas were expanded to encompass transferees who had acquired property without valuable consideration or with actual notice of the use. Pollard J first stated this extension in the case of Y.B. (1524) 14 Hen. VIII 4 pl. 5 when he said:

If the feoffees enfeoff one without consideration, this is to the first use, even if it is without notice: but on consideration without notice the use is changed. But on notice with consideration the first use remains, and this is the difference.

One limitation was that subpoenas applied only to persons who were claiming through or under the feoffee. It did not apply to persons who came after the feoffee. Those who fell in the former category were said to come in the "*per*", and the latter in the "*post*", both being expressions taken from the forms of the old writs of possession⁴. Those who came in the "*post*" had a superior property right compared to the beneficiary's equitable claim. For example, a lord who exercises his right to forfeit the land of a feoffee who dies without an heir is asserting a right against the land that does not arise through or under the feoffee. The lord, thus, is enforcing a right that came in the "*post*" and the beneficiary had no protection against him. Claims in the "*post*" were, hence, transfers that were effected by operation of law and as such, not liable to the use in favour of a beneficiary. Lord Hale realised this in the case of Pawlett v. AG (1668) Hardres 465 when he said:

...a trust is created by the contract of the party, and he may direct it as he pleaseth; and he may provide for the execution of it, and therefore one that comes in the *post* shall not be liable to it ... and therefore they only are bound by it who come in in privity of estate."

A further limitation was that subpoenas were not extended to encompass *bona fide* purchasers for value who did not have any notice of the use. The superior right of a purchaser for value without notice over a beneficiary's claim cannot be explained with the concept of "*per*" and "*post*". It is incontrovertible that the purchaser's claim to ownership

⁴ "Per and Post", [1888] 4 L.Q.R. 362

arises through or under the feoffee and consequently, comes in the “*per*”, yet the purchaser is protected as if his right comes in the “*post*”.

The incomplete protection afforded to beneficiaries and limited extension of their rights was unavoidable when seen in the light of the fact that the beneficiary’s right to the use depends on whether the use attaches to the legal owner’s conscience. To have further extended the beneficiary’s right would have entailed replacing the theory that the use attaches to the owner’s conscience with the rule that the use follows or attaches to the land itself.

A succinct definition of the use was laid down in the case of Delamere v. Barnard (1567) Plowden 346. It was said in that case that the use was “a thing collateral annexed to the person touching the land.” This definition clearly spelt out that the use attaches to the person and not the land, thereby giving rise to an *in personam* right in favour of the beneficiary against the owner, as opposed to a right *in rem* against the land. Sir Edward Coke, however, introduced the phrase “in privity to the estate” to this definition when he wrote that the use was “a thing collateral annexed *in privity to the estate* of the land, and to the person touching the land.” Edward Coke’s definition was later repeated in the cases of Arguendo, King v. Holland (1648) Style 20 and Lord Willoughby’s Case (1626) Jones, W. 96.

As a result, two elements were necessary to establish a trust, namely, confidence reposed in the person of the feoffee, and privity in estate. It can be surmised from Lord Hale’s statement in Pawlett v. AG (1668) Hardres 465 that the phrase “privity in estate” was a veiled contractual link between the transferee and beneficiary.

4.2.2 Right *in personam* evolves to a right *in rem*

Until the interest of the *cestui* or beneficiary in the trust property was recast as a direct property interest, the protection given to a beneficiary was be limited. This is illustrated by Arthur Johnson’s Case (1596) 1 Popham 106. In that case, a husband assigned a lease to two of his brothers-in-law for the use of his wife. Upon his death, the wife remarried and her second husband took the profit during the wife’s life. When she died, the two brothers-in-law took administration of her estate. The question arose whether the two brothers-in-law who were trustees under the assignment or the second husband should have the lease. The question was decided in favour of the trustees since they held the use as well as the legal interest in the lease after the death of the wife. It was said that the second husband could not have the use since the use “is as a thing in action.” The decision illustrates that the wife or her second husband’s right to the use was only a personal right or a right *in personam* whereas the *in rem* rights or real rights vested in the trustees.

The conversion of the use from merely a right *in personam* to a right *in rem* happened in the late 17th century. The conversion of the use can be attributed to Lord Nottingham. In Medley v. Martin (1673) Rep. Temp. Finch 63, Nottingham held that the trust property could not be used to satisfy execution proceedings brought by the trustee’s creditors. Then in Bevant v. Pope (1681) 2 Freem. 71, he held that a trustee’s widow’s share for life in the trustee’s estate (her dower rights) does not include the trust property

and cannot be satisfied out of it. These decisions overturned the defense of coming in the “*post*”, which was at one time unassailable. These decisions marked a shift from the previous *in personam* right of the beneficiary to a right *in rem*.

The case of Creed v. Coville (1683) 1 Vern. 172 also evidenced this change in thinking of the what the beneficiary’s right entailed. Lord Nottingham in this case decreed that the trust property could be used to pay a bond that the *cestui* had expressly made himself liable to. These cases, in essence, placed trust assets, that were once regarded as being part of the trustee’s assets, as the *cestui*’s assets. The *in rem* rights of a *cestui* to the assets comprising a trust was eventually settled by the Statute of Frauds (1677) 29 Car. II. The Statute of Frauds provided that the trust assets would not be liable to execution for the debts of the trustee but were liable to execution by the *cestui*’s judgment creditors.

The recognition of the beneficiary’s *in rem* right to trust assets overcame any objections on grounds of privity that sought to restrict the *cestui*’s right to protect his own estate. In Harvey v. Baker (1677) 79 Seld. Soc. 631 a father left his estate in trust for his son. The son brought a suit against a receiver appointed by the trustees for an account of his father’s real and personal estate. It was argued that the receiver had “no privity” with the son, as the trustees of the estate were the ones who had appointed the receiver. Hence, it was argued, the receivers’ duty to account was to the trustees and not to the son. Lord Nottingham dismissed the objection and pointed out that the *cestui* was the owner of the trust assets. Consequently, Nottingham found that it was:

...reasonable that the plaintiff should pursue his demand by following his estate into such hands to which he can trace it. For it is not fit to oblige the plaintiff to charge the trustees for the [agent’s] acts when he thinks he may have a readier and juster satisfaction by setting the saddle on the right horse.

The beneficiary’s right was further enhanced when the Chancellor’s in the late 17th century used the principles of agency to extend the third party action. The doctrine of notice was revised in the cases of Merry v. Abney (1663) 2 Freem. 151 and Sheldon v. Cox (1764) to the effect that whatever was within the notice of an agent equally lay within the notice of the principal. As Grimstone M.R. said in the case of Merry v. Abney (1663) 2 Freem. 151:

Notice to the father, who transacted, is notice to the son, and shall affect him; so notice of a dormant incumbrance to one who purchaseth for another, is notice to the purchaser.

This was yet another extension that was used to surmount the claim of a purchaser for valuable consideration, which in the past, came in the *post*.

The transformation of the beneficiary’s or *cestui*’s right from an *in personam* right only to an *in rem* right witnessed the development of the beneficiary right from a mere contractual right to proprietary right. It also witnessed the falling away of the previously insurmountable right of a purchaser and the *post*, and the extension of the doctrine of notice with the use of agency principles. The transformation spearheaded by Lord

Nottingham not only extended the *cestui's* interest into a proprietary right in the trust assets but also exposed those assets to the burdens of ownership, particularly by availing those assets for execution by the *cestui's* creditors. And in so doing, Nottingham spared the trust from the criticism the beneficiary action faced at common law, namely, that if the beneficiary right were recognised at common law, it would give the beneficiary a right to sue but not to be sued. This, as Crompton J in Tweddle v. Atkinson (1861) 1 B. & S. 393 described, would be a “monstrous proposition”.

4.2.3 Constructive trust in the Chancery

Arthur Corbin argues that the constructive trust was a privity-creating device when it was attached to a promise made for the benefit of a third person. Corbin maintains that the Chancellor created a trust out of a simple exchange of promises for the purpose of overcoming the impediment of privity and consideration. In his article, he wrote:

If in this process he [the Chancellor] was disregarding and in a measure nullifying the sacred requirement of `privity' of contract, if he was putting into the hands of a stranger one end of the `vinculum juris' that had previously been beyond his reach, if he was overlooking the requirement in the action of assumpsit that a promise was enforceable only by one who had given something for it or suffered a `detriment' in reliance on it, what of it? ...[The Chancellor] had at his command something that the common law judges did not yet have at theirs—the magic word `trustee'. By its use and with this single word, he rendered innocuous the threatening magicians ensconced within the phrases `lack of privity' and `stranger to the consideration'.

Corbin's views were conclusions he drew from the case of Tomlinson v. Gill (1756) Amb. 330. Corbin was of the view that this was the first case in which the promisee was held to be a trustee for a third party by the Chancellor. The promise itself was deemed to be the *res* or property of the constructive trust.

In Tomlinson v. Gill (1756) Amb. 330, Tomlinson was the creditor of a man who had died without leaving a will. The debtor's widow was administratrix of the estate. The debtor's father asked the widow to let him be joined with her as administrator of the estate. In exchange, he promised to pay for any shortfall in the estate so that his son's debt would be discharged. The widow agreed and the debtor's father was made an administrator. The assets in the estate were insufficient to discharge the son's debts and Tomlinson brought an action against the administrators for an account, alluding to the father's promise to the widow. The Chancellor, Lord Hardwicke, decreed that the plaintiff was entitled to an account and that if there were insufficient assets in the estate to pay of his debt, that the plaintiff should have the benefit of the contract between the debtor's father and the widow. Lord Hardwicke was of the view that:

The plaintiff is proper for relief here for two reasons: 1st, He could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them. 2dly, The bill is brought for an account, and that draws to it relief, like the common case of a bill to be paid out of assets.

Arthur Corbin analysis of Lord Hardwicke's reasoning was that the Chancellor viewed the promise made by the debtor's father to his widow as creating a trust in favour of the creditors. Corbin supports his analysis by reference to the Chancellor's statement that the "widow is a trustee for them [the creditors]" and wrote:

...there was no trust fund to be administered either by the defendant or by the promisee. There was merely a contract between two persons by which one of them promised to pay a debt due to the plaintiff, a third party; and the promisee is called a trustee merely as a means of sustaining a bill in equity by the beneficiary against the promisor.

