*R. J. Bullen**

THE RIGHTS OF STRANGERS TO CONTRACTS UNDER SEAL

There is little doubt that the requirement of consideration as an essential ingredient in the creation of a simple contract at common law, and in particular the rule that consideration must move from the promisee, was a major influence in the formulation of the doctrine of privity. This article proposes to study the question of privity in relation to contracts under seal where the law has developed free of the complication of consideration.

The striking feature of the law with respect to deeds is that the question of third parties was settled as early as the sixteenth century, and remained so settled until confusion entered with twentieth century legislation. The common law position was simply one of privity: only the parties to a deed could sue thereon. This rule was confined, however, to deeds which were strictly "between" parties, or to use the legal appellation, to "deeds *inter partes*". The rule will be referred to as the "*inter partes* rule". Where the deed was not of such a type, it was considered, not unreasonably, that any rule of privity was inapplicable; the question of the identification of the persons entitled by such a deed to sue on it was resolved simply by construction.

This article will (i) describe the legal operation of the rule on deeds *inter partes* at common law; (ii) define the types of deed subject to the rule and distinguish and consider those exempt from the rule; and (iii) analyse the statutory modifications of the rule with a view to ascertaining the present status of a stranger to a contract under seal.

The inter partes Rule at Common Law

In the case of *Scudamore* v. *Vandenstene*[1] an indenture of charterparty was made between the plaintiff as owner of a ship whereof Robert Pitman was master, on the one part, and the defendant on the other part, in which the defendant covenanted with the plaintiff and Robert Pitman to perform certain covenants. Pitman signed, sealed and delivered the indenture, but was not named therein as a party. In an action brought by the plaintiff on the deed the defendant pleaded Pitman's release, but it was held that the release did not affect the plaintiff's right to sue on the deed because Pitman was not a party thereto. "And the diversity was taken and agreed between an indenture reciprocall between parties on the one side, and parties on the other side, as this was; for there no bond, covenant or grant can be made to or with any that is not party to the deed. But where the deed is not reciprocall, but is without a between, & c. as, *omnibus Christi fidelibus & c.* there a bond, covenant, or grant may be made to divers severall persons."[2]

It should be noted that Pitman had signed and set his seal to the deed and the covenants were expressed to be made with both him and the plaintiff, yet as he was not named in the parties clause, he could not be regarded as a party to the indenture. Thus the common law rule with respect to third party rights under deeds *inter partes* was one of strict privity—only the parties thereto could sue on the deed. The rule differed from notions of privity in simple contracts, however, in the quite technical requirement that a covenantee or grantee named as such in the deed could still not be regarded as a party thereto unless he was also named as one of the parties

* Lecturer in Law, the University of Adelaide.

1. (1587) 2 Co. Inst. 673.
2. *Ibid.*

in the parties clause. If he was not so named he was therefore no party to the deed and could maintain no action on it to enforce the grant or covenant.

Scudamore v. *Vandenstene* involved a third party covenantee. In *Windsmore* v. *Hobart*,[3] three years earlier, a third party grantee in an indenture had failed in his action on the deed for the same reason—he was not mentioned in the parties clause.

The rule was regarded as inflexible and the decisions in the following centuries were uniform in nonsuiting grantees,[4] and covenantees,[5] who were not named as party to the deed, and in disallowing to a party the plea of the release of his obligations under an indenture by a covenantee not named as a party.[6] The rule was discussed and accepted as being beyond doubt in a series of cases.[7]

The common law requirement that a person could be regarded as a party to the deed only if he was named as a party in the parties clause was quite technical; so that a person so named in a deed could be a party and could therefore sue on it even though he had not executed it.[8]

In the case of grants of interests in real property, the *inter partes* rule applied only to grants of immediate interests. A grantee could take an interest in remainder granted to him in a deed *inter partes* without being named a party thereto.[9]

It should be noted, too, that the general equitable exception to privity in simple contracts established in *Tomlinson* v. *Gill*[10] applied equally to contracts under seal; if a stranger to a deed *inter partes* could be regarded as having been constituted a cestui que trust of the benefit of the covenant, he could compel the trustee/party to enforce the covenant on his behalf.[11]

Deeds Subject to, and Exempt from, the inter partes Rule

It has been pointed out that the rule, being purely one of privity, applied only to deeds *inter partes*. A deed *inter partes* is a document which records a conveyance, covenant or agreement, or some other arrangement entered into between two or more parties and evidences an intention thereby to be bound to each other in respect of the thing undertaken. It is somewhat analogous, in other words, to a bilateral contract.

