RECENT DEVELOPMENTS IN THE DOCTRINE OF PRIVITY*

According to the doctrine of privity of contract, no-one is entitled to enforce, or is bound by, the terms of a contract to which he is not an original party.[1] This article is not concerned with attempts to impose restrictions on strangers to the consideration,[2] but with those contracts which purport to confer a benefit, whether by way of gift or exemption from liability. Comment is further confined to issues arising out of two recent cases: *Beswick v. Beswick*[3] and *Coulls v. Bagot's Executor and Trustee Co. Ltd.*[4]

Beswick v. Beswick

By a written agreement, Peter Beswick, an elderly coal merchant, transferred the goodwill and trade utensils of his business to his nephew, John Beswick. The consideration provided by the latter consisted of a promise to employ his uncle as a consultant for the rest of his life at £6.10.0 a week (the time to be put in by the old man to be at his own absolute discretion) and a promise that in the event of Peter Beswick's death he would pay his widow Ruth an annuity to be charged on the business at the rate of £5 a week.

When his uncle died twenty months later, John Beswick paid one sum of £5 to his aunt but thereafter refused to continue payments. The widow, having taken out letters of administration to her husband's estate, brought suit in both her representative and her personal capacities, requesting *inter alia* an order for specific performance. In the Chancery Court of the County Palatine of Lancaster,[5] Burgess V.C. awarded her nominal damages of forty shillings but refused any further relief.

The Court of Appeal (Lord Denning M.R., Danckwerts and Salmon L.JJ.) held that Mrs Beswick was entitled as administratrix, to a decree of specific performance, and that the Court, in its equitable jurisdiction, had power to order the nephew to pay the arrears and weekly sums during her life. The Master of the Rolls and Danckwerts L.J. (Salmon L.J. expressing no opinion) were agreed that the widow could enforce the obligation in her own name by virtue of section 56(1) of the Law of Property Act 1925 (Eng.). Lord Denning went further to say that the rule preventing third parties from suing on

* We are grateful to Professor H. A. J. Ford for his guidance whilst we were writing this article. He cannot, of course, be held responsible for any errors that remain.

1 Cheshire and Fifoot, *The Law of Contract* (Australian ed. 1966), 529.

2 *Ibid.* 554 ff.

3 [1966] Ch. 538 (C.A.); [1967] 3 W.L.R. 932 (H.L.).

4 (1966-67) 40 A.L.J.R. 471 (H.C.A.), on appeal from the Supreme Court of South Australia: *In the Estate of Coulls* [1965] S.A.S.R. 317.

5 [1965] 3 All E.R. 858.

a contract for their benefit was procedural only and did not impede enforcement by them of their rights.

The House of Lords (Lord Reid, Lord Hodson, Lord Guest, Lord Pearce and Lord Upjohn) unanimously affirmed the order for specific performance, but with like unanimity rejected the *dicta* of the majority of the Court of Appeal regarding the effect of section 56(1). Lord Denning's procedural interpretation of the doctrine of privity was not argued by the respondent in the House of Lords.

Coulls v. Bagot's Executor and Trustee Co. Ltd

Meanwhile another written agreement by which a husband of advancing years had sought to provide for his wife had been considered by the Australian courts. By an informal document headed *Agreement between Arthur Leopold Coulls and O'Neil Construction Proprietary Limited* the husband, Arthur Coulls, in consideration of £5, granted the company the right to quarry stone on his land. The agreement provided for extensions of time and payments of royalties. The last paragraph read:

> I authorise the above Company to pay all money connected with this agreement to my wife, Doris Sophia Coulls, and myself, Arthur Leopold Coulls, as joint tenants (or tenants in common?). (the one which goes to living partner)

The document was signed by Arthur Coulls, by L. O'Neil on behalf of the company and by Mrs Coulls.

On the husband's death, proceedings were commenced by way of originating summons in the Supreme Court of South Australia to determine, amongst other questions, the effect of the agreement.

Mayo J. held that Mrs Coulls was the 'lawful assignee' of the royalties, entitled to demand that payment of them be made to her and to hold them as her own.

His Honour's decision was reversed by the High Court of Australia (Barwick C.J., McTiernan, Taylor, Windeyer and Owen JJ.), where it was held unanimously that there had been no assignment, and by a majority (McTiernan, Taylor and Owen JJ.) that the agreement, on its true construction, was a contract between Mr Coulls and the company together with a revocable mandate to pay royalties to his wife, a mandate which ended at his death. The Chief Justice and Windeyer J. construed it as a promise made by the company to the husband and wife jointly, and therefore enforceable by them both together and, after the death of either, by the survivor. Taylor and Owen JJ. agreed that this would be the result of such a construction.

Having set out the facts in each case and the course of litigation it is proposed to deal with the legal issues, classified under broad headings.