Corbin's analysis of Tomlinson v. Gill (1756) Amb. 330 is flawed when other factors that led to the widow being termed a "trustee" are considered. The first reason why the widow was referred to as a "trustee" was that the entire estate to be administered by the widow was a trust for the creditors. Creditor trusts were imposed in the Chancery in the cases of Pitt v. Pelham (1670) 2 Freem. 134 and Cook v. Fountain (1672) 3 Swans. App. 585 where testators left a will directing their assets to be sold to pay their debts. In Tomlinson v. Gill (1756) Amb. 330, since the debtor died intestate, Lord Hardwicke was merely imposing a constructive trust to protect the interest of the creditors. The promise made by the debtor's father to the widow was but an asset of the estate comprising the trust, and was not what created the trust. Hence, Corbin's view that "there was no trust fund to be administered" cannot be supported since the entire estate, in principle, was a trust for the creditors.

The second reason that the widow was referred to as a "trustee" was because an executor or executrix of an estate were regarded as trustees in the sense that the executor was trusted to pay the debt and legacies of the estate. Henry Maddock recognised this usage when he wrote:

...in Lord Nottingham's time an Executor was considered as a Trustee; and the opinion then prevailed, that a Legatee is entitled to bring his Bill in Equity against an Executor for his Legacy, upon the foundation, that the office of Executor is a Trust.

The third reason for the widow to be termed a "trustee" is found in Lord Hardwicke's analysis of the Statute of Frauds. The analysis came about because the debtor's father argued that he should not be held liable for his promise since it was not in writing, and consequently, was void under the Statute of Frauds. In order to determine the validity of the argument, Lord Hardwicke examined section 4 of the Statute in order to determine if the promise had to be in writing. If Corbin's analysis, that Lord Hardwicke viewed the promise as creating a trust, were correct, Lord Hardwicke would surely have relied on Sections 7 and 8 of the Statute, which expressly excluded trusts of personalty and choses and constructive trusts, to overcome the father's argument.

In the Chancery, an executor of a will in which the testator had directed his assets to be sold to pay his creditors was called a trustee. In Gregory & Parker v. Williams (1817) 3 Mer. 582, a creditor to whom a debtor's estate was conveyed, and who promised to pay out of the assets comprising the estate a debt owing to another creditor was termed a

trustee. In Ex parte Byas (1743) 1 Atk. 124, an assignee of a note who promised to repay the plaintiff out of the proceeds of the note was also called a trustee for the plaintiff. These cases illustrate that constructive trust was not simply a privity-creating device utilized by the Chancellor to overcome the obstacles of stranger to the consideration and lack of privity as Corbin argued. Overcoming the privity hurdle could not have been the aim of the Chancellor since in many cases, such as Moore v. Darton (1851) 4 De G. & Sm. 517, the promisor himself (as opposed to the promisee) was termed a trustee. Trusts, it seems, was only the means of expressing obligations and not a privity-creating tool used by the Chancery.

4.3 Assignments of Rights

At common law, contract rights could not be assigned because it was said that contract rights were too personal to be transferred. Assignments also faced objections because they posed the threat of maintenance and champerty. The fear of common law judges to open the door to maintenance and champerty is illustrated in Lampet's Case (1612) 10 Co. Rep. 46b where it was said:

And first was observed the great wisdom and policy of the sages and founders of our law who have provided, that no possibility, right, title nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression to the people, and chiefly of terre-tenants.

The original prohibition against assignments weakened by the 17th century, and succumbed to circumvention and exceptions. In George v. Chansey (1639) 1 Chan. Rep. 125, it was held that a devise assigned to the king could transfer the chose to a party by subsequent reassignment. In Ferner v. Meares (1770) 2 Wm. Black 1269, an obligation, that was worded in such a way that the debtor was required to render performance in favour of anyone to whom the obligee assigned, was valid and enforceable by the assignee against the debtor. Another manner in which the rule against assignments was circumvented was for the assignee to be expressly appointed as the attorney of the assignor and given the authority to sue upon the obligation. This was done in the case of Potter v. Turner (1622) Winch 7.

Assignment of a right through a power of attorney, however, posed the difficulty that the assignee was an agent for the assignor. The problem with the position of the assignee as agent was that even if the assignor had received full satisfaction or consideration for the assigned right, the assignor could nevertheless interfere with the assignee's right to collect the assigned debt by, for example, revoking the power of attorney. This was so since the assignee, being the assignor's agent, would be a fiduciary to the assignor. The position needed to be reversed so that an assignor who received full satisfaction for the assigned right would be a fiduciary to the assignee.

At common law, the issue that there was no privity of contract between the assignee and the debtor was never raised. The only question that needed to be addressed was whether the assignee had a valid power of attorney, whether there was a precedent debt through which could be established a common interest between the assignor and the assignee, and

whether any other rules designed to prevent maintenance was applicable to the case. The common law judge only deliberated on the duties owed by the assignor and assignee to each other. There was, however, undeniably a need to give greater protection to the interest of the assignee.

In the 18th century, common law judges gave better protection to assignee by, firstly, recognizing a contractual link between the assignor and assignee. Creating a contractual obligation between the assignor and assignee was possible if the assignee had provided consideration for the right assigned. The second way in which assignees received greater protection was when the assignor was deemed to be a trustee for the assignee in equity. The second technique gave a superior right to assignees in that they were acknowledged as the beneficiary of the assignment, thereby eliminating the assignor's power to revoke the assignee's rights since the latter was considered the beneficiary under a trust. In Delaney v. Stoddart (1785) 1 T.R. 22, the court held that an assignor who assigned a right was to be considered as a trustee for the assignee. Though trust was within the purview of the Court of Chancery, Ashhurst J rationalized the use of the trust concept in the common law court in the case of Winch v. Keeley (1787) 1 T.R. 619, when he said:

It is true that formerly the Courts of Law did not take notice of an equity or trust; for trusts are within the original jurisdiction of a Court of Equity; but of late years, it has been found productive of great expense to send parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection.

With the introduction of the trust concept in the common law courts, the assignor was under a fiduciary duty to act *bona fide* toward the assignee. The assignor was therefore precluded from exercising any of the legal rights resulting from the prohibition on assignments.

The Chancellor, however, was not concerned with protecting the assignee from the assignor, but rather with protecting the debtor from the assignee. The Chancellor, consequently, used the concept of trust to confer ownership of the chose in action (that is the right to sue) on the assignee. But with conferment of ownership was also developed the debtor's right to raise defenses and equities in an action brought by an assignee.

4.3.1 Assignments in the Chancery

The Courts of Chancery generally did not enforce legal choses in action, such as a debt or an insurance policy, since the right to enforce debts or claims arising from a contract fell within the purview of the common law courts. The case of Meechett v. Bradshaw (1634) Nels. 22 illustrates that assignees of legal choses could only seek a decree to prevent the right assigned to them from being arbitrarily revoked or revoked *mala fide*. In such cases, the Chancellor would compel the assignor to lend his name to a suit brought by the assignee in the common law court. The Chancellor, however, did not interfere in cases such as Earl of Suffolk v. Greenville (1641) Nels. 15 and Mitchell v. Eades (1700) Prec. Ch. 125 where the revocation was merely through the operation of law, for instance by reason of marriage or death. The Chancellor did allow an assignee to have a remedy in the Chancery in his own name if the assignee could establish an equitable reason for the

assignment or that consideration was provided for the assigned right. Thus, in the case of Anonymous (1675) 2 Freem. 145, Lord Keeper Bridgman, applying the rule that consideration must have been provided for the assigned right to be enforceable in the Chancery, said that the Courts of Chancery would not:

...protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee; but not when the debt or chose in action is assigned to one to whom the assignee owes nothing precedent, so that the assignment is voluntary or for money then given.

The Chancellor exercised direct authority over equitable choses, such as a legacy in a trust fund, since these came within the jurisdiction of the Courts of Chancery. The equitable principles applied in the Chancery created a special class of equitable interests that could only be recognised and enforced in the Courts of Chancery. The Courts of Chancery also enforces assignments of subject matters not in existence at the time of the assignment. For instance, in the case of Langton v. Horton (1841) 3 Beav. 464, the Chancellor recognised an assignment of the future cargo of a whaling ship in exchange for an advance of money to fund the expedition.

The Courts of Chancery imported a contractual notion to equitable assignments. The Chancellors regarded equitable assignments as contracts by which the title to the chose in action was transferred to the assignee. Lord Hardwicke in the case of Wright v. Wright (1749) 1 Ves. Sen. 409 pointed out that assignments:

...always operates by way of agreement or contract, amounting in consideration of this court to this, that one agrees with another to transfer, and make good that right or interest; which is made good here by way of agreement.

Since the Chancellor viewed assignments as a contract to transfer the title to a chose in action, the natural consequence that flowed from this was that the assignee had a right to bring an action in his own name. This effect is illustrated by the case of Fashion v. Atwood (1679) 2 Chan. Cas. 169. In that case, Atwood was indebted to his father, Pearson. In settlement of his debt to Pearson, Atwood assigned to him certain debts owed to him. Pearson then reassigned these debts to one of his own creditor for the benefit of all of Pearson's creditors. All of Pearson's creditors brought an action in their own names against Atwood's executrix after his demise to claim the benefit of the debts due under the assignment. The creditors did not have a power of attorney, which would have been a prerequisite had the action been brought in the Common Law Courts. The Court, in that case said:

By the agreement Pearson had a good Title in Equity to the Debts, which in Equity are become his, and are no longer Atwood's; and therefore decreed for the Creditors of Pearson.

The Chancellor, evidently, was not concerned with the prohibition at common law that contractual rights could not be assigned because they were personal in nature.

Adding a contractual flavour to assignments also diminished objections on the ground of maintenance to actions brought by assignees. The Chancellor did not have to consider whether there was a precedent debt that gave rise to a common interest between assignor and assignee in order to overcome the maintenance objection. As long as the assignee could establish valuable consideration for the assignment, he could succeed regardless that there was no pre-existing debt between the assignor and assignee.

In the case of Bates v. Dandy (1741) 2 Atk. 207, the plaintiff lent money to a man who, in exchange for the advance, promised that he would assign to the plaintiff some mortgages that he had previously assigned to his wife. The plaintiff sought to enforce the promise. The issue before the court was whether the man's promise amounted to a transfer of the right to the mortgages to the plaintiff as security for the loan. Lord Hardwicke found that the husband, for his own benefit, could properly assign the wife's chose in action. Lord Hardwicke, in deciding the case did not preoccupy himself with the question whether there was a precedent debt between the assignor and assignee. Instead the report makes it clear that Hardwicke did not consider the issue of maintenance and his decision was based on the fact that the assignment had been for a valuable consideration. The Chancellor said, "The husband may assign the wife's chose in action, or a possibility that the wife is entitled to ... for a valuable consideration."