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3. (1584) Hob. 313; 80 E.R. 456.
4. *Reynold* v. *Kingman* (1587) Cro. Eliz. 115; 78 E.R. 373; *Greenwood* v. *Tyler* (1620) Hds. 314; 80 E.R. 456.
5. *Gilbey* v. *Copley* (1683) 3 Lev. 138; 83 E.R. 618; *Berkeley* v. *Hardy* (1826) 5 B. & C. 355; 108 E.R. 132; *Southampton* v. *Brown* (1827) 6 B. & C. 718; 108 E.R. 615; *Gardner* v. *Lachlan* (1836) 8 Sim. 123; 59 E.R. 49.
6. *Offly* v. *Warde* (1668) 1 Lev. 235; 83 E.R. 385; *Storer* v. *Gordon* (1814) 3 M. & S. 308; 105 E.R. 627.
7. *Lowther* v. *Kelly* (1723) 8 Mod. 115; 88 E.R. 91; *Metcalfe* v. *Rycroft* (1817) 6 M. & S. 75; 105 E.R. 1171; *Ex parte Cockburn* (1863) 9 L.T. (N.S.) 464; *Chesterfield Colliery Co.* v. *Hawkins* (1865) 3 H. & C. 672; 159 E.R. 698; *Forster* v. *Elvet Colliery Co.* [1908] 1 K.B. 629, 639. And see especially statements in *Berkeley* v. *Hardy* (1826) 5 B. & C. 355, 359; 108 E.R. 132, 134, and *Gardner* v. *Lachlan* (1836) 8 Sim. 123; 59 E.R. 49, 51.
8. Provided, of course, the covenantor had executed the deed; *Clement* v. *Henley* (1643) 2 Roll. Ab. 22 (5) 2, cited in *Rose* v. *Poulton* (1831) 2 B. & Ad. 822; 109 E.R. 1348; *Morgan* v. *Pike* (1854) 14 C.B. 226; 139 E.R. 93.
9. Co. Litt. 213a; *Windsmore* v. *Hobart* (1584) Hob. 313; 80 E.R. 456.
10. (1756) Amb. 330; 27 E.R. 221.
11. *Page* v. *Cox* (1852) 10 Hare 163; 68 E.R. 882; *Re Flavell* (1883) 25 Ch. D. 89; *Gandy* v. *Gandy* (1885) 30 Ch. D. 57; *Harmer* v. *Armstrong* [1934] Ch. 65.

At common law all deeds *inter partes* were required to be indented, and were known for that reason as indentures.[12]

> "The deed indented (which is that which is called an indenture) is when the paper or parchment is cut and indented. And it is defined to be a writing containing a conveyance, bargain, contract, covenants, or matter of agreement, between two or more, and is indented in top or side answerable to another that likewise doth comprehend the self-same matter."[13]

The formal requirement of indenting is no longer necessary: a deed between parties has the effect of an indenture though not indented or expressed to be an indenture.[14] The effect of these statutory provisions is to abolish the requirement of any formal distinctions between deeds *inter partes* and deeds not *inter partes*. The one basic substantive distinction however remains.

The *inter partes* rule never applied to deeds not *inter partes*. The logical reason for this was that such an instrument has no parties in the ordinary sense. The most common form of a deed not *inter partes* is a deed poll, which is a deed made by one person to express his intention with respect to a particular subject, or by a group of persons to express their common intention, and evidencing thereby an undertaking to be bound by what is expressed. The name, derived from the fact that such deeds were originally polled, or cut even, as opposed to indented,[15] would seem in view of the statutory abolition of the requirement of formal distinctions between different deeds to be out of date, but it is still customary to refer to deeds expressed in the first person, and addressed to the public at large, as "deeds poll".

It has always been held that a covenantee or grantee named in a deed poll may sue the maker of the deed for the benefit of the covenant or grant whether or not he has joined in executing the deed.[16] This is not as radical as might at first appear; it must be remembered that, at least technically, the deed poll by its very nature has no parts and therefore no parties or non-parties in that sense.