RIGHTS OF THE THIRD PARTY

It was not until 1840, when Lord Denman C.J. in *Eastwood v. Kenyon*,[6] rejected the view of Lord Mansfield that moral obligation could constitute consideration in favour of the opinion contended for by the reporters Bosanquet and Puller,[7] that the nature of the consideration required to support a promise was finally settled. Similarly, it seems that only with the judgment of the Queen's Bench in *Tweddle v. Atkinson*[8] did the lengthy confusion in the law regarding privity come to an end; but the conflict of earlier authorities[9] left the ground open for debate as late as the hearing of *Beswick v. Beswick* in the Court of Appeal.

Lord Denning based his contention that a third-party beneficiary could sue on a contract, by joining the promisee either as co-plaintiff or co-defendant, firmly on *Dutton v. Poole*.[10] There the Court of Exchequer Chamber held that a promise made by a son to his father for the benefit of his sister could be enforced by her, because there was 'such apparent consideration or 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'.[11] In *Drive Yourself Hire (London), Ltd v. Strutt*,[12] His Lordship had earlier discussed the significance of that and of three other cases, all decided between 1677 and 1823: so it seems best simply to refer to his judgment and to a note written by a learned contributor to the *Law Quarterly Review*[13] soon afterwards.

In the House of Lords it was assumed, but without any argument being presented on the point, that the confirmation of *Tweddle v. Atkinson* in *Dunlop Pneumatic Tyre Co. v. Selfridge and Co. Ltd*[14] and *Scruttons Ltd v. Midlands Silicones Ltd*[15] correctly represented the law, at least since 1861. Lord Reid alone countenanced a reappraisal:

> It is true that a strong Law Revision Committee recommended so long ago as 1937 (Cmd. 5449): 'That where a contract by its express terms purports to confer a benefit directly on a third party it shall be enforceable by the third party in his own name . . .' (p. 31). And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter. But if legis-

6 (1840) 11 Ad. & E. 438, 447 ff.; 113 E.R. 482, 485.
7 Note to their report of *Wennall v. Adney* (1802) 3 B. & P. 247, 249; 127 E.R. 137, 138, the importance of which is attested by Holdsworth, *History of English Law* (second ed. 1937), VIII, 36-37.
8 (1861) 1 B. & S. 393; 121 E.R. 762.
9 Discussed by Holdsworth, *op. cit.*, VIII, 11ff. and by Windeyer J: (1966-67) 40 A.L.J.R. 471, 485.
10 (1677) 8 T. Raym. 302; 2 Lev. 210; 1 Vent. 318, 332; 3 Keb. 786; T. Jo. 102.
11 (1677) 2 Lev. 210, 211-12, *per* Scroggs C.J.
12 [1954] 1 Q.B. 250.
13 E.J.P., 'Privity of Contract', (1954) 70 *Law Quarterly Review* 467.
14 [1915] A.C. 847.
15 [1962] A.C. 446.

> lation is probable at an early date I would not deal with it in a case where that is not essential.[16]

His Lordship's words raise several interesting side-issues, but for the present the main question has been settled in Australia by Fullagar J. in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd*:

> With all respect to what is said by Denning L.J. in *Smith and Snipes Hall Farm Ltd v. River Douglas Catchment Board . . .*,[17] I think that *Tweddle v. Atkinson* laid down a rule which has been accepted by the House of Lords and by the Privy Council, and that *Dutton v. Poole* must be taken to have been long since overruled.[18]

In *Coulls v. Bagot's Executor and Trustee Co. Ltd* Barwick C.J. expressly left the point open, but Windeyer J. reviewed cases going back to the early days of assumpsit in the sixteenth and seventeenth centuries, including *Dutton v. Poole,* and concluded regretfully that he was compelled to differ from Lord Denning's conclusions. Prior to setting out on his journey through the precedents, His Honour expressed the view that whilst history is valuable in properly understanding legal doctrines, the 'history of much of our law is a story of *development*[19] over centuries', a continuing process not to be turned back by searching the reports of ancient courts to restore a pristine, but long subverted, faith.[20]

Whatever may have been the state of the law prior to 1861, whatever the position since, it is always open to Parliament to restore (or alter) the law.

Section 56(1) of the Property Law Act 1958 (Vic.) is virtually a replica of the same section in the English Law of Property Act 1925 and reads as follows:

> 56.(1) 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 is not named as a party to the conveyance or other instrument.

The definitions section, 18(1), which corresponds fairly closely with section 205(xx) of the English Act, provides:

> 18.(1) In this part unless inconsistent with the context or subject matter—
>
> * * *
>
> 'Property' includes any thing in action, and any interest in real or personal property;

16 [1967] 3 W.L.R. 932, 935.

17 [1949] 2 K.B. 500, 514-15; *infra* p.

18 (1956) 95 C.L.R. 43. In *Scruttons Ltd v. Midland Silicones Ltd* [1962] A.C. 446, 472, Viscount Simonds referred to this case and continued: '. . . the late Fullagar J. delivered a judgment with which Dixon C.J. said that he entirely agreed. So do I—with every line and every word of it, and, having read and re-read it with growing admiration, I cannot forbear from expressing my sense of the loss which not only his colleagues in the High Court of Australia but all who anywhere are concerned with the administration of the common law have suffered by his premature death.'

19 Authors' italics.

20 (1966-67) 40 A.L.J.R. 471, 485-86.