The third effect of the Chancery treating assignments on a contract model was that the assignor, debtor and assignee were all treated as parties to the original contract between the assignor and debtor. Hence, whatever defenses or equities that the debtor could have raised against the assignor under the contract could similarly be raised against the assignee in an action brought by him. Thus it was held in the case of Ex parte Byas (1743) 1 Atk. 124 that an assignee's claim to the assets of the assignor was subject to a prior security interest created over those assets in favour of a moneylender. In Tyrell v. Hope (1743) 2 Atk. 558, the Chancellor used the trust mechanism to impose a trust on the assignor, thereby restricting his ability to assign rights over his wife's marriage settlement to his assignees. Since the wife was deemed a *cestui que trust*, the assignees who took the assignment were regarded as her trustees and could not lay claim to the assets comprising the trust.

The Chancellor, due to the recognition of vested interest, was at times faced with two conflicting equities when dealing with an assignee that had given valuable consideration for the assignment. This happened in Tyrell v. Hope (1743) 2 Atk. 558 and Sir Edward Turner's Case (1681) 1 Vern. 7 where the husband assigned his wife's marriage settlement for his own benefit. In the former case, the interest of the wife was protected. In the latter case, the position was reversed and the Chancellor protected the assignee's interest. The position was finally settled in the case of Jewson v. Moulson (1742) 2 Atk. 417 which decided in favour of protecting the wife's vested interest. The final position taken by the Chancellor was in line with rule established in the case of Purduw v. Jackson (1824) 1 Russ. 1 that an assignor cannot assign any greater right than he actually has. Thus, it was observed in the case of Burnett v. Kinnaston (1700) 2 Vern. 401 that:

An opinion has certainly prevailed that a distinction subsists between an assignment by operation of law and an assignment for a valuable consideration to an individual by

contract; that the former is no bar to the right of the surviving wife, but that the latter is. Yet the earlier prevailing opinion was erroneous, because all assignments pass only the interest which the husband had: How can he for valuable consideration or otherwise convey more than he has?

The Courts of Chancery overcame the objections prevalent in the common law courts against assignments by construing assignments as an alienation of the chose itself, thereby giving the assignee an independent right to bring an action against the obligor. This was achieved by introducing a contract element to assignments. The modern law of assignments is based on that contract model introduced by the Chancellor.

The development in the Chancery between 1680 and 1800 illustrates that the Chancellor permitted beneficiary actions through the use of various equitable machinations such as trusts and assignments. The Chancellor's refusal to impose the privity of contract restriction in beneficiary actions, that had been predominant in the Common Law Courts, can be understood when the Chancellor's decisions are viewed in the light of the fact that the rule of consideration had not gained great importance in the Chancery at that time. Furthermore, the development of the beneficiary's promissory right under a trust to a right *in rem*, and the enforceability of assignments of choses in action contributed to the Chancellor's not adhering to the common law restriction of privity of contract.

The influence of equity, however, diminished by the early 19th century and, hence, the rules created by the Chancellor faded away. The Chancellor was no longer prepared to freely use concepts such as constructive trust to permit beneficiary actions. Trusts in favour of creditors were later categorized as contracts of agency, thereby limiting beneficiary actions. Of no less importance was the fact that the doctrine of consideration had gained greater importance and had become a highly technical doctrine in itself. Ultimately, the privity rule conceived along the consideration doctrine and established in Bourne v. Mason (1669) 1 Vent. 6 was accepted and took its place as the cornerstone of English contract law.

CHAPTER 5

THE EMERGENCE OF THE DOCTRINE OF PRIVACY OF CONTRACT BETWEEN 1800 AND 1890

5.1 The Veritable Rule in Tweddle v. Atkinson

Most modern textbooks writers on contract, such as G.H. Treitel and Andrew Phang Boon Leong, credit Tweddle v. Atkinson (1861) 121 ER 762 as the case that establishes the doctrine that only parties to a contract can enforce it. P.S. Atiyah, however, states that this conclusion is misconceived and blames, in no small measure, the legal profession for this misconception. The learned author wrote:

As has often happened in the law, the case became important, not for what the judges said, but for what the legal profession came to believe the case stood for. And what they believed that *Tweddle v. Atkinson* stood for was the proposition that it is somehow contrary to the inherent nature of a contract that it should be capable of conferring enforceable rights upon third parties.

In the 19th century, the rule of consideration had become an essential pre-requisite for a plaintiff to enforce a contract at common law. The early cases of *Bourne v. Mason* (1669) 1 Vent. 6 and *Crow v. Rogers* (1724) 1 Strange 592 laid down the requirement that the plaintiff must not be a stranger to the consideration. The 19th century case of *Price v. Easton* (1833) 4 B. & Ad. 433 picked up on this and Denham J ruled that the plaintiff must show “consideration for the promise moving from the plaintiff to the defendant.” Sir John Comyns’ Digest similarly states that “the legal interest in the simple contract resides with the party from whom its consideration moves.” When *Tweddle v. Atkinson* (1861) 121 ER 762 was decided, Crompton J reiterated this rule when he said, “the promisee cannot bring an action unless the consideration moved from him.” The statements in these cases are a reflection of the consideration rule and had nothing whatsoever to do with the rule that only parties to a contract could enforce it.

In order to fully appreciate the judgments in the case of *Tweddle v. Atkinson* (1861) 121 ER 762, it must be noted that the 17th century rule of pleading in the case of *Starkey v. Mylne* (1651) Cremer Ms. 105 was still in force in the 19th century. That rule of pleading was that the plaintiff had to allege that he was the promisee even though in reality he was not. In *Starkey v. Mylne* (1651) Cremer Ms. 105 the plaintiff’s declaration made it appear as though the plaintiff was a party or co-promisee in a tripartite contract. Essentially, where X receives a promise from Y for Z’s benefit, and the consideration for Y’s promise moves from Z and not X, Z had to file a declaration as if he had received the promise directly from Y. This requirement implied the common law judges’ belief that the consideration draws the promise to the person who provided it.

The understanding that the promise follows the consideration or that the consideration draws or pulls to it the promise and the use of such phraseology was not uncommon at that time. In *Edmundson v. Penny* (1845) 1 Pa. St. 335, Gibson C.J. said that:

The plaintiff must unite in his person both the promise and the consideration of it; and if the action, in such case, cannot be sustained on the foundation of the consideration by drawing the promise to it, it cannot be sustained at all.”

This requirement illustrates that the rule that only a party to a contract can enforce it had not yet become a rule of contract law. The rule, if it was brewing, was quelled by this rule of pleadings. Contemporary legal writers assert that two precedents decided in the 19th century brought about the shift to the rule that only a party to a contract can enforce it. Those two precedents are *Price v. Easton* (1833) 4 B. & Ad. 433 and *Tweddle v. Atkinson* (1861) 121 ER 762. It is necessary, therefore, to scrutinize these two cases to discover the true premise upon which they were decided.

In Price v. Easton (1833) 4 B. & Ad. 433, William was the defendant's employee. He owed the plaintiff £13. The defendant told William to leave his future earnings with him and he promised that if William did this, the defendant would pay William's debt to the plaintiff. The defendant did not make any promise to the plaintiff and the latter was not a party to this arrangement. William accepted the offer and left a sizeable sum of his earnings with the defendant. The defendant, however, did not pay the debt owed to the plaintiff. The plaintiff brought an action against the defendant for breach of promise but failed in his action.

The plaintiff, in argument before the court, relied on the interest and benefit theories established by the cases during the period between 1500 and 1680. The defendant, on the other hand, relied heavily on the consideration rule enunciated in the cases of Bourne v. Mason (1669) 1 Vent. 6 and Crow v. Rogers (1724) 1 Strange 592. The defendant's counsel never raised or directed the court to any rule that only a party to a contract can enforce it. The opinions of the judges found in the report also does not indicate that they ever considered such a rule.

Denman C.J. in that case said, "I think the declaration cannot be supported as it does not shew any consideration for the promise moving from the plaintiff to the defendant." Littledale J. remarked, "No privity is shown between the plaintiff and the defendant. This case is precisely like Crow v. Rogers (1 Str. 582) and must be governed by it." Patteson J., on the other hand, said, "After verdict, the Court can only intend that all matters were proved which were requisite to support the allegations in the declaration, or what is necessary to be implied from them. Now it is quite clear that the allegations in this declaration are not sufficient to shew a right of action in the plaintiff. There is no promise to the plaintiff alleged."

It is discernible from the opinions of Denman C.J. and Littledale J. that they were primarily concerned with the consideration rule. They were of the view that the plaintiff had not provided any consideration for the promise and hence, could not enforce it. Their decision was premised on the consideration rule propounded in Bourne v. Mason (1669) 1 Vent. 6 and Crow v. Rogers (1724) 1 Strange 592. Most would prefer to gloss over these two opinions and concentrate on that part of the decision of Patteson J. where he said, "There is no promise to the plaintiff alleged" to substantiate the claim that the rule established was that only a party to a contract can enforce it.

The statement that "There is no promise to the plaintiff..." cannot be read without the crucial final word "alleged". The last word illustrates that Patteson J. was not referring to a parties-only rule but to the fictional rule of pleadings that required the plaintiff to state in his declaration that the promise was made to him, though in reality it had not. Properly read, there is nothing in the opinions of the judges in the Court of King's Bench that suggests that they considered anything other than the consideration rule.

The second case, Tweddle v. Atkinson (1861) 121 ER 762, is widely acknowledged by the legal fraternity as the case from which the rule that only a party to a contract can enforce it originates. In that case, the plaintiff's father and father-in-law executed a written

postnuptial agreement whereby they each undertook to pay to the plaintiff a certain sum by a certain date. The agreement provided:

Memorandum of an agreement made this day between William Guy ... and John Tweddle ... Whereas it is mutually agreed that the said William Guy shall pay the sum of £200 to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay £100 to the said William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby further agreed ... that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.