The recognition of the right of a non-executing covenantee or grantee named in a deed to sue on it applies equally to all deeds that are not *inter partes*. An indenture is not necessarily a deed *inter partes*. In *Cooker* v. *Child*[17] where a charterparty which was indented between the master of the ship and the defendant contained a covenant by the defendant to pay money to the plaintiff, it was held that as the deed did not have a parties clause, and could not therefore be regarded as a deed *inter partes*, "the party may covenant with other persons to do several other acts, for which everyone severally may bring his action".[18]

A person seeking to sue on a deed not *inter partes* must however be a covenantee or grantee. In other words, in order to enforce a covenant

12. Conversely, however, indentures are not *necessarily* deeds *inter partes*—see *infra*, text to n.17.
13. Shep. Touch., 50.
14. Law of Property Act, 1925 (U.K.), s.56(2); Law of Property Act, 1936-1975 (S.A.), s.34(2); Property Law Act, 1958 (Vic.), s.56(2); Conveyancing Act, 1919-1972 (N.S.W.), s.38(2), (3); Property Law Act, 1969-1973 (W.A.), s.9; Property Law Act, 1974-5 (Qld.), s.44; Conveyancing and Law of Property Act, 1884-1973 (Tas.), s.61(1)(d).
15. See Shep. Touch., 50.
16. *Green* v. *Horne* (1694) 1 Salk. 197; 91 E.R. 177; *Lowther* v. *Kelly* (1723) 8 Mod. 115; 88 E.R. 91.
17. (1673) 2 Lev. 74; 83 E.R. 456.
18. *Ibid.*

contained in the deed he must be able to show that the covenant was made with him, and to be entitled to a grant, that the grant was made to him. This presents no problems where a covenant is expressed to be made with that person. In *Cooker* v. *Child*, for example, it appears that the defendant's promise was expressed to be made "with" the plaintiff: "the defendant . . . covenanted with the said Bently (the master of the ship), *necnon cum praedict'* Cooker (the plaintiff)."[19]

The covenant may however simply be made without being expressed to be "with" anyone. In such a case it appears from what little authority there is on the point that whether a beneficiary of the covenant is a "covenantee" is a question of the construction of the deed. In *Sunderland Marine Insurance Co.* v. *Kearney*,[20] one Kearney had arranged, as a person interested in certain cargo, to have the cargo insured with the defendant company. The company issued a policy in the form of a deed poll in which they covenanted to insure against loss of the said cargo. In an action brought by Kearney against the company to recover the insurance moneys, one Noonan, as the other person interested in the said cargo, was joined as plaintiff. The company's objection to the joinder on the ground that the plaintiff was not named in the policy was overruled by Lord Campbell C.J. who held that:

> "the deed poll binds the defendants to all persons coming within the purport of the contract, without naming them . . . The company engaged to make good all losses and damages which might happen to the subject matter of the said policy in respect of 300 1. assured. To whom were they to make good? Necessarily to the parties interested in the subject matter, who were damnified by the loss. These parties were the assured; and, accordingly, the stipulations of the policy, by the company are with the 'assured' ".[21]

It was held further that a covenantee need not be actually named in the deed, despite a statement to the contrary in *Green* v. *Horne*,[22] as long as he is sufficiently designated therein.

A much clearer and more striking example is the case of *Moss* v. *Legal and General Life Assurance Society of Australia*.[23] In this case an insurance policy taken out by one B. V. Blake on his life was contained in a deed and provided that in the event of the death of the assured the society "will pay to Mark Moss" the sum assured. The insurance society argued that the contract was between the society and Blake, and not with the plaintiff Moss, who could not sue on it. Barry J. in the Supreme Court of Victoria held that since the contract was clearly a deed poll the only question was with whom the covenant to pay the sum had been made. As there was no express indication that the covenant had been made with anyone, the question of who the covenantee was had to be determined by the construction of the deed as a whole. It was held that the covenant should be construed as having been made with the plaintiff Moss because "the interest appearing on the face of the deed is primarily in the plaintiff".[24]

These cases appear to establish then that a beneficiary may be a covenantee with respect to a covenanted benefit contained in a deed poll even though the

19. *Ibid.*
20. (1851) 16 Q.B. 923; 117 E.R. 1136.
21. *Id.*, 1140, 1142.
22. *Supra*, n.16.
23. (1875) 1 V.L.R. (Law) 315.
24. *Id.*, 318.

covenant is not expressed to be made with him; it is enough if according to the proper construction of the deed the covenant was impliedly made with him. The construction so adopted in each of these cases appears to have been based merely on the fact that the covenant was expressed to be for the plaintiff's benefit. Such an approach, it is submitted, is entirely proper in the context. By virtue of the very nature of a deed not *inter partes*, it would be unreal to insist that the covenantor in such an instrument should expressly purport to covenant "with" the intended beneficiary of the promise who, after all, would inherently seldom be party to the deed.