Regarding the operation of section 56(1), two points are clearly settled: first, a third party must fall within the 'scope and benefit' of the promise before he can avail himself of the provision,[21] secondly, he must be in existence and identifiable, at the time the contract is made.[22] Beyond this there has been considerable controversy. A well known article by E. P. Ellinger in the *Modern Law Review*[23] outlines some of the cases where the meaning of the section has been canvassed.

The most widely discussed interpretation derives from a judgment of Denning L.J. (as he then was) in *Smith and Snipes Hall Farm Ltd v. River Douglas Catchment Board.*[24] The defendants had entered into a drainage contract with the plaintiffs' predecessors in title to a plot of land, which was flooded due to the negligence of the defendants in carrying out the agreement. The learned Lord Justice rejected the contention that the plaintiffs, not being parties to the drainage contract, were unable to sue on it. He held that section 56(1) had re-enacted what he conceived to be the old common law rule: a contract could be enforced at the instance of one who was not a party, provided that it had been for his benefit and that he had a 'sufficient interest'.[25] The last two words were not to be taken as connoting a contractual or fiduciary relationship between the third party and the promisee, but as extending to any situation where, on moral grounds, the beneficiary had a legitimate right to expect performance. His Lordship reiterated this view of the section in a subsequent case, referred to above, *Drive Yourself Hire Co. (London), Ltd v. Strutt.*[26]

The operation of this statutory provision was not considered in *Coulls's case,* but Windeyer J. referred to the fact that the matter would soon be discussed in the House of Lords. In *Beswick v. Beswick* the radical view of section 56(1) in which the Master of the Rolls and Danckwerts L.J. had concurred in the court below was rejected in all five speeches. Their Lordships' opinions are confessedly *obiter dicta,* for, like the Court of Appeal, they had no reason to decide the question, Mrs Beswick having been granted a decree of specific performance in her capacity as administratrix; but the technical rules of precedent have but limited force in England's highest appellate court.[27]

All the noble judges who heard the case emphasized that the Law of Property Act 1925 (Eng.) was a consolidation act and that there

21 *White v. Bijou Mansions* [1937] Ch. 610; [1938] Ch. 351 (C.A.).

22 *Bohn v. Miller Bros Pty Ltd* [1953] V.L.R. 354, followed in *Bird v. Trustees, Executors and Agency Co. Ltd* [1957] V.R. 619.

23 (1963) 26 *Modern Law Review* 396.

24 [1949] 2 K.B. 500. 25 *Ibid.* 514.

26 [1954] 1 K.B. 250. In neither of these did the other members of the Court of Appeal base their judgments on the same ground as Denning L.J.

27 The *obiter dicta* of the House of Lords in *Hedley, Byrne and Co. Ltd v. Heller and Partners Ltd* [1964] A.C. 465 have been widely accepted as authoritative by commentators and were applied in *Smith v. Auckland Hospital Board* [1965] N.Z.L.R. 191 (C.A.).

is a strong presumption that such an enactment does not change the law.[28] The previous provision had been section 5 of the Real Property Act 1845 (Eng.), to all intents and purposes identical with section 178 of the Real Property Statute 1864 (Vic.). The latter read as follows:

> 178. Under an indenture executed after the passing of this Act, an immediate estate or interest in any land and the benefit of a condition or covenant respecting any land may be taken, although the taker thereof be named a party to the same indenture; and a deed executed hereafter purporting to be an indenture shall have the affect of an indenture although not actually indented.

This was re-enacted, substantially unaltered, in the consolidations of 1890[29] and 1915.[30] In the 1928 consolidation the new English phraseology was substituted, and copied in 1958.

The effect of the old provision was simply to abolish the common law rule that 'a grantee or covenantee, though named as such in an indenture under seal expressed to be made *inter partes*, could not take an immediate interest as grantee nor the benefit of a covenant as covenantee unless named as a party to the indenture'[31] so far as the rule applied to realty, but not (owing to the words used) to personalty.

The technical provision in section 56(2), obviously designed to cover the same ground as the second clause in the 1864 Statute, and the location of the section under the cross-heading *Conveyances and other Instruments* combine with the unlikelihood of Parliament's intending to undermine the basis of contractual rights by such an obscure means to strengthen the normal presumption applicable to consolidations. At this point it may be observed that all Their Lord ships' reasons apply with equal relevance to section 56(1) in the Victorian Act.

Despite these considerations, it remains true that if such were the only meaning that the words of the Act could be given, the courts would have to hold that Parliament had changed the law, albeit *per incuriam*. Such results would be less likely in civil law systems where reference is regularly made to the *travaux préparatoires*. In this connection there is a remarkable *dictum* in the speech of Lord Upjohn, which derives some support from words of Lord Reid:

> For my part, I see no objection to considering [the proceedings of the joint committee of both Houses on consolidation Bills], not with a view to construing the Act, that is of course not permissible, but to see whether the weight of the presumption as to the effect of consolidation Acts is weakened by anything that took place in those proceedings.[32]

28 *Gray v. Inland Revenue Commissioners* [1960] A.C. 1, 13, *per* Viscount Simonds.
29 Real Property Act 1890, s. 165.
30 Real Property Act 1915, s. 108.
31 *Per* Lord Upjohn [1967] 3 W.L.R. 932, 961.
32 [1967] 3 W.L.R. 932, 963.