The plaintiff's father-in-law, William Guy, died before paying the sum of £200, which he undertook to pay in the agreement. There was no evidence, since the action was upon declaration and demurrer without evidence being taken, that the plaintiff's father had paid his portion. The plaintiff brought a declaration in assumpsit against his father-in-law's executor. The plaintiff failed in his action, the Court of Queen's Bench having held that the action could not be maintained. Crompton J. in his opinion said that, "the promisee cannot bring an action unless the consideration moved from him." Blackburn J. said that, "no action can be maintained upon a promise unless the consideration moves from the party to whom it is made." These two statements are reflective that Tweddle v. Atkinson (1861) 121 ER 762 can be considered the provenance of the contemporary rule that consideration for a contract must move from the promisee. Wightman J.'s opinion was that, "it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."

There is again nothing in the opinions expressed by the judges in Tweddle v. Atkinson (1861) 121 ER 762 to suggest that they considered a rule that only parties to a contract could enforce it. The opinions they expressed stressed the consideration test and it is not possible to read more into the case, which was premised solely on the consideration rule.

The judges of the Courts of Queen's Bench were also concerned with the principle that there must be mutuality of consideration. The plaintiff was attempting to enforce a promise made in postnuptial agreement. In order to succeed, he had to establish consideration for the promise. The fact that he had married William Guy's daughter could not be deemed as consideration for the promise since the marriage had taken place prior to the agreement. The marriage was, consequently, past consideration, and that was not recognised as valid consideration under English contract law. The plaintiff, in order to establish consideration for the father-in-law's promise, relied on the principle of near relation or otherwise known as natural love and affection which had been used in Dutton v. Poole (1678) 2 Lev. 210.

However, the judges in Tweddle v. Atkinson (1861) 121 ER 762 were of one mind that Dutton v. Poole (1678) 2 Lev. 210 was no longer good law. The judges were also all concerned that permitting an action on the basis of near relation would upset general tenets of the law of contracts because of the lack of mutuality between the plaintiff and the

defendant. This concern is evident in their response to the argument of counsel George Mellish that:

...an exception exists in the case where a father is making a provision for his children, the nearness of the relationship giving them the benefit of the consideration; and, in truth, justice is in favour of the exception.

Crompton J., in response to this argument said, “There must be mutuality;” and asked Mellish whether he was saying, “...that the plaintiff is liable to be sued, as well as competent to sue?” Wightman J. added that, “That is the great difficulty; there is no mutuality or reciprocity.” That the judges would be loath to permit an action on a promise that lacked mutuality is brought out in Crompton J.’s statement that, “It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued.”

These objections could be regarded as implying the existence of a parties-only rule but read in context, it illustrates the court’s apprehension that permitting such an action would require the defendant to perform his obligation under an agreement even though the plaintiff’s father had not performed his obligation under the agreement. P.S. Atiyah noted this when he wrote:

...the Court declined to assist him, chiefly because they seem to have thought it would be unfair if the groom could sue his father-in-law, and yet be free from liability if his own father failed to make his contribution.

Put another way, the court’s concern was that if the plaintiff was allowed to sue William Guy for his promise but could not be sued by William Guy for the plaintiff’s father’s promise, then William Guy would be deprived of the right to raise the defense that there had been a failure of consideration on account of the fact that John Tweddle had not performed his promise under the postnuptial agreement.

A review of the two precedents thus shows that the rule that only a party to a contract can enforce it did not emanate from the opinions expressed by the judges in those two cases. The search for the source of the parties-only rule must, consequently, go beyond the common law action of *assumpsit*.

5.2 Beneficiary Actions in the Continent

The school of natural law in the Continent used will theory to justify recognition of an action by the beneficiary. However, when will theory percolated English law in the 19th century, the common lawyers used it to substantiate the rule that only a party to a contract can enforce it and thereby subjugate the beneficiary action.

Prior to the advent of will theory, the will of the parties to a contract and their underlying intention was unimportant because only real contracts and formal contracts were considered enforceable agreements. The French legal historian Jean Brissaud noted this when he wrote:

Formalism has the effect of compelling the judge and parties to adhere strictly to words and acts leaving to one side questions of intent. Or, to speak more exactly, in a law which is formalistic the will has no legal existence except to the extent to which it is expressed by exact words; it is incarnated in its material expression ...

Will theory began to develop on the Continent when the principle of consensual contracts and contractual informality initially emerged. As the principle of consensualism became prevalent, an analysis of the relationship between the will of the parties and consent was unavoidable. Such analysis was indeed undertaken by many learned Continental writers, for instance, Hugo Grotius, Emanuel Kant whose work on will theory caused it to gain greater influence in the German legal practice, and Hegel who defined contracts as:

...the process in which there is revealed and mediated the contradiction that I am and remain the independent owner of something from which I exclude the will of another only in so far as in identifying my will with the will of another I cease to be an owner.

Scottish commentators in their writings in the 18th century recognised will theory. (P.S. Atiyah) However, in England, leading philosophers and commentators criticized will theory because they explained the binding nature of promises by reference to the expectation theory, which was more harmonious with the doctrine of consideration. David Hume, for example, wrote that men invent promises, and serving self-interest is the first law of promises. Hume argued that merely exercising one's will could not create an obligation or duty to perform. Performance of promises for the benefit of another was not out of kindness, but rather was precipitated by the promisor's self-interest and belief that his performance will be reciprocated by the promisee because the promisee expects another performance of the same kind.

Some of those commentators believed that in order to protect the promisee's expectation the law enforced promises. Thus, Adam Smith wrote:

It is the disappointment of the person we promise which occasions the obligation to perform it. ...the obligation to perform a promise cannot proceed from the will of the person to be obliged, as some authors imagine. For if that were the case a promise which one made without an intention to perform it would never be binding.

Be that as it may, will theory did influence the development of English contract law. P.S. Atiyah wrote that will theory was generally accepted in English contract law in the later part of the 19th century. The learned writer contends that the first seventy years of the 19th century was under the influence of the expectancy theory and will theory gained acceptance in the later part of the 19th century. The acceptance of will theory as part of English law witnessed the recasting of the principle that consideration created contractual obligation to the rule that obligations were created by promises.

The rule that only a party to a promise can seek its enforcement was not a consequence of will theory. However, the views of the French writer Robert J. Pothier, which followed the

tenets of Roman Law, was instrumental to the development of the parties-only objection in England. Pothier argued against beneficiary actions because, firstly, he believed that the wills of the parties were exclusive to them alone, and the beneficiary's will was never involved in the formation of the agreement. He wrote that contracts:

...being formed by the consent and concurrence of intention of the parties, they cannot oblige or give a right to a third person, whose intention did not concur in forming the agreement.

Pothier's second reason for not recognizing a beneficiary action was that since the promisee does not derive a direct benefit from the promisor's performance of a third party obligation, he cannot be said to have suffered any injury from the promisor's failure to perform. The promisee thus, according to Pothier, lacked an interest in the enforcement of the promise. Pothier explained this rationale when he wrote:

...what I have stipulated in favour of the third person, not being anything in which I have an interest capable of pecuniary appreciation, no damages can result to me from a failure in the performance of your promise, and therefore you may be guilty of such failure with impunity. Now there is nothing more repugnant to the nature of a civil obligation than a power to contravene it with impunity.

The lack of "interest" reason advanced by Pothier made sense to English common lawyers since historically, the doctrine of interest in the promise had been part of the history of English contract law. The lack of interest rationalization by Pothier resembled the prohibition in English law to enforce promises that lacked consideration. Pothier's twin objection to the beneficiary action appears to be what was finally developed as a dual objection to a beneficiary action at English contract law, namely, that only a promisee from whom consideration moves can enforce a promise, and that only a party to the contract can enforce it.

5.3 Privity of Contract, Will Theory & Actions in Assumpsit

Though Pothier used the will theory to argue against beneficiary action, the original tenets of will theory, if applied in England, would have resulted in direct conflict with decisions in cases such as Bourne v. Mason (1669) 1 Vent. 6 and Crow v. Rogers (1724) 1 Strange 592 that were based on the consideration doctrine. Beneficiary actions, if recognised through the use of the original tenets of will theory, would result in parties enjoying greater freedom to bind themselves but not a corresponding freedom to free themselves of the shackles of legal obligation. The parties to a contract, in essence, would have an enlarged sphere of liabilities. This would have caused 19th century judges to tread with caution as the law at that time was developing toward limiting the liabilities of contracting parties.⁵

⁵ Quarman v. Burnett (1840) 7 M. & W. 499 enunciated the independent contractor rule to limit the liability of the employer; Hadley v. Baxendale (1854) 9 Ex. 341 laid down rules to limit the damages that may be obtained for a breach of contract; Priestley v. Fowler (1837) 3 M. & W. 1 introduced the doctrine of common employment to limit the application of the principle of vicarious liability.

Certain English writers who wrote treatises on contract in the 19th century classified privity of contracts as a twofold objection based on the consideration objection and the parties-only objection. William W. Story in his treatise on contract made reference to the consideration test and a parties-only rule in his work. He wrote:

As between the plaintiff and the defendant, there must be privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise may have been made by the defendant to pay the plaintiff.

William W. Story did not credit the development of the parties-only rule in England to will theory that had been developed in the Continent, but the source is unmistakable in the light of the fact that the learned author had made a great number of references in his treatise to the work of Pothier. Sir Frederick Pollock and Sir William Anson were probably the most radical of the writers who recognised a dual privity objection. Both of them placed great emphasis on the parties-only rule, and advanced the argument that it is a patently obvious rule that could be inferred from the nature of contracts. Both these writers also openly credited Continental will theory as the source of the objection.

Frederick Pollock wrote that, “No third person can become entitled by the contract itself to demand the performance of any duty under the contract.” William Anson in his treatise stated that the parties-only objection was independent of the consideration doctrine and was not a result of it. To Anson, Dutton v. Poole (1678) 2 Lev. 210 was no longer good law in England simply because the plaintiff in that case was not a party to the contract. He wrote, “The point is connected with the effect of a contract rather than the nature of consideration.” Anson was of the view that the rule that consideration must move from the plaintiff is a result of the very nature of a contract, and similarly, it is the nature of a contract that, according to Anson, gives rise to the parties-only objection. The reliance on civilian will theory as the basis to fashion the parties-only objection drove Pollock to write:

The fundamental notion from which we must take our departure is one that our system of law has in common with the Roman system and the modern law of other civilized countries derived therefrom. ...The legal effects of a contract are confined to the contracting parties.

The rule that only a party to a contract can enforce it was not merely espousing Civilian will theory into English law. An internal source of the rule lay in the ancient action in covenant upon deeds under seal. Sir William Blackstone wrote that, “A promise is in the nature of a verbal covenant, and wants nothing but the solemnity and sealing to make it absolutely the same.” In essence, the learned writer was asserting that once the formality of a covenant is removed from it, the covenant was, in essence, the same as an informal promise. This implies that the parties-only rule applied in covenants should equally apply to the action of *assumpsit*.