It should be noted that the right of any covenantee or grantee to sue on a deed not *inter partes* is subject to his fulfilling all stipulations the compliance with which is a condition precedent to the liability of the maker of the deed.[25]

The statutory abolition of the requirement of formal distinctions between deeds *inter partes* and all other types of deeds[26] means of course that it is no longer possible to categorise a deed as being *inter partes* or not by means of an easy reference to its form. As has been observed, the only reason the distinction will matter is to determine whether or not a covenantee or grantee in the deed can maintain an action on it. This problem of categorisation was presented in the case of *Chelsea & Walham Green Building Society* v. *Armstrong*,[27] where Vaisey J. held that the problem resolves itself into a question of construction of the nature of the deed. In that case a registered transfer of land contained a covenant by the transferee with a building society for the repayment to them of money due under a mortgage to which the land was subject. Both transferee and transferor had executed the transfer, but the building society had not. The building society could maintain an action at common law on the covenant only if the registered transfer could be regarded as a deed not *inter partes*. In holding that on the true construction of the nature of the registered transfer it was a deed not *inter partes*, Vaisey J. based his view on the particular features of the transfer that it did not commence with a parties clause, it was expressed in the first person, and was recorded in a public register as a matter of public record. The transfer was therefore "analogous to a deed poll, or more accurately a deed not inter partes".[28] The learned Judge went on to point out that the ancient distinction between a deed *inter partes* and a deed not *inter partes* with respect to the rights of non-executing covenantees or grantees has the solid foundation that the former is essentially a private arrangement, contemplated as a contract or as carrying out a contract made as a private, not public, matter, whereas the latter is usually intended to be a matter of public concern.[29]

It may be argued that it is today technical and pedantic to determine the right of a person to sue on a particular deed according to whether the deed is classed as *inter partes* or not, when for all other purposes the distinction is no longer relevant. But the point of the reasoning in *Chelsea & Walham Green Building Society* v. *Armstrong* is that the real question involved is whether the deed should properly be construed as intended to confer a right of action on the person concerned against the maker of the deed. In the case of a deed not *inter partes*, such a construction can readily be adopted; in the case of a deed between parties, in which the rights and obligations are,

25. *MacDonald* v. *Law Union Insurance Co.* (1874) L.R. 9 Q.B. 328.
26. *Supra*, text to n.14.
27. [1951] Ch. D. 853.
28. *Id.*, 857.
29. *Id.*, 858.

at least according to traditional common law theory, presumed to have been intended as undertaken exclusively between the parties themselves, this construction may be improper.

Statutory Modifications to the inter partes *Rule*

Whether or not, however, the common law position so described may be attacked as depending on technical and unreal distinctions, it must now be noted that the common law has undergone alteration in this respect.

The *inter partes* rule was abrogated by an Act of 1844, entitled "An Act to Simplify the Transfer of Property". S.11 of that Act provided:

> "That it shall not be necessary in any case to have a Deed indented; and that any person, not being a Party to any Deed, may take an immediate Benefit under it in the same Manner as he might under a Deed Poll."

The Act was not confined to real property,[30] and presumably s.11 applied to deeds concerning realty or personalty. For no apparent reason, however, the Act was repealed during the next year and replaced with the Real Property Act, 1845 (U.K.). S.5 of that Act provided:

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

It would appear that, apart from clearly being confined to real property, this section was intended to have the same effect as s.11 of the repealed Act; that is, to treat a grant or covenant respecting real property contained in a deed *inter partes* as if it were contained in a deed not *inter partes*. Though this conclusion seems obvious enough, the Court of Appeal in *Forster* v. *Elvet Colliery Co. Ltd.*[31] held rather strangely that the section was confined to covenants which run with the land, although this restriction was expressly doubted by Lord Macnaghten in the House of Lords on appeal.[32]

This section itself was re-enacted in the Law of Property Act, 1925, which was a consolidation of previous property legislation; but, as part of the general policy of the drafters to assimilate the law of real and personal property, the new section involved a considerable widening of terms. S.56(1) of that Act provides that:

> "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."[33]

It can be seen that the words "tenements or hereditaments" in the old section have been changed to "land or other property"; "the benefit of a condition or covenant" has been expanded to "the benefit of any condition, right of

30. See s.5.
31. [1908] 1 K.B. 629.
32. [1909] A.C. 98, 102.
33. The corresponding Australian provisions are: Law of Property Act, 1936-1975 (S.A.), s.34(1); Property Law Act, 1958 (Vic.), s.56(1); Conveyancing Act, 1919-1972 (N.S.W.), s.36c; Property Law Act, 1969-1973 (W.A.), s. 11(1); Property Law Act, 1974-5 (Qld.), s.13; Conveyancing and Law of Property Act, 1884-1973 (Tas.), s.61.

entry, covenant or agreement", and "indenture" has become "conveyance or other instrument".