The distinction involved is clear: that one cannot look at the proceedings to determine *how* the law was changed, but only whether a change was intended. Would it be permissible to use such materials to ascertain Parliament's intention to override other presumptions of construction, for example, the presumptions against retrospective penalties or expropriation without compensation? It might be asked, with the greatest respect, what reasons of policy or construction justify this qualification of the general prohibition of extrinsic material—unless that prohibition itself is unjustified, which Lord Reid, for one, denies.

In the event, Lord Reid, Lord Hodson and Lord Guest relied on the reference in the definition section to requirements of context, the context being a set of conveyancing provisions in a consolidation act. It is interesting that Their Lordships felt able to allow consolidation as part of the 'context'.

Lord Guest discountenanced the views of Simonds J. (as he then was) in *White v. Bijou Mansions*[33] and of Wynn-Parry J. in *Re Miller's Agreement*[34] as inconsistent with his belief that the 1925 Act had in no way altered the pre-existing law, so that section 56(1) would be restricted to realty. Although Lord Reid and probably Lord Hodson[35] inclined to a similar approach, it seems that Lord Pearce and Lord Upjohn would have held, had it been necessary, that since the consolidation the effect of the old section 5 extended to personalty.

Lord Upjohn tentatively concluded that the statutory provision applied only to sealed documents strictly *inter partes* where the promisor purports to contract with, or make a grant to, the party relying on the section; so that, had John Beswick purported to covenant with his aunt to pay her an annuity, *although she was not a party* either to the indenture or the transaction which it embodied yet (in His Lordship's view) she might have been able to rely on the Act, provided that the covenant had been contained in the appropriate kind of document.

Is there not a conflict between this conclusion and Lord Reid's explanation of the rule that section 56(1) abolishes: 'that being *in fact*[36] a party to an agreement might not be enough; the person claiming the benefit had to be *named*[36] a party in the indenture'? Elsewhere he says:

33 [1937] Ch. 610, 625.
34 [1947] Ch. 615.
35 'One effect of section 56 was to make clear that which may not have been plain in the authorities, that those matters dealt with were not confined to covenants, *etc.* running with the land.' [1967] 3 W.L.R. 932, 941. The ambiguity of this *dictum* appears to be resolved against the inclusion of personality by His Lordship's construction of 'property' (pp. 942 f.), but if so his approval of *In re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430 cannot be unqualified.
36 Authors' italics.

> Perhaps more important is the fact that the section does not say that a person may take the benefit of an agreement although he *was*[36] not a party to it: it says that he may do so although he was not *named*[36] as a party in the instrument which embodied the agreement.[37]

In *Vandepitte v. Preferred Accident Insurance Corporation of New York* Lord Wright, speaking for the Privy Council, stated:

> No doubt at common law no-one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds . . .[38]

that is to say, privity and enforceability are each essential to bilateral agreements.

If that is correct, the old common-law rule is seen to be the necessary consequence of the requirements of privity and the rule excluding extrinsic evidence in the construction of deeds; and the exception allowed when an indenture was not drawn strictly *inter partes, i.e.* 'between A of the one part and B of the other part' (*Cooker v. Child*[39]), suggests that the courts used to disregard the parol evidence rule and inquire whether the plaintiff was in actual fact a party to the transaction. Such an interpretation accords with the view of Lord Reid, and the result would be that section 56(1) permits the court to enforce an indenture, though strictly *inter partes*, in favour of those who are really parties to the transaction but not expressed to be parties to the deed; to that extent the parol evidence rule would have to be modified.

On the other hand, the argument in *Cooker v. Child* did not turn on the plaintiff's being a party in fact (assuming that he was by agency),[40] but on the proposition of Sir William Jones, apparently accepted by the court, that an indenture not strictly drawn should be treated as a deed poll for the purpose of deciding who could sue on it, so that privity was not in issue. No reference was made to the parol evidence rule, which would have been a stumbling block to the plaintiff if Lord Reid's statement of the old law is correct. The case is therefore authority for Lord Upjohn's conclusion that the section abolishes, not the parol evidence rule, but the requirement of privity in deeds *inter partes* (apparently restricted to realty) and that there is no need for it to cover other indentures where the principles applicable to deeds poll have always applied.

JOINT PROMISEES

The classical doctrine of consideration may be expressed in the form of two rules: first, that no promise is binding unless given for valuable consideration; secondly, that the consideration must move

[37] [1967] 3 W.L.R. 932, 939.
[38] [1933] A.C. 70, 79.
[39] (1673) 2 Lev. 74; 83 E.R. 456.
[40] Bentley, master and part-owner of a ship, with the consent of Cooker, the other part-owner, entered into a charterparty with the defendant, Child.

from the person seeking to enforce the terms of the contract. The first rule is undisputed in Anglo-Australian law, but the second has been subject to critical scrutiny and redefinition, the most notable instance being Lord Denning's abandonment of its requirement altogether.