In Piggott v. Thompson (1802) 3 B. & P. 147, which was an action in *assumpsit*, a lessor’s agent sought to enforce a lease. The lease agreement, which was in writing but not under

seal, named the lessor's agent as the person to whom the rent should be paid. The agent was not allowed to sue in his own name to enforce the agreement because he was not a party to the lease agreement. Rooke J. in that case said, "I think the contract was made with the lessors..." John Bosanquet and Christopher Puller, in their Note on the case, referred to ten cases on *inter partes* deeds from the 17th and 18th century that dealt solely with the rule that only a party to the deed could enforce it. The fact that these cases were cited illustrates that English writers found a nexus between the old action in covenant and assumpsit.

The parties-only rule in the action in covenant did not stem from the use of the seal, although the use of the seal meant that the owner of the seal was liable on the deed. Willard T. Barbour explained that the importance of the seal emanated from the fact that, "To be able to write was in the twelfth century a tremendous accomplishment, and any written document was bound to be impressive to the ordinary person." Hence, the deed itself was the contract as opposed to merely being evidence of it. Barbour explained: The mere attaching of the seal to a writing bound the party to whom the seal belonged.

Even if one carelessly lost his seal, and another made improper use of it, there was no defence. It follows that the use of the seal bound the owner, whether he were actually a party to the contract or not.

The parties-only rule, however, did not hinge on the use of the seal but rather, appears to have issued from contractual principle. This is illustrated in Clement v. Henley (1643) 2 Rolle Ab. 22, where the court held that a party to a deed could bring an action in covenant though he had not sealed it, but a person who was not a party to a deed could not bring an action though he had sealed it.

Gilby v. Copley (1684) 3 Lev. 138 was a case where the argument whether substance over form should prevail, in that whether the right of a person not a party to a deed should be allowed to sue because of the form of the deed, or whether the right to bring an action should be determined by the nature of the relationship of the parties created by the deed.

In that case, a deed, which was referred to as an indenture by its own terms, stated that the plaintiff would sell his sheep to the defendant for £244. The plaintiff's agent executed the deed on the plaintiff's behalf. The plaintiff delivered the sheep but the defendant failed to pay the sum promised. The plaintiff brought an action of debt but an objection was raised that only the plaintiff's agent could bring the action, since he was the party to the deed. The deed was not indented. The judges were inclined to allow the plaintiff's action and reasoned that a principal could sue on a non-indentured deed, while if the deed was indented, only the agent had the right to bring the action. In essence, the judges' reasoning was that form should prevail over substance.

Levinz, who reported the case, however, did not agree with this reasoning. He wrote that he would have not allowed the plaintiff's action since:

...the indenting or not indenting of the Deed is not material, but the matter is his being party or not party; for it is common erudition that one not party to a deed made *inter partes* cannot take by the deed, unless by way of remainder.

Levinz, thus, advocated that substance should prevail over form and that the beneficiary's right to sue should be determined from the "common errudition" that only a party to the deed may seek to enforce it. Levinz's views were successfully argued before the court in Storer v. Gordon (1814) 3 M. & S. 308 and thereafter, a steady string of cases, such as Berkeley v. Hardy (1826) 5 B. & C. 355, Metcalf v. Rycroft (1817) 6 M. & S. 75, Carnegie v. Waugh (1823) 2 Dow. & Ry. K.B. 277 and Southampton v. Brown (1827) 6 B. & C. 718, applied the parties-only rule.

5.4 Privity invades Equity

The parties-only rule was applied in equity by Lord Eldon as early as in 1815 in the case of Wallwyn v. Coutts (1815) 3 Mer. 707. In that case, certain lands were conveyed to the trustees for the payment of debts. Lord Eldon decided that a trust for the payment of debts could be revoked by the parties despite that fact that it would amount to the termination of the rights of the creditors, who were the beneficiaries.

In Ex parte Williams (1817) Buck. 13, a partnership between Hughes and Joseph provided in the terms of the partnership that debts owed to the pre-partnership creditors of Hughes, which were set out in a schedule, would become the responsibility of the partnership. When the partnership was formed, Hughes' assets were transferred to the partnership in order to pay his debts to his creditors. The petitioner was one of the scheduled creditors. When the partnership was bankrupt, the petitioner sought a declaration that he should obtain a dividend out of the partnership estate. Lord Eldon refused to grant the declaration, reasoning that the deed, which had not been accepted by the petitioner, could not by itself create the petitioner's right to bring the action. Lord Eldon went on to state:

There are some old cases upon this subject and in one of them (reported by *Levinz*, or by some of the Reporters of his Time) where A. by Deed covenanted with B. a Party to it, that he, A. would pay a Sum of Money to C., a Stranger to the Deed. C. attempted to maintain an Action on the Covenant against A. Whatever then may have been the Law, such an action certainly could not now be supported.

Subsequently, in the case of Colyear v. The Countess of Mulgrave (1836) 2 Keen. 81, the parties who created a trust in favour of their daughters later revoked it. A claim by the daughters was rejected and the court said:

I apprehend that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other.

The Chancery, thereafter, hardened its attitude toward beneficiary actions and by the end of the 19th century, the parties-only rule was in equity, an independent objection distinct from the consideration rule. Perhaps the most potent judicial articulation of the parties-

only rule was in the case of Re Rotherham Alum & Chemical Co. (1833) 25 Ch. D. 103 where Lindley L.J. said:

...an agreement between A and B that B shall pay C gives C no right against B. I cannot see that there is in such cases any difference between Equity and Common Law; it is a mere question of contract.

The foundation had now been laid for the House of Lords' 1915-proclamation in Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847 that a *jus quaesitum tertio* cannot arise by way of contract in English law, which this led Viscount Haldane to authoritatively state:

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

Consequently, the parties-only principle emerged as a firm doctrine in English contract law in Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd (1915) AC 847 and was not laid down as a rule by Tweddle v. Atkinson (1861) 121 ER 762, contrary to popular belief.

CHAPTER 6

THE RAISON D'ÊTRE FOR REFORM

6.1 Contemporary Exceptions to the Privity Rule

The doctrine of privity has come under heavy criticism because rigid application of the rule often results in injustice. Certain exceptions have been developed over the years to mitigate the severity of the doctrine. Among the notable exceptions are restrictive covenants concerning land. A restrictive covenant may be enforced by injunction against any person who acquires or occupies the servient tenement with notice of the covenant irrespective of the fact that the subsequent purchaser or occupier of the land was not a party to the original agreement under which the benefit of the restrictive covenant was conferred on the owner of the dominant tenement. A restrictive covenant, though not an interest expressly recognised by the National Land Code 1965, is viewed as a negative easement under Section 283(1)(b) of the Code. The court,

consequently, enforces such restrictions by injunction as in the case of Alfred Templeton & Ors. v. Low Yat Holdings Sdn Bhd & Anor (1989) 2 MLJ 202 and Tam Kam Cheong v. Stephen Leong Kon Sang (1980) 1 MLJ 36. These cases apply the principles laid down by Lord Cottenham in Tulk v. Moxhay (1848) 2 Ph. 774.

The principles of agency constitute yet another exception to the doctrine of privity though it is sometimes believed that agency is not a true exception to the doctrine. The reason behind the belief in some quarters that agency is not an exception to the doctrine lies in the fact that the principal is treated as the real contracting party while the agent is looked upon as the means through which the principal contracts. The principles of agency are widely accepted as a clear exception to the parties-only rule especially in cases where the agent acts within the scope of his usual authority or in cases where the principle is undisclosed or in certain cases of agency of necessity. Where an agent acts within the scope of his usual authority, the principal is liable for all the acts of the agent. The principle was stated by Wills J. in Watteau v. Fenwick (1893) 1 Q.B. 346 emphatically:

The principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that this is only so where there has been a holding out. ...But I do not think so.

Equity has not remained idle while these common law exceptions were developed. Through the use of the concept of trust, equity has developed its own exception to the doctrine of privity. Since a trust may be created not only over something physical but also over a *chose in action*, it presented itself as the ideal implement to create an exception to the doctrine. Thus, if *A* owes *B* a sum of money under a contract, the debt owed to *B* is a *chose in action* and that can well be the subject matter of a trust. It has even been held in Tomlinson v. Gill (1756) Amb. 330 that a person can be a trustee of a promise to pay money to a third party. A trust in favour of a third party simply means that the third party can sue the promisor to enforce the contract. It also means that the third party (and not the promisee) is beneficially entitled to any money paid or payable under the contract. The House of Lords expressly acknowledged trusts as an exception to the parties-only rule in the case of Les Affréteurs Réunis, S.A. v. Leopold Walford (London) Ltd. (1919) A.C. 801.

The legislature has also had a hand in creating certain exceptions to the rule of privity of contract. Among the more prominent statutory exceptions is the concept of absolute assignments that can be found in Section 4(3) of the Civil Law Act, 1956. Any absolute assignment in writing by the assignor of any debt or other legal *chose in action* transfers the legal right to the debt or *chose in action* to the assignee provided express notice in writing of the assignment is given to the debtor. The assignee, though not a party to the contract under which the debt or *chose in action* is created, has all legal and other remedies in respect of the debt or *chose in action* from the date of the notice to the debtor.

Other statutory exceptions were created from time to time to extirpate the injustice caused by the application of the doctrine. For instance, life insurance policies in favour of a spouse or child could not be enforced against the insurer at common law due to the rigour

of the doctrine. This pitiful state of affair was reversed by Section 23 of the Civil Law Act, 1956. A life insurance policy in favour of a spouse or child today creates a trust in favour of that spouse or child and the moneys payable under such policies do not form part of the estate of the insured. Then there are the marine insurance policies where legislation has carved out situations in which a third party may sue on such a policy and insurance policies required to be taken under the Road Transport Act, 1987. Under the Road Transport Act, 1987, an insurer is liable to indemnify the person or class of persons specified in the policy in respect of any liability which the policy seeks to give protection.

These exceptions are evidently the result of having successfully drawn the legislature's attention and Parliament's subsequent intervention can be said to be attributable to the commercial repercussions that entail from holding on to a rule which many have come to regard as archaic. But the statutory exceptions that were made from time to time, though undoubtedly eradicated the injustice that resulted from the application of the doctrine in those areas, certainly did not revolutionize the common law as applied in Malaysia. The sporadic changes introduced by the legislature were precipitated either by the weight of commercial or social pressure. Parliament has certainly not yet dealt with the heart of the matter—the inconvenience and injustice that continues to result from the application of the doctrine in the manifold areas which have not seen the light of statutory intervention.