It is submitted that in the context of the history of the law relating to deeds, and in the light of the earlier sections modifying that law, the intention was simply to extend the operation of s.5 of the 1845 Act to include grants of and covenants with respect to personal as well as real property. But the way in which this was done, by greatly expanding the terms used in the earlier section, left s.56(1) open to very wide interpretation. In a long line of cases since s.56(1) was enacted, strangers to simple contracts have put forward the section as doing away with the fundamental doctrine of privity of contract. The attempts, championed by Lord Denning, have been met with a reaction of various restrictive interpretations that the courts have felt compelled to apply, culminating in the opinions expressed on the section by the House of Lords in *Beswick* v. *Beswick*.[34]

In *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*[35] Denning L.J. put forward the view that the effect of this section was to abolish the rule that only the parties thereo can bring an action on a contract. Lord Denning M.R. restated his view in the Court of Appeal in *Beswick* v. *Beswick*[36] where, with the support of Danckwerts L.J., it was held that the plaintiff could under the section sue on a simple contract to which she was not a party.

Are the words used in s.56(1) open to such a sweeping conclusion? Undoubtedly they are, if they are considered in isolation, even if one might differ from Lord Denning's opinion that he could think of "no words more apt" to abolish the doctrine of privity.[37] But what has been suggested is that the section must be interpreted in the context of its predecessor and the old law relating to deeds *inter partes*.

In the appeal to the House of Lords in *Beswick* v. *Beswick* the Court was unanimous in rejecting the view that s.56(1) had abolished the doctrine of privity of contract, but a variety of opinions were put forward as to the effect of the section. Lords Reid, Hodson and Guest all found difficulty in defining the exact ambit of the section, but eventually agreed that the words "land or other property" were confined to real property.[38] The stumbling block in the way of adopting this interpretation however was the fact that the definition section defines "property" in very wide terms:[39] "Unless the context otherwise requires, " 'property' includes any thing in action, and any interest in real or personal property". It was held, however, that the context did "otherwise require" for two reasons. First, the 1925 Act was a consolidation Act, and the presumption followed that it did not alter the pre-existing law, so that if the words are open to more than one meaning, the interpretation which involved no change in the law should be adopted.[40] Second, s.56(1) was grouped with other sections under the cross-heading "Conveyances and other Instruments".[41]

34. [1968] A.C. 58.
35. [1954] 1 Q.B. 250.
36. [1966] Ch. 538.
37. [1954] 1 Q.B. 250, 274.
38. [1968] A.C. 58, 76, 79, 87.
39. (U.K.) s.205(1); (S.A.) s.7; (Vic.) s.18(1); (N.S.W.) s.7(1); (W.A.) s.7; (Qld.) s.4; (Tas.) s.2
40. [1968] A.C. 58, 77, 79, 87.
41. *Id.*, 77, 81, 87. The S.A., Vic., W.A., and Tas. sections appear under similar headings, but in N.S.W., where the section is under the heading "Property generally", and in Qld., where the heading is "General rules affecting property", this reasoning would not apply.

It is submitted that the interpretation so adopted by Lords Reid, Hodson and Guest is unsatisfactory in several respects. We are left in doubt as to whether their Lordships were prepared to acknowledge that the section extended to all contracts, albeit confined to real property. Their observations nowhere in terms indicate that simple contracts are excluded, the word "agreement" being freely used. On the other hand, Lord Reid, at least, seems to have been of the view that s.56(1) had effected no change whatever to the position under s.5 of the 1845 Act,[42] and that section, as has been observed, was confined to deeds. Furthermore it may be suggested, with respect, that the view that the words "land or other property" mean real property only is a rather startling conclusion. But the fundamental reason for the difficulties encountered by Lords Reid, Hodson and Guest, it is submitted, is that the attempt to ascertain the meaning of the section was made without a full understanding of its background.[43]

The contrasting approach of Lord Upjohn was first to review the common law position, and the modification of the law under the 1844 and 1845 Acts, and then in the light of those observations to attempt to define the operation of s.56(1). It is respectfully submitted that the conclusions so reached by his Lordship, in which Lord Pearce concurred, though stated to be "tentative", represent the most accurate assessment so far made of the section.