In the light of the recent cases there is little doubt that the second rule stands, but preoccupation with it can obscure the fact that the plaintiff in an action must first of all be a party to the contract. As Sir Garfield Barwick pointed out in his judgment:

> Questions of consideration and of privity are not always kept distinct. Indeed, on some occasions when lack of privity is the real reason for not allowing a plaintiff to succeed on a promise not made with him, an unnecessary and irrelevant reason is given that the plaintiff was a stranger to the consideration; that is to say, that he was not merely not a party to the agreement but was not a party to the bargain. In *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge and Co. Ltd* [1915] A.C. 847 privity was not lacking because it was assumed, but the promise made by the defendant to the plaintiff was as between them gratuitous.[41]

So far His Honour's words are an expanded restatement of the *dictum* of Lord Wright in *Vandepitte's case*. The innovation (if such it is) comes at the point where the learned Chief Justice continued that in *Coulls's case* 'whether the promise was made by the company to the deceased alone or to the deceased and [Mrs Coulls], it was not as between promisor and promisee a gratuitous promise'.[42] His Honour and Windeyer J., having construed the agreement as a promise made to the husband and wife jointly, concurred in a qualification to the second rule as stated above: where there are two (or more) joint promisees one of whom provides consideration on behalf of both, the right of action accrues to them together. It does not lie in the mouth of the promisor to question whether the consideration which he has received for his undertaking moved from one or other or both of the parties on the other side of the contract.

As there are both privity and valuable consideration, the joint promisees can enforce the agreement. Indeed, they must sue together, or if one refuses, the other must join him as a co-defendant after a suitable tender of costs: *Whitehead v. Hughes*.[43] On the death of either the right of action accrues to the survivor alone, whether the consideration was promised by him in actual fact or not. On this issue Barwick C.J. differed from Taylor, Windeyer and Owen JJ. in thinking that the survivor would have to join the personal representatives of the deceased joint promisee. Support for the majority view is indicated by the judgments in *Anderson v. Martindale*[44] and *Jell v. Douglas*.[45] The former case is authority for the further proposition

[41] (1966-67) 40 A.L.J.R. 471, 477.
[42] *Loc. cit.*
[43] (1834) 2 Cr. & M. 318; 149 E.R. 782.
[44] (1801) 1 East 497; 102 E.R. 191.
[45] (1821) 4 B. & Ald. 374; 106 E.R. 974. Neither this nor the proceeding case, however, is authority for Their Honours' ruling that one joint promisee can provide consideration on behalf of all.

that such personal representatives have in fact no standing to bring an action.

It may be that, no matter how the issue of survivorship is resolved, if the joint promisees must sue together the promisor can hold them jointly liable; for as Crompton J. declared in *Tweddle v. Atkinson*:

> 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.[46]

If that is correct, in the situation where the promisee providing the consideration dies before performing the co-promisees' part of the bargain, the party on the other side cannot exact performance from his executor,[47] unless the latter, denied a right of action, is yet to be burdened with continuing liability on the primary obligation of the contract.[48]

It is submitted that the principle accepted by the High Court is applicable to cases where the benefit conferred on a joint promisee is the protection of an exemption clause. Logically there would seem to be no bar to this provided the contract is expressed to be made with a company and its servants jointly. *Cosgrove v. Horsfall*[49] is fundamentally different because there the servants had no privity with the plaintiff; here they would have privity, the company furnishing consideration on behalf of all the joint promisees (they must not be several promisees of course). If the company defaults, what then is to stop the other party suing the company and its servants as co-contractors? In theory there is no objection if Crompton J. is followed, but in practice such a result could scarcely be tolerated.

It is submitted that no-one would be found to be a joint promisee unless evidence were led, whether by way of proving his signature to the contractual document or otherwise, of a genuine intention to enter into all the rights and liabilities of the contract. In the case of a company's servants this would rarely be so unless, as Morris L.J. suggested in the different context of his judgment in *Adler v. Dickson*,[50] the company were acting as agent for its employees—but the agency would have to be authorized or ratified, for 'Liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will'.[51]

Two more points remain under this heading. The first is that, although Their Honours do not say so expressly, they clearly mean

[46] (1861) 1 B. & S. 393, 398; 121 E.R. 762, 764.

[47] Except where the equitable doctrine of enrichment applies: *vide* Williams, *Joint Obligations* (1949), 70 ff.

[48] As he is, admittedly, in the case of breaches of contract other than failure to perform the primary obligation: Williams, *op. cit.*, 74.

[49] (1945-46) 62 T.L.R. 140.

[50] [1955] 1 Q.B. 178, 196.

[51] *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234, 248 *per* Lord Bowen. Contrast *In re Harrison* (1920) 90 L.J. Ch. 186.

that the right of action belongs to joint promisees or the survivor as promisees, not as beneficiaries. The fact that Mr and Mrs Coulls, on one construction of their agreement which the company, were co-beneficiaries with a right of survivorship was not relevant. If A promised B and C jointly, consideration actually moving from B, that he would pay an annuity to C, or to a stranger X, C would on B's death have the sole right to enforce the promise.