6.2 Arguments Defending the Rule

There are several arguments in favour of the third party rule. Firstly, although the law does not allow contractual rights to be created in favour of a third party, it does not prohibit the same result being achieved through the use of appropriate drafting of contracts. An instance where proper drafting can be used to achieve this is in collateral contracts.

Secondly, contracts are very much still regarded as a personal transaction and its spherical limit encompasses only the parties to the contract. Thirdly, there is still concern to contain maintenance and champerty. If the rule did not exist, a promisor would be liable to be sued twice, one action by the promisee and the other by the third party beneficiary.

Fourthly, Crompton J.'s observation in Tweddle v. Atkinson (1861) 121 ER 762 remains a concern among many proponents of the rule. Crompton J. expressed his disdain at the very idea that a person could be treated as a party to a contract merely for the purpose suing when he could not be sued on it. The lack of mutuality or reciprocity argument continues on today.

The fifth argument is that contracts being a bargain in nature cannot be reconciled with permitting third party contractual rights since the third party has not provided any consideration for the bargain. The sixth reason is that if third parties were permitted to enforce contracts, to which they are not parties, it would eliminate or restrict the right of the contracting party to vary or rescind the contract. This effectively diminishes the hallowed principle that parties must have freedom to contract. Finally, it is argued that

recognizing a third party action would open the floodgates to limitless and wide-ranging possible third party plaintiffs [see Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd. (1988) 62 A.L.J.R.].

6.3 Arguments and Fears Addressed

All of the arguments in favour of maintaining the privity rule is unconvincing and does not justify the continued existence of a rule that has suffered an endless tide of criticism. As regards the first justification, namely that proper drafting could successfully circumvent the rule, the reality of the matter is that laymen left to order their own affairs would understandably fail to do so. Even in Tweddle v. Atkinson (1861) 121 ER 762, proper drafting could have included the husband as a co-promisee, but evidently the lay persons involved in the transaction were either unaware how to do so or that there was a requirement in the first place to do so in order for the agreement to be enforceable. Even in cases where the parties have sought legal advice such as in Beswick v. Beswick (1968) A.C. 58 and Woodar Investment Development Ltd. v. Wimpey Construction (U.K.) Ltd. (1980) 1 W.L.R. 277, they have failed to get around the parties-only rule. The rule still causes problems despite the fact that the parties take steps to draft their contracts in a manner to get around the parties-only rule. For instance, the law on the effect of a Himalaya clause in a bill of lading could only be settled after canvassing the issue twice before the Privy Council in The Eurymedon (1975) A.C. 154 and The New York Star (1981) 1 W.L.R. 138.

The second argument that third parties cannot sue because contracts are personal transactions between the contracting parties implies the underlying objection that since a third party has not consented to the contract by either making an offer or accepting one, he should not be allowed to obtain any contractual rights under the contract. The argument of lack of consent is essentially designed to protect the third party's personal autonomy. Without such protection, a third party who has not consented to a contract may find himself liable for the burdens arising under it. However, permitting a third party to enforce a contract made for his benefit will not undermine the third party's personal autonomy as the only question there is giving the third party any benefits accruing to him under a contract and does not entail imposing any burdens on him. In addition to that, allowing a third party to enforce a contract made for his benefit results in giving effect to the intention of the contracting parties who intended to confer a benefit on the third party.

The concern over maintenance and champerty can be overcome when a contract is viewed as a set of promises, each promise giving a right of enforcement by legal action. Once a promise has been enforced by action and performance is extracted by that action, the promise is extinguished and the promisor has no further liability. Consequently, once the third party has enforced by action a promise made for his benefit, the promise having been extinguished by the action eliminates the promisee's right to enforce the promise. There is, hence, no danger of maintenance and champerty.

The argument that it would be unfair to permit a third party to have only the benefit of a contract and not be liable to be sued on it lacks justification when viewed in the light of the fact that unilateral contracts, such as in the cases of Rogers v. Snow (1573) Dalison 94,

Daulia Ltd. v. Four Millbank Nominees Ltd. (1978) Ch. 231 and Koshida Trading (S) Pte. Ltd. v. Limco Products Manufacturing Pte. Ltd. (1990) 2 MLJ 341. In addition to this, a promisor could still bring an action against the promisee. The promisor's interest would thereby be adequately protected despite the fact that he may not have a right of action against the third party.

The argument that the third party is not a party to the bargain in the sense that he has not provided any consideration for the promise, as a justification for the continued existence of the parties-only rule, is irrelevant in Malaysia since Section 2(d) of the Contracts Act 1950 specifically provides that consideration for a promise may be provided by the promisee or any other person. If the law permits a gratuitous promisee to enforce a contract for which he has not provided any consideration, then there appears no reason why the law should not enforce a promise for a third party's benefit in a contract when the consideration for that promise has been provided by the promisee.

The last two arguments in favour of the parties-only rule, namely, the interference with the contracting parties' right to vary or rescind the contract and the limitless categories of persons who could qualify as a third party beneficiary are not insurmountable issues that altogether preclude the possibility of reform. The contracting parties' right to vary or rescind the contract can be maintained with prescribed limitations, for example, where the third party has not relied on the contract, the contracting parties may still be able to vary or rescind it. As for the latter objection, a test demarcating who is a third party beneficiary can prevent the flood of litigation feared by parties-only protagonists.

The foundations of liability in contract, in theory and also historically, do appear to embody as part of it the parties-only rule. In fact, the parties-only rule is inconsistent with fundamental theories of contractual liability. For instance, theory provides that a contract is a bargain essentially means that the court will enforce a contract where there was provided valuable consideration or a promise to provide valuable consideration. If a third party is not allowed to enforce a contract, for which valuable consideration has been provided on the basis that the third party is to be able to enforce the contract, the bargain would be defeated.

The Continental will theory imposed liability on the basis of the intention of the person, or his will or promise. It does not appear that will theory requires the parties-only rule as will theory within the law of contract, essentially, was developed to give effect to the intentions of the contracting parties. Will theory would be ineffective if the parties-only rule were part of it as it would defeat the manifest intention of contracting parties that a third party should derive enforceable right under their contract.

The parties-only rule also cannot be justified on the basis of the expectancy theory or reliance theory in contract. If the law of contract is said to have been designed to protect reasonable expectations created by a contract, the expectation theory would be an incorrect basis for contractual liability as a third party would not be able, with the existence of the parties-only rule, to enforce a contract made for his benefit and which has caused a reasonable expectation in the third party that it will be performed.

If the law of contract is, on the other hand, said to be designed to protect a person who has reasonably relied on a contract, the existence of a parties-only rule would also render this theory ineffectual as a third party who has reasonably relied on a contract, believing that it would be performed, would be left without redress.

The United Kingdom's Law Commission also noted that there are a plethora of commercial transactions that create complex patterns of relationships and in which the traditional requirements of offer, acceptance and consideration are not readily discernible. The Law Commission was also of the view that the parties-only rule would be contrary to commercial reality as it would preclude a third party from enforcing rights given for his benefit under a contract that creates a continuing relationship between the third party and the contracting parties. Ideally, when dealing with a series of commercial contracts linked with each other, as in the case of construction contracts, that were executed for the attainment of some common underlying purpose, the parties-only rule should not apply to hinder the enforcement of rights conferred on a third party for the attainment of that underlying purpose.

The conceptual techniques devised by the law to circumvent the rule has succeeded in only alleviating a small part of the practical difficulties caused by the parties-only rule. Even these conceptual techniques are not themselves free of their limitations and where third parties are unable to avail themselves of these techniques, the conflicting interests of third parties and contracting parties has led to the courts developing fine and unhappy distinctions. The difficulties caused by the parties-only rule have been particularly acute in the field of construction contracts, claims for misstatements, shipping, insurance, sale of goods and contracts for the payment of a sum of money to a third party.

6.4 Construction Contracts

Building projects customarily involve a number of different contracts between the employer (or otherwise called the developer), main contractor, sub-contractors, architects, surveyors and financiers. These contracts are connected to each other for the attainment of an underlying purpose. However, due to the parties-only rule, those who are not a party to a contract within the set of contracts cannot rely on the provisions of that contract for the purpose of bringing an action or defending one. This is illustrated by the case of Ryoden (M) Sdn. Bhd. v. Syarikat Pembinaan Yeoh Tiong Lay Sdn. Bhd. (1992) 1 MLJ 33. In that case, X employed the defendant as the main contractor for the construction of apartments. The defendant entered into a sub-contract agreement with the plaintiff whereunder the plaintiff would supply and install air-conditioning systems and lift services for the apartments. The main contract between X and the defendant provided that payment for work done under sub-contract agreements should only be effected once the defendant receives payment from X. The plaintiff brought an action against the defendant for payment for work done under the sub-contract as certified by the architect. The defendant, in his defence, relied on the clause in the main contract that did not require him to make any payments until X paid him. The High Court at Kuala Lumpur ruled that the clause in the main contract could not be imported into and form part of the sub-contract. Since the plaintiff was not a party to the main contract, there was no privity of contract between X and the plaintiff. Consequently, the defendant could not have the benefit of the clause in

the main contract for his defence. John N. Adams and Roger Brownsword, in a commentary on London Drugs Ltd. v. Kuehne and Nagel International Ltd. (1993) 1 WWR 1, stated:

The basic idea of a network is that of a cluster of contracts set up to serve a principal organising purpose. This is most apparent in commercial contexts such as construction and carriage where the principal purpose is achieved through a network of main and sub-contracts. In brief, our proposal was that, in a network, privity should be relaxed and third party questions should be adjudicated instead in the light of principles of transactional fairness.

Despite proposals for the parties-only rule to be relaxed, the rule has in most cases been unwaveringly applied, leading to unjust results. Due to such results, third parties have looked to the law of tort for some remedy. This happened in the case of Junior Books Ltd. v. Veitchi Co. Ltd. (1983) 1 A.C. 520 where a sub-contractor was held liable by the House of Lords to a building owner in the tort of negligence causing economic loss.