His Lordship expressed difficulty in agreeing with the view that "land or other property" should be construed as limited to real property, in view of the wide import of the ordinary meaning of the word "property" quite apart from the expanded definition in s.205. On the other hand, he was reluctant to accept that the section had made this extension in view of the fact that it was contained in a consolidation Act, and presumed not to alter the law, but he nevertheless added that:

> "Without expressing any concluded view, I think it may be that the true answer is that Parliament (as sometimes happens in consolidation statutes) inadvertently did alter the law in section 56 by abrogating the old common law rule in respect of contracts affecting personal property as well as real property".[44]

It would seem to be an entirely acceptable rationalisation of s.56(1) that the widening of the terms used was intended by the drafters simply to extend the abolition of the *inter partes* rule where the deed concerned land effected in the 1845 Act to all deeds concerning either land or personalty. However, in *White* v. *Bijou Mansions Ltd.* Simonds J. expressly doubted that the *inter partes* rule had ever applied to personalty,[45] and this view, if correct, would preclude such a rationalisation. One writer[46] has maintained that the source of this doubt was the fact that Simonds J. had confused what are two separate rules; the one that no grant of an immediate interest in land could be made to a non-party, this rule being confined to land, the other that a non-party could not sue on a covenant, which applied to both real and personal property. It may be pointed out, however, that these two branches have been treated as the same rule throughout the cases, right from its first

42. [1968] A.C. 58, 76.
43. Lord Reid confessed that he did not "profess to have a full understanding of the old English law regarding deeds": *ibid.*
44. [1968] A.C. 58, 105.
45. [1937] Ch. 610, 625.
46. Andrews, "Section 56 Revisited", (1959) 23 *The Conveyancer and Property Lawyer* 179, 180.

definitive statement in *Scudamore* v. *Vandenstene*: ". . . no bond, covenant, or grant can be made to or with any that is not party to the deed";[47] and both s.5 of the 1845 Act, and s.56(1) of the 1925 Act include the grant of an interest and the benefit of a covenant in one category.

One rule or two, however, it is clear that both grants and covenants of either personalty or realty were treated as subject to the same *inter partes* requirement. *Scudamore* v. *Vandenstene* itself was concerned with a charter-party. And in the cases of *Offly* v. *Warde*,[48] *Gilbey* v. *Copley*,[49] *Storer* v. *Gordon*,[50] *Metcalfe* v. *Rycroft*,[51] *Gardner* v. *Lachlan*,[52] *Barford* v. *Stuckey*,[53] *Re Piercy*,[54] *Ex parte Cockburn*,[55] and *Chesterfield Colliery Co.* v. *Hawkins*,[56] all cases of personalty, the rule was accepted and applied.

While the wording of the section seemed to Lord Upjohn to compel the conclusion that it did change the law to the extent of abrogating the *inter partes* rule with respect to personalty, in his view s.56(1) should not be interpreted as effecting any other change in the pre-existing law. The conclusion followed that the section must be confined to deeds.

> "Section 56, like its predecessors, was only intended to sweep away the old common law rule that in an indenture inter partes the covenantee must be named as a party to the indenture to take the benefit of an immediate grant or the benefit of a covenant; it intended no more."[57]

It might be added that this conclusion is further supported by the fact that the section enables a person to take the benefit of a covenant, etc. although he is not "named" as a party.[58] The requirement that a person be "named as a party" has only ever applied in the case of *inter partes* deeds;[59] a person can be a party to simple contract regardless of whether or not he is named in any parties clause—it is an open question of construction.

According to *Beswick* v. *Beswick*, then, the effect of s.56(1) is to abolish the *inter partes* rule, at least with respect to deeds concerning real property, and (if, as has been submitted, the view of Lord Upjohn should be preferred to that expressed by Lords Reid, Hodson and Guest) also with respect to deeds concerning personal property. Its overall effect is thus to equate the position of strangers to deeds *inter partes* with that of strangers to deeds not *inter partes*. That position has been stated: a grantee or covenantee named or sufficiently designated as such can sue on the deed. Unless, however, he is a grantee or covenantee then he has no rights at all under the deed, and this is equally the case with deeds *inter partes* under s.56(1) as it is with deeds not *inter partes* at common law. The point was expressed by Simonds J. in *White* v. *Bijou Mansions Ltd.*:

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47. *Supra*, text to n.2.
48. (1668) 1 Lev. 235; 83 E.R. 385.
49. 1683) 3 Lev. 138; 83 E.R. 618.
50. (1814) 3 M. & S. 308; 105 E.R. 627.
51. (1817) 6 M. & S. 75; 105 E.R. 1171.
52. (1836) 8 Sim. 123; 59 E.R. 49.
53. (1820) 2 Brod. & B. 333; 129 E.R. 995.
54. (1873) 9 Ch. App. 33.
55. (1863) 9 L.T. (N.S.) 464.
56. (1865) 3 H. & C. 677; 159 E.R. 698.
57. [1968] A.C. 58, 106.
58. This was mentioned, without being explained, by Lord Reid: *id.*, 76.
59. *Supra*, text to n.8.

> "It is impossible, in my view, to regard this section as creating a benefit in favour of any persons who may like to avail themselves of it and say: 'If we can take advantage of this it will be for our benefit' . . . Just as under s.5 of the Act of 1845 only that person could call it in aid who, although not a party, yet was a grantee or covenantee, so under s.56 of this Act only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something or with which some agreement or covenant is purported to be made."[60]

This statement, expressly adopted by Lord Upjohn in *Beswick* v. *Beswick*,[61] had been referred to and approved in *In re Miller's Agreement*,[62] *In re Foster*,[63] and in Australia in *Bohn* v. *Miller Brothers Pty. Ltd.*,[64] *Bird* v. *Trustees Executors & Agency Co. Ltd.*[65] and *Concrete Construction Pty. Ltd.* v. *Government Insurance Office of N.S.W.*[66]

Even in the face of this wealth of unqualified support, however, the criticism might be made of the *dictum* of Simonds J. that it could perhaps be read as suggesting that a beneficiary under a deed cannot be a covenantee unless the covenant in his favour purports expressly to be made with him, and to deny that a covenant can be construed as being intended to be made with the beneficiary even where that is not specifically expressed. It has been seen that beneficiaries of a covenant in deeds poll have been held to have been, according to the true construction of the deed, covenantees with respect to that covenant and entitled to sue on it even though this has not been expressed.[67] It was suggested there that that approach is, in the context of deeds poll, quite proper: to require that a covenantor expressly purport to covenant with his intended beneficiary when that beneficiary is not party to the instrument would be unreal. The same consideration should apply equally, it is submitted, to the application of s.56(1) which operates only in the case of intended beneficiaries who are not parties to the deed. All that could reasonably be required for such a beneficiary to succeed would be to show that the covenant in his favour was made in circumstances which disclosed an intention that he should be legally entitled to its benefit.

Lord Greene M.R. in the Court of Appeal in *White* v. *Bijou Mansions Ltd.*[68] more clearly reflected a realistic view of a third party "covenantee" of a deed *inter partes:*

> ". . . whatever else s.56 may mean, it is, I think, confined to cases where the person seeking to take advantage of it is a person within the benefit of the covenant in question, if I may use that phrase. The mere fact that somebody comes along and says: 'It would be useful to me if I could enforce that "covenant",' does not make him a person entitled to enforce it under s.56. Before he can enforce it he must be a person who falls within the scope and benefit of

60. [1937] Ch. 610, 624-625.
61. [1968] A.C. 58, 106.
62. [1947] Ch. 615.
63. (1938) 54 T.L.R. 993.
64. [1953] V.L.R. 354, 358.
65. [1957] V.R. 619, 622.
66. [1966] 2 N.S.W.R. 609.
67. *Supra*, text to nn.20-24.
68. [1938] Ch. 351.

> the covenant according to the true construction of the document in question."[69]

To similar effect is the view expressed by Denning L.J. in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* that "a covenant is, for this purpose, sufficiently made 'with' a person if it is, on the face of it, made directly for his benefit in such circumstances that it was intended to be enforceable by him."[70]

As Denning L.J. pointed out in that case, the decision of Danckwerts J. in *Stromdale & Ball Ltd.* v. *Burden*[71] provides an example of this approach to the section. In this case a deed *inter partes* executed between the landlord and the tenants of a house described as No. 40 Romford Road granted the tenants license to assign their lease to the plaintiff company. By clause 4 of the deed, the landlord covenanted to agree to assign the lease to the said company upon written notice given by the company of their desire to take over the lease. The plaintiff company was not a party to the deed, and the covenant was not expressed to be "with" the company. Danckwerts J. held that the company was entitled under s.56 to enforce the covenant. After referring to the *dicta*, cited above, of Simonds J. and Greene M.R. in *White* v. *Bijou Mansions Ltd.* his Lordship said:

> "It seems to me that in the present case the intention of clause 4 of the deed of license is to enable the person therein named, the plaintiff company, and no one else, to obtain the leasehold interest of the defendant in No. 40 Romford Road. In the language of Simonds J. the plaintiff company is a person to whom the instrument purports to grant something or with which some agreement or covenant is purported to be made. S.56 provides that a person may take an immediate or other interest in land or the benefit of any covenant or agreement over or respecting land, although he may not be named as a party to the instrument. It is difficult to see what the intention of clause 4 of the deed of license was if it was not to confer on the plaintiff company an interest in No. 40 Romford Road and to give the plaintiff company the benefit of the covenant or agreement conferring an option to acquire the defendant's leasehold interest."[72]

In *Beswick* v. *Beswick* Lord Upjohn added a third condition to the application of s.56(1), that the section refers only to documents strictly *inter partes*.[73] It is difficult to understand why this was added as a "condition" to calling the section in aid, for it necessarily follows from what has been observed with respect to deeds not *inter partes* that the section can only apply to deeds *inter partes*. The rule it abolished only ever applied to *inter partes* deeds.

Conclusion

The present law can be stated as follows. If a deed can be properly regarded as being not *inter partes*, then it has always been the law that any grantee or covenantee named or sufficiently designated in the deed can sue on it for the benefit of the grant or covenant, irrespective of whether or not he has joined in executing the deed. The question whether any person is a grantee

69. *Id.*, 365.
70. [1954] 1 Q.B. 250, 272.
71. [1952] Ch. 223.
72. *Id.*, 234.
73. [1968] A.C. 58, 107.

or covenantee depends on the construction of the deed as a whole. But if the deed in question is properly to be classified as *inter partes* then the old common law rule that a grantee or covenantee named as such must also be named as a party to the deed in order to sue on it still applies except to the extent that it has been abrogated by s.56(1) of the English Law of Property Act and its Australian equivalents.[74] According to the most recent judicial pronouncement on the section, its effect is to abrogate the *inter partes* rule at least in all cases of deeds concerning real property.[75] Where the *inter partes* deed does not concern real property, then according to Lords Reid, Hodson and Guest in *Beswick* v. *Beswick*, the *inter partes* rule would apply to exclude grantees and covenantees not named as parties. It has been submitted, however, that the view of Lord Upjohn in that case, with which Lord Pearce concurred, that the section should be interpreted as abrogating the *inter partes* rule with respect to all *inter partes* deeds whether concerning real or personal property, is preferable in the historical context in which the section was enacted. If this view is accepted then a grantee or covenantee can enforce any deed *inter partes*. Again, the question whether any person is a grantee or covenantee is one of construction of the deed.

The present position would appear to be then that in any litigation involving an action by a person who, although not party to a deed, asserts that a grant or covenant therein was made for his benefit, there are two basic questions of construction for the court. First, such a person can only sue on the deed if according to its true construction he is a grantee or covenantee. He does not have to be expressly described as such; it is enough that he was impliedly intended to be legally entitled to the benefit of the grant or covenant. Second, if the deed is construed as being not *inter partes* in character, the third party grantee or covenantee can succeed at common law; if the deed is construed as being of an inter partes nature, he must rely on s.56(1).

It can be readily observed that the two questions of construction described are logically reducible to one process. The single question in any case should be simply whether the plaintiff was intended to be a beneficiary. If upon construction of the deed the answer is affirmative, the plaintiff ought to succeed. The law has not, according to the authorities reviewed, yet reached this stage, but the way is open for this final rationalisation. The reason for the involvement of two stages of construction, it will be remembered, is solely the historical hangover in the case of deeds construed as being *inter partes* in nature, when an intended covenantee or grantee succeeds only with the aid of s.56(1). According to the view put forward here, it can be seen that the present law allows a grantee or covenantee expressly so named or impliedly designated as such in any deed, whether *inter partes* or not, and whether concerning real property or not, to bring an action to enforce the grant or covenant in his favour, irrespective of whether or not he is a party to the deed.

74. *Supra*, n.33.
75. It follows that even if the registered transfer in *Chelsea and Walham Green Building Society* v. *Armstrong* (*supra*, n.27) had been held to have been *inter partes*, the building society could have relied on s.56(1) to sue on the covenant.