The second matter arises in this way. After a straightforward exposition of the rights of joint promisees, Windeyer J. concluded by basing himself on *Rookwood's case*[52] and considerations of general principle. The Elizabethan report is quite short:

> Rookwood having issue three sons, had an intent to charge his land with four pounds *per annum* to each of the two youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay them duly the four pounds *per annum*, to which the two youngest sons being present agreed; and he promised *to them*[53] to pay it. And for non-payment after the death of the father, they brought an *assumpsit* —The whole Court held clearly that it was well brought, and that it was a good consideration; for otherwise his lands had been charged with the rents.

If this is an instance of A making a promise to B and C jointly for a consideration moving from D, then as between promisor and promisees the undertaking is gratuitous and the *assumpsit* would not be well brought by the youngest sons at the present day. It must, in view of what His Honour says elsewhere in his judgment,[54] be assumed that he construed the eldest son's promise as being made to his father and brothers jointly.

Now that the standing of promisees in a common law contract for the benefit of a stranger to the consideration has been examined it is possible to return to the simple example where A promises to B, who supplies consideration, that a benefit or exemption will be conferred on C.

RIGHTS OF THE PROMISEES

Although the right of the promisee to bring an action for damages against a defaulting promisor in such a situation has not been denied, it has often been contended that his damages would be nominal on the grounds that he personally would have suffered no damage. In *Beswick v. Beswick,* for example, it was generally assumed that the administratrix's damages would be derisory because there was no loss to the estate. Counsel for the nephew conceded, however, that damages might be substantial if the facts were different.

Windeyer J., who alone considered damages in *Coulls's case* and

52 (1589) Cro. Eliz. 164; 78 E.R. 421.

53 Authors' italics.

54 'For us the rule prevails that a plaintiff who sues on a promise must show a consideration for it provided by him.' (1966-67) 40 A.L.J.R. 471, 484.

whose remarks were endorsed by Lord Pearce and Lord Upjohn, illustrated how this might be so. His Honour postulated a contract whereby B promised A to pay $500 to C and failed to do so:

> . . . I do not see why, if A sued B for a breach of [their contract], he must get no more than nominal damages. If C were A's creditor, and the $500 was [*sic*] to be paid to discharge A's debt, then B's failure to pay it would cause A more than nominal damage. Or, suppose C was a person whom A felt he had a duty to reward or recompense, or was someone who, with the aid of $500 was to engage in some activity which A wished to promote or from which he might benefit—I can see no reason why in such cases the damages which A would suffer upon B's breach of his contract to pay C $500 would be merely nominal: I think that in accordance with the ordinary rules for the assessment of damages for breach of contract, they could be substantial. They would not necessarily be $500; they could I think be less, or more.[55]

It is respectfully accepted that there is no reason why such damages should not be recovered if they are reasonably foreseeable; for the difficulty of measuring loss does not prevent recovery—the days of the *Abbot of St Edmund's case*[56] are long past. Could Mrs Beswick, as her husband's representative, have recovered substantial damages for the frustration of his purpose—founded on the moral duty to provide for his wife—if the point had been argued? It may be doubted whether the learned Judge's principle was intended to stretch that far.

Notwithstanding expressions of Lord Esher M.R. and Fry L.J. in *Cleaver v. Mutual Reserve Fund Life Association*,[57] it is now widely accepted[58] that the celebrated *dictum* of Lush L.J.[59] to the effect that a promisee can recover all that he could if he were the beneficiary under the contract, was based on the premiss (reasonable in the case) that the promisee was also a trustee.[60]

In the circumstances to which Uthwatt J. (as he then was) referred in *In re Schebsman*,[61] where, 'as a matter of construction the covenant can be read as if the words "or as the covenantee may direct" were inserted in the covenant after the name of the payee',[62] we may safely assume that the promisee could recover all that he might have done if the contract had been made for his benefit. This is not a genuine exception to the normal assessment of damages as propounded by Windeyer J. It is interesting that at no stage does it appear to have

55 (1966-67) 40 A.L.J.R. 471, 486.
56 (Michaelmas 1202) Plea 136 Suffolk; Fifoot, *History and Sources of the Common Law* (1949), 15.
57 [1892] 1 Q.B. 147, 153, 157-58.
58 Windeyer J. (1966-67) 40 A.L.J.R. 471, 486-87; Lord Upjohn in *Beswick v. Beswick;* Murray C.J. in *Viles v. Viles* [1939] S.A.S.R. 164, 168.
59 *Lloyd's v. Harper* (1880) 16 Ch. D. 290, 321.
60 Nevertheless, it is not easy to see why this should necessarily explain the *dictum* where the terms of the contract require payment directly to the beneficiary and the promisee is trustee of a chose in action only.
61 [1943] 1 Ch. D. 366.
62 *Ibid.* 373.

been argued that the Coulls-O'Neil agreement might have been construed as a contract for the benefit of the widow or such person as the stipulator might direct. The informal nature of the writing and the use of the word 'authorise' might conceivably have enabled counsel to put such an argument. The result would have been that the payments would continue to Mrs Coulls, in accordance with the terms of the contract, until the executor otherwise directed.[63]

Apart from exceptional fact situations, it is equally clear both that damages would not correspond to the value of the benefit contracted for and that damages assessed on the promisee's personal loss would be awarded to him in his own right and not on trust for the intended beneficiary.