However, in D & F Estates Ltd. v. Church Commissioners for England (1988) 3 W.L.R. 368, the House of Lords held that a purchaser could not maintain a claim against a builder in tort for the cost of repair of defects in a building. In that case, the third defendants were the main contractors in the construction of some flats. The plaintiff leased a block from the first defendants. The sub-contractor did not properly carry out the plasterwork in the flat and some of it fell down, thereby requiring replacement. The House of Lords found that the cost of the replacement could not be recovered from the third defendants. It was held that if the defect had caused personal injury or damage to property, an action would lie but an action did not lie in tort for a pure economic loss. This decision was subsequently followed in Murphy v. Brentwood District Council (1991) 1 A.C. 398 and it was additionally held in that case that a local council that had negligently failed to ensure that the work done by the builder complied with building by-laws and regulations could not be liable to an extent greater than the builder.

As a result of these cases, third parties often have to obtain collateral warranties from the developer, main contractor, sub-contractors, architects, surveyors or any other professional involved in the project. The United Kingdom's Law Commission noted that in the case of an average shopping centre, one professional may have to enter into numerous warranty contracts because tenants, for example, would have no direct recourse against him without such a contract. Reforming the parties-only rule would, consequently, diminish the complexities that spring from the execution of numerous separate contracts. If the main construction contract between the developer and main contractor were expressed to be for the benefit of financiers, purchasers and tenants alike, the need for collateral warranties would be removed.

6.5 Accountability for Misstatements

In Candler v. Crane, Christmas & Co. (1951) 2 K.B. 164, the plaintiff relied on accounts, prepared for a company by their accountants, in deciding to invest in a company. The accountants had been authorized by the company to discuss the accounts with the plaintiff.

The plaintiff, who suffered a loss on his investment, sought to recover the loss from the accountants. The court rejected the plaintiff's claim stating that there was no duty on the accountants to take care when making statements.

In Candler v. Crane, Christmas & Co. (1951) 2 K.B. 164, the accountants gave the advice to the plaintiff pursuant to a contract they had with the company. They had knowledge that the plaintiff was contemplating investing in the company and that it was very likely that the plaintiff would rely on the advice in deciding whether to invest in the company. The facts illustrate that the plaintiff relied on the advice and acted upon it to his detriment. Prior to the decision of the House of Lords in Hedley Byrne Co. Ltd. v. Heller & Partners Ltd. (1964) A.C. 465, the principles in which has been applied by the High Court in Kuala Lumpur in Kluang Wood Products Sdn. Bhd. & Anor. v. Hong Leong Finance Bhd. & Anor. (C.S. No. D2-22-150-88), a claim could not be brought either in contract or in tort by the plaintiff regardless of the fact that in most cases, it could reasonably be said that the contract was made for the benefit of the third party (the plaintiff investor in Candler's case).

In the case of Smith v. Eric S. Bush (1989) 2 W.L.R. 970, a surveyor provided a valuation on a house that the building society was considering an advance on. The mortgagor-purchaser relied on the report when buying the house. The valuation turned out to be incorrect eventually and the mortgagor-purchaser suffered loss when the true state of the house became evident. The House of Lords held that a surveyor who, on the instructions a building society, carries out a valuation on a dwelling house assumes responsibility to the intending purchaser since the surveyor has knowledge that the intending purchaser would be relying on the surveyor's care and skill. There was no necessity for the surveyor to have provided an express or implied undertaking before he could be made liable.

To successfully impose a duty of care in tort for a misstatement, the conditions stated in Hedley Byrne Co. Ltd. v. Heller & Partners Ltd. (1964) A.C. 465 must be satisfied. Those conditions are set out in the speech of Lord Morris in that case. Lord Morris, with whom Lord Hodson agreed, said that:

...it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such a skill, a duty of care will arise. The fact that the service is to be given by means of or instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

Lord Morris' speech makes it clear that the factors that will be considered by the court in deciding whether a duty of care in tort exists are: (1) the purpose of making and communicating the statement; (2) the relationship between the maker of the statement and the person who relied on it or to whom it was communicated; (3) whether the person

making the statement knew or should have known that the statement would be relied on by the person; (4) whether the person actually relied on the statement and whether he should have properly done so or should have sought independent advice.

Despite the imposition of a duty of care in such cases, Hedley Byrne Co. Ltd. v. Heller & Partners Ltd. (1964) A.C. 465 does not represent a general rule that pure economic loss of such nature is recoverable in tort. Although Lord Devlin castigated the general rule prohibiting recovery of economic loss, the case is merely viewed as an exception to the general rule.

Liability in tort for misstatements causing economic loss are, consequently, more likely to be imposed in cases where the relationship between the parties is, as Lord Devlin says, equivalent or akin to a contract. A professional architect, accountant or surveyor would not readily agree to be bound to a third party unless he has imposed a fee for that purpose. An agreement to be bound certainly cannot be implied in the contract in such cases. Nevertheless, the law of tort imposed liability in such cases because it was just and reasonable to do so, and also because the relationship between the promisor and the third party was, as Lord Devlin put it, equivalent or akin to a contract.

Reform of the parties-only rule will enable a third party to sue under the contract as a third party beneficiary. The only issue to be decided then would be whether the contracting parties intended for the third party to have an enforceable right under the contract and whether the parties intended to confer a benefit on the third party or whether the benefit was incidental to the contract. However, it is unlikely that reform of the rule would open up a floodgate of third party beneficiaries who are not already entitled to some form of relief under the law of tort.

6.6 Shipping

In Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd. (1986) A.C. 786, the plaintiffs bought steel coils that were carried from Korea to England under a contract made between the Korean vendor and the defendant shipowners. The coils were improperly stored and suffered damage during transit. The risk in the goods had passed to the plaintiffs upon shipment from Korea but the property in the goods did not pass until the plaintiffs paid for the goods. Since the risk had passed to the plaintiffs, they were obliged to pay the Korean vendor regardless of the damage to the coils. The plaintiffs' action against the shipowners failed because the plaintiffs were not privy to the contract of carriage between the shipowner and the Korean vendor. The House of Lords also refused to impose a duty of care in tort on the shipowner, deciding that a duty of care could not be manufactured out of complex contractual provisions. Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd. (1986) A.C. 786 illustrates the problem faced by third parties who are trying to found an action on a contract to which they are not a party.

Another problem faced is third parties when they attempt to rely on contracts to which they are not a party for defences or immunities provided in those contracts. An example would be in the case of "Himalaya" clauses. These clauses are designed to extend the protective clauses in a main contract to servants, sub-contractors and agents. Although the problem has been resolved by New Zealand Shipping Co v. A.M. Satterthwaite and

Co: The Eurymedon (1975) A.C. 154 and The New York Star (1981) 1 W.L.R. 138, the Privy Council's reasoning in those cases is not plain and without complication. The United Kingdom's Law Commission observed that the decision is complicated:

...involving as it does an implied contract between shipper and stevedore made through the agency of the carrier which becomes binding on the ultimate buyer by reason of another implied contract when he presents the bill of lading and takes delivery.

The Supreme Court of Canada, in fact, suggested statutory intervention to reform the parties-only rule in International Technical Operators Ltd. v. Miida Electronics Inc. (1986) 28 D.L.R. (4d) 641 to overcome this problem, as opposed to the complex implied contract analysis approach adopted by the Privy Council.

6.7 Insurance Claims

Section 96(1) of the Road Transport Act, 1987 provides that any person who recovers a judgment in respect of a liability covered by a third party insurance policy is entitled to be paid by the insurer the judgment sum, together with interest and costs awarded thereunder. A third party would be entitled to commence an action against the insurer for payment, as in the case of Union Insurance (M) Sdn. Bhd. v. Chan You Young (1999) 1 MLJ 593, regardless of the fact that he is not a party to the contract of insurance.

Section 23 of the Civil Law Act, 1956 and Section 162 of the Insurance Act, 1996 create a trust in favour of a spouse or child of the insured nominated by the insured to benefit under the insurance policy. The statutory trust enables a spouse or child of the insured, who are essentially third party beneficiaries, to bring an action against the insurer for the sum payable under the contract of insurance.

Despite these statutory exceptions to the parties-only rule, there remain situations where third parties are unable to enforce contracts of insurance that have been taken out for their benefit. Among the notable ones are insurance policies taken out by employers for the protection of their employees and policies taken out by retailers to insure themselves against their liability to consumers. Though the third party could bring an action against the insured, such an action would be redundant in cases where the insured is insolvent. The third party would then be left without a remedy as the parties-only rule prevents him from enforcing the contract of insurance directly against the insurer.

6.8 Contracts for the Sale of Goods

In contracts for the sale of goods, a person who buys goods from a retailer or some other intermediary and suffers damage as a result of defects in the goods is prevented by the parties-only rule from suing the manufacturer of the goods for the loss. A person who suffers damage as a result of defects in goods purchased for him by someone else is also prohibited, not only, from bringing an action against the manufacturer but also against the retailer. Since there is no contractual link between the victim and the manufacturer or the seller in such cases, the victim's only recourse is for negligence under the law of tort. In

the absence of negligence on the part of the manufacturer or the seller, the victim is left without a remedy.

This difficulty is illustrated in the case of Simaan General Contracting Co. v. Pilkington Glass Ltd. (No.2) (1988) Q.B. 758. In that case, a sheikh entered into a contract with the plaintiff to construct a building. The sheikh wanted the glass used in the building to be a uniform shade of green. The plaintiff entered into a contract with glazing experts for the supply and fitting of the glass. The glazing experts, in turn, purchased green glass from the defendant, a glass manufacturer. The glass used was defective, in that, it consisted of different shades of green and some parts of it looked red. The plaintiff could not get payment from the sheikh until the glass was replaced and this caused the plaintiff substantial economic loss. Since the plaintiff had no contractual relationship with the defendant, the plaintiff had no alternative but to sue the defendant in tort. However, since the plaintiff's loss was purely an economic or pecuniary one, his claim failed since such losses were not recoverable in tort under the principle established in Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd. (1973) Q.B. 27.

The difficulties arising from the application of the parties-only rule is well illustrated by Simaan's case. For instance, if the glazing experts had in the interim period become insolvent, the plaintiff in that case would have been left without a remedy. Furthermore, the defendant in that case, being the glass manufacturer, would be in a better position to exercise quality control and to get insurance coverage against risks or defects.

It would also be better for the plaintiff to have direct recourse against the defendant in such cases, as it would remove the necessity of bringing a number of indirect legal actions in order to achieve the same end result. The only difficulty arising from the proposition that the plaintiff should have a direct cause of action against the defendant in such cases is the fact that the contracting parties may never have intended the plaintiff to have an enforceable right under the contract. Seen in the light of Simaan's case, it could be difficult to argue that the glazing expert and the defendant manufacturer intended the plaintiff to have an enforceable right under their contract.