The House of Lords unanimously conceded that nominal damages awarded to a personal representative would be entirely unsatisfactory. The same applies where the promisee could obtain substantial compensation, but only for his own loss. It would also be unjust, as Plunket L.C. observed in *Swift v. Swift*,[64] to expect a plaintiff entitled to an annuity to accept a lump sum assessed by a jury as the probable capitalized damage resulting from the defendant's failure to pay—this would be relevant when the promisee is also beneficiary. Needless to say, weekly or quarterly actions for damages would be equally inconvenient.

Taking these matters into account, Their Lordships had no difficulty in agreeing with the learned judges in the Court of Appeal that specific performance was a proper remedy and that its availability was sanctioned by principle and authority,[65] especially where the promisee had wholly or in part performed his side of the bargain.[66]

Special problems might arise if the interest of the third party clashed with claims by creditors against an estate,[67] but they would be dealt with according to the general rules of equity when specific performance is sought. One very important rule is that the obligations of the contract must be mutually enforceable, an aspect referred to by the Chief Justice in *Coulls's case*.[68]

Their Lordships attached no significance to the fact that Peter Beswick was to render personal services under the contract with his nephew. Perhaps that might have been argued more strenuously if he had been seeking specific performance during his lifetime, but Lord Upjohn, who alone dealt with the matter, explained it thus:

> The fact that [the uncle] by the agreement was to render such services as consultant as he might find convenient or at his own absolute dis-

63 Another special application of the rule would be the device relating to exemption clauses and indemnities summarized by McGarvie, Pannam and Hocker, *Cases and Materials on Contract* (1966), 658 n. (1).

64 (1841) 3 I.R. Eq. 267.

65 *E.g. Peel v. Peel* (1869) 17 W.R. 586; *Hohler v. Aston* [1920] 2 Ch. 420.

66 *Hart v. Hart* (1881) 18 Ch. D. 670, 684, *per* Kay J.

67 *Per* Lord Pearce [1967] 3 W.L.R. 932, 952, and Lord Upjohn at 960.

68 (1966-67) 40 A.L.J.R. 471, 477.

> cretion should decide may be ignored as *de minimis* and the contrary was not argued. In any event the fact that there is a small element of personal service in a contract of this nature does not destroy that quality of mutuality (otherwise plainly present) want of which may in general terms properly be a ground for refusing a decree of specific performance.[69]

In any event, it would appear that that portion of Peter Beswick's consideration was entirely illusory on the principle for which *British Empire Films Pty Ltd v. Oxford Theatres Pty Ltd*[70] is authority.

Even if the promisor's undertaking were to transfer identifiable property or funds to the beneficiary, the promise being one which could be specifically enforced at the suit of the promisee, then it is clear that the beneficiary would not at once have all the remedies of a *cestui que trust* on the basis that equity treats as done that which ought to be done, for that maxim will not be applied in favour of a volunteer.[71]

It might sensibly be advanced that if a contract for the benefit of a third party were performed according to its tenor, whether voluntarily or by a court order, the beneficiary would *prima facie* hold the proceeds on a resulting trust for the promisee unless a presumption of advancement could be raised. Not forgetting the judgment of Joyce J. in *In re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*,[72] it seems that there will be a resulting trust in very few cases indeed; for in this kind of contract it is usually abundantly clear that the beneficiary is intended to hold to his own use.[73] That construction of the Beswick agreement was accepted by all and Lord Upjohn's critical remarks on *Re Engelbach*[74] and *Re Sinclair*[75] lend authority to this conclusion.

The source of the promisee's remedies is his contractual standing, which also puts him in a position to rescind or vary the contract by agreement with the promisor.[76] The necessity for the latter's co-operation can have a special significance, for the benefits under the contract in favour of a third party will not under some statutes be property of the deceased for the purpose of assessing death duties.[77] The general rule may, however, be modified: for example the contract may be such as envisaged by Uthwatt J. in *Re Schebsman*,[78] with the result that the promisee's powers (and tax liabilities) would be considerably greater. At the other extreme, he may have divested himself of his

69 [1967] 3 W.L.R. 932, 957.
70 [1943] V.L.R. 163.
71 *In re Anstis* (1886) 31 Ch. D. 596.
72 [1902] 1 Ch. 282.
73 *Vide* Williams, 'Contracts for the Benefit of Third Parties', (1944) 7 *Modern Law Review* 123, 126.
74 [1924] 2 Ch. 348.
75 [1938] Ch. 351.
76 Barwick C.J. deliberately left the question unresolved, but for the reasons given by Windeyer J. it is difficult to see what possible equity the beneficiary could have against the promisee in the absence of a contractual or fiduciary relationship: (1966-67) 40 A.L.J.R. 471, 487.
77 *Cathels v. Commissioner of Stamp Duties* (1962) 62 S.R. (N.S.W.) 455, where the relevant provision was Stamp Duties Act 1920-56 (N.S.W.) s. 102 (1)(a).
78 *Supra* p. 220.

whole standing by assignment under section 134 of the Property Law Act 1958. If the assignee is a volunteer and the chose in action is within the provisions of the statute, all the requirements of the section must have been fulfilled or at least the volunteer armed with the means of completing the formalities,[79] for equity will not perfect an imperfect gift.