6.9 Payments Due to Third Parties Under a Contract

This category involves contracts where a promisor agrees under a contract with a promisee to pay a sum of money to a third party. The parties-only rule prohibits a third party from bringing an action against the promisor to recover the sum of money. In Ang Teow v. Shee Choi Seng (District Court Appeal No. 26 of 1988), the defendant requested the plaintiff to repair a crane. The defendant had an agreement with the owner of the crane that the latter will pay the cost of the repair. District Judge Sarjit Singh held that the plaintiff had no could not sue the owner of the crane to recover the cost of the repair since the plaintiff was not a party to the agreement between the defendant and the crane owner.

In England, the results in this category of cases caused by the application of the third party rule have attracted the most vigorous condemnation of the parties-only rule by the House of Lords. In Beswick v. Beswick (1968) A.C. 58, the defendant got his uncle to sell his business to him in return for the defendant's promise to pay £5 each week to his aunt after his uncle's death. After the uncle's death, the defendant made some payments to the aunt

but after some time stopped making the payments. The aunt brought an action against the defendant for specific performance. The action was brought in her personal capacity and in her capacity as administratrix of her husband's estate. The House of Lords rejected the claim made in her personal capacity but granted an order of specific performance in her capacity as administratrix. Although, in the final analysis, the aunt succeeded in obtaining relief, she only managed to do so because she was the administratrix of the promisee's estate and because the agreement was capable of specific performance. If the personal representative of the estate had been some one other than the aunt, there would have been no relief for the aunt unless the personal representative was willing to bring an action. In such a case, the existence of the parties-only rule would cause injustice.

6.10 Action by a Promisee for the Benefit of the Third Party

The need for reform of the parties-only rule also stems from the fact that a promisee would not be able to be of much assistance to a third party in recovering the loss caused by the promisor's breach. This is mainly due to the contractual principles surrounding remedies for breach of contract. Essentially, the rule established in the case of Hadley v. Baxendale (1854) 9 Exch. 341 and Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. (1949) 2 K.B. 528 allow compensation only for the loss suffered by the promisee, and for the loss suffered by the third party. Consequently, even if the promisee is willing to assist the third party by bringing an action against the promisor, the promisee will only succeed in recovering nominal damages as he has not personally suffered any loss as a result of the promisor's breach.

The law relating to remedies for breach of contract could naturally be reformed to overcome the problems caused by the parties-only rule. This could be done, for instance, by widening the scope of contracts that are capable of specific performance under the Specific Reliefs Act, 1950. However, this may not be a plausible solution as a number of contracts should not, as a matter of course, be specifically enforced such as contracts that involve personal service and those that require the court to constantly supervise its performance.

Even if the law relating to remedies for breach of contract was reformed, that would not necessarily be an end to problems. If, for instance, the defendant in Beswick's case was the administrator of the uncle's estate, as opposed to the aunt, he would refuse to enforce the contract. There is, consequently, no guarantee for a third party beneficiary that the promisee will bring proceedings to enforce a contract made for his benefit. The reform of the rule relating to remedies for breach of contract, hence, is not as attractive as a reform of the parties-only rule.

CHAPTER 7

CONCLUSION

The parties-only rule has been the source of many debates in England for the past 60 years since the Law Revision Committee recommended, in its Sixth Interim Report published in 1937, the abolition of the rule. In Malaysia, there has not been much discussion about the rule and the difficulties that ensue from its continued application here. The parties-only rule has been accepted and applied in Malaysia as part of its common law and the courts regard it as part of contract dogma that need not be questioned or challenged. The Malaysian courts have left the creation of exceptions to the rule to the Legislature and save for the recognition of the common law exceptions to the rule, the Malaysian courts, unlike their English counterpart, have not ventured to even criticise the continued existence of the parties-only rule.

The English judges, however, have not concealed their distaste for the parties-only rule. In Beswick v. Beswick (1968) A.C. 58, Lord Reid, delivering his speech in the House of Lords, agreed with the 1937 Law Revision Committee's proposals for reform and stated that, "if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter."

Similarly in the case of Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd. (1980) 1 W.L.R. 277, Lord Scarman stated his hope that a review of the rule would be undertaken before long by the Legislature and warned that if this was not done, the House of Lords may be compelled to "reconsider Tweddle v. Atkinson and the other cases which stand guard over this unjust rule". Perhaps the most recent scathing attack of the parties-only rule was by Lord Justice Steyn in Darlington Borough Council v. Wiltshier Northern Ltd. (1995) 3 All E.R. 895. The learned judge denigrated the rule in these words:

The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of the contracting parties ... there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.

The study of the history of the development of the parties-only rule reveals that some of the objections against the beneficiary action are without any basis. One reason advanced for the existence of the parties-only rule is that the beneficiary, not having suffered any detriment or damage within the contemplation of an action in *assumpsit*, was disqualified from bringing such an action. Thomas A. Street explained this when he wrote:

...[t]he reason for the modern rule is found in the original conception underlying *assumpsit* ... giving redress for damages incurred by the nonfulfillment of a

deceitful promise. Only the person who suffered the detriment or damage in question could therefore bring suit upon breach of the promise.

However, Thomas Street's conclusions cannot be reconciled with the numerous early cases that allowed a beneficiary action on account of the fact that the beneficiary had suffered detriment. The beneficiary action, in fact, flourished during the 1600s and this was in no small part due to the original nature of an action of assumpsit, which was tortious. Tort, which was recognised in the early days in cases such as Tottenham v. Bedingfield (1573) 3 Leon. 24 as an action between strangers, was free from the shackles of privity. Hence, there is no historical foundation to assert that the parties-only rule was rooted in tort and that the beneficiary action was not recognised because of the beneficiary's inability to satisfy the requirement that only a person who suffered detriment could bring an action in assumpsit.

The second and perhaps foremost reason for not recognising a beneficiary action is that such recognition will hamper or interfere with the contracting parties' freedom to revoke or vary their contract. The right to vary or rescind a contract is perhaps one of the most fundamental tenets of contract law. The cases of Re Schebsman (1944) Ch. 83 and Winterbottom v. Wright (1842) 10 M. & W. 109 illustrate that the right to vary or revoke a contract is a fundamental right of the parties' freedom of contract.

This objection to recognising a beneficiary action, however, does not take into account the fact that the rights of the contracting parties and the third party beneficiary operate harmoniously until such time that the contracting parties decide to mutually revoke their contract. The rule of privity of contract, therefore, cannot be supported on this basis, as there is no reason to disallow a beneficiary action in cases where the contracting parties have not mutually agreed to vary or rescind their contract. The rule would have been more plausible if it had accorded the beneficiary a voidable right subject to the contracting parties' power to mutually revoke the contract.

The right of the contracting parties to vary or rescind the contract, however, must be superceded if the third party's expectations have been raised by the contractual promise made for his benefit. Even Peter Kincaid, in his dynamic criticism of the United Kingdom's Law Commission's provisional recommendation that the parties-only rule be abolished, noted:

Avoiding disappointment of reasonably-raised expectations is a coherent value which could form a partial basis for the third party's right ...

Reliance by the third party on the contractual promise made by the promisor is, consequently, sufficient justification to impose limits on the contracting parties' freedom of contract and to permit enforcement of the contract by the third party.

A third argument against the beneficiary action is that the law of contract does not recognise nor enforce a bare contract. In other words, a gratuitous promisee does not have any enforceable rights because he has not provided any consideration and if that is a trite principle of contract law, then a third party beneficiary, who is only a mere donee, could

not have a greater right than a gratuitous promisee. G.H. Treitel explains that third party action is not permitted because:

...the third party is often a mere donee. A system of law which does not give a gratuitous promisee a right to enforce the promise is not likely to give this right to a gratuitous beneficiary who is not even a promisee. The doctrines of privity and consideration, though not identical, are closely connected. This connection helps to explain the development of the doctrine of privity.

This objection is clearly grounded on the fact that the third party has not provided any consideration for the promise. However, Treitel's analogy between a bare promisee and a third party beneficiary as justification for the parties-only rule is somewhat weak. In a contract for the benefit of a third party, while it may well be the case that the third party had not provided any consideration for the promise and may properly be classified as a donee, it does not mean that the promisor did not receive any consideration for his promise.

The consideration for the promise, in most of these contracts, moves from the promisee to the promisor. If the promisee provides consideration for the promise to the promisor, the promisor could hardly be termed a donor of a benefit to the third party.

In addition to that, the Section 2(d) of the Malaysian Contracts Act, 1950 makes it clear that consideration for a promise may move from the promisee or any other person. The rule is certainly wider than the rule at English law. In the Malaysian context, a bare promisee would be entitled to enforce a contract as long as some other person has provided valuable consideration for the promise.

If a bare promisee could enforce a contract in Malaysia, the objection to a beneficiary action on account of the fact that the third party is a gratuitous beneficiary cannot be sustained. Apart from that, it is also clear that the rule that consideration must move from the promisee or some other person is only an element for the creation of a legal contractual obligation. The rule cannot truly be said to govern who can have enforceable rights under a contract so as to exclude a donee's right to enforce a contract.

The reform of the parties-only rule in Malaysia is necessary in order to avoid the difficult results caused by the existence of the rule. The autonomy of the will of contracting parties should be respected. If freedom of contract is truly a fundamental tenet of contract law, then the decision of contracting parties who have freely chosen to benefit a third party by their contract must be given effect.

Any reform of the parties-only rule must necessarily address several concerns. Firstly, if the right of a third party is recognised, adequate protection must be given to the promisor against double liabilities. The promisor certainly cannot be open to an action by both the promisee and the third party, and be found liable to both. Such a result is not merely untenable but would be an injustice to the promisor.

Secondly, rules must be put in place to deal with the situations under which the contracting parties retain their right to revoke or vary the contract, and when that right is lost. Thirdly, the promisor should be permitted to raise equities and defenses in the third party's action. Legislation must make it clear that the promisor retains the right to raise any and all equities or defenses that would have been available to him in an action by the promisee, in the action brought by the third party. This will be in line with the concept of reciprocity of contracts.

Reform of the rule in Malaysia is not recommended merely on account of the fact that most major common law jurisdictions such as America, Australia, New Zealand and recently, England, have abolished the parties-only rule, but rather to avoid further injustice caused to third party beneficiaries who have reasonably relied on the performance of the contractual promise made for their benefit.