Between these limits lie the cases where the promisee contracts as a trustee or becomes such by declaration or equitable assignment. The principles in this field are relevant only to contracts designed to confer positive benefits, and not exemptions from liability.[80] Because Peter Beswick and his nephew might have rescinded the contract had they wished, the Court of Appeal rejected the trust solution. Indeed, the Master of the Rolls indicated that trusts of choses in action must be irrevocable—a view in accordance with that of Nicholas J. in *Ryder v. Taylor*[81] and an *obiter dictum* of Sir George Jessel in *In re Empress Engineering Co.*[82]

Per contra, in his very authoritative judgment in *Wilson's case,*[83] Fullagar J. remarked:

> It is difficult to understand the reluctance which Courts have sometimes shown to infer a trust . . . I cannot see why it should be necessary that such a trust should be irrevocable: a revocable trust is always enforceable in equity while it subsists.[84]

Lord Reid seems not to have had this point in mind when he said that a trust relationship would preclude the promisee from releasing the promisor from his obligations. It is dangerous to found a firm conclusion on *dicta* in cases where the issue of revocability was not argued as such. Where there is such a conflict of learned opinion (at least in appearance), it would be unwise to venture on the hazardous task of disentangling the web of authority on a point which is really incidental to this article.

Assuming, however, for the sake of discussion that Fullagar J. was right, the principles of estoppel may be applicable. If a trustee who has reserved a power of revocation represents to his *cestui que trust* that there has been no such reservation,[85] there seems to be no reason on principle why a common law estoppel should not be raised if the representee acts to his prejudice in consequence.[86] Again, if the trustee

79 Windeyer J. in *Coulls's case* (1966-67) 40 A.L.J.R. 471, 482; *cf. In re Rose* [1952] Ch. 499 and *Norman v. Commissioner of Taxation* (1963) 109 C.L.R. 9, 28-29. The argument of J. A. Weir in (1932) 10 *Canadian Bar Review* 389-91, that any written contract will of itself fulfil the requirements of the section, is impliedly rejected.

80 *Vide* McGarvie, Pannam and Hocker, *op. cit.,* 664 n. (3).

81 (1933) 36 S.R. (N.S.W.) 31, 47.

82 (1880) 16 Ch. D. 125.

83 *Supra* p. 212.

84 (1956) 95 C.L.R. 43, 67-68.

85 Cases where such a representation amounts to a declaration of irrevocable trust must be excluded.

86 *Sarat Chunder Dey v. Gopal Chunder Laha* (1892) L.R. 19 I.A. 203, *per* Lord Shand (speaking of common law estoppel generally); *de Tchihatchef v. Salerni Coupling Ltd* [1932] I Ch. 330.

promises that he will not revoke the trust, it is conceivable that the *cestui que trust* can rely on the doctrine of equitable estoppel if he has changed his position in reliance on the promise.

That doctrine is traced back to the words of Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.*:

> . . . If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.[87]

His Lordship's statement has been approved by the House of Lords[88] and was accepted by the Privy Council in *Ajayi v. R. T. Briscoe (Nigeria) Ltd*,[89] where it was pointed out that if the promisee cannot resume his former position the promise becomes irrevocable.[90] No difficulty arises from the prohibition on using the principle as a sword, for the meaning of the prohibition is that equitable estoppel 'may be part of a cause of action, but not a cause of action in itself'.[91] It is submitted that there is no logical reason why the doctrine should not apply to the fiduciary relationship of a trustee and his *cestui que trust*, just as it has been applied to contractual relations in cases where trusts did not need to be considered.

CONCLUSIONS

In the light of the foregoing discussion, what conclusions may be drawn as to the present state of the law?

Where a contract is made for the benefit of a third party it is reasonably certain that he acquires no rights at common law, unless he appears as grantee or covenantee in a deed. The beneficiary under a simple contract can have no legal right to enforce it unless he is also a joint promisee, in which case consideration need not have moved from him personally. His equitable rights depend on his being a *cestui que trust*, and unless he stands in a contractual or fiduciary relationship with the promisee the latter may freely choose whether to rescind or vary or enforce the contract.

J. F. HENRY
F. H. CALLAWAY

87 (1888) 40 Ch. D. 268, 286.
88 *Tool Metal Manufacturing Co. Ltd v. Tungsten Electric Co. Ltd* [1955] 1 W.L.R. 761.
89 [1964] 1 W.L.R. 1326.
90 *Ibid.* 1330.
91 *Combe v. Combe* [1951] 2 K.B. 215, 220, *per* Denning L.J. *Cf. Thomas v. Thomas* [1956] N.Z.L.R. 785.