Chapter 14

Privity of contract

SUMMARY

1 The doctrine of privity of contract

In the middle of the nineteenth century the common law judges reached a decisive conclusion upon the scope of a contract. No one, they declared, may be entitled to or bound by the terms of a contract to which he is not an original party.[1]

The decisive case was *Tweddle v Atkinson* in 1861.[2]

> In consideration of an intended marriage between the plaintiff and the daughter of William Guy, a contract was made between Guy and the plaintiff's father, whereby each promised to pay the plaintiff a sum of money. Guy failed to do so, and the plaintiff sued his executors.

The action was dismissed. Wightman J said:

> Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration ... But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.[3]

1 *Price v Easton* (1833) 4 B & Ad 433; *Tweddle v Atkinson* (1861) 1 B & S 393. For history, see Simpson *History* pp 475-485; *Dutton v Poole* (1677) 2 Lev 210; *Bourne v Mason* (1668) 1 Vent 6; EJP 70 LQR 467. See also the review of the history by Windeyer J in *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] ALR 385 at 407-409. See Dowrick 19 MLR 374; Furmston 23 MLR 373; Simpson 15 ICLQ 835; Millner 16 ICLQ 446; Scammell 1955 Current Legal Problems 131; Andrews 8 LS 14; Wilson 11 Sydney LR 230. Kincaid [1989] CLJ 243; Adams and Brownsword 10 LS 12; Flannigan 103 LQR 564.

2 (1861) 1 B & S 393.

3 Ibid at 397-398.

The learned judge, by basing his decision on the rule that consideration must move from the promisee, emphasised the English identification of contract and bargain. But it has already been observed that this rule is itself an insular reflection of the general assumption that contract, as a juristic concept, is the intimate if not the exclusive relationship between the parties who have made it.[4]

The doctrine of privity was reaffirmed by the House of Lords in 1915. In *Dunlop v Selfridge*:[5]

> The plaintiffs sold a number of their tyres to Dew & Co, described as 'motor accessory factors', on the terms that Dew & Co would not resell them below certain scheduled prices and that, in the event of a sale to trade customers, they would extract from the latter a similar undertaking. Dew & Co sold the tyres to Selfridge, who agreed to observe the restrictions and to pay to Messrs Dunlop the sum of £5 for each tyre sold in breach of this agreement. Selfridge in fact supplied tyres to two of their own customers below the listed price.

As between Dew and Selfridge this act was undoubtedly a breach of contract for which damages could have been recovered. But the action was brought, not by Dew, but by Messrs Dunlop, who sued to recover two sums of £5 each as liquidated damages and asked for an injunction to restrain further breaches of agreement. They were met by the objection that they were not parties to the contract and had furnished no consideration for the defendants' promise. The objection, indeed, was obvious, and plaintiffs' counsel, not daring to contest it, sought to evade its application by pleading that their clients were in the position of undisclosed principals. The House of Lords not unnaturally considered such a suggestion difficult to reconcile with the facts of the case, and gave judgment for the defendants.

It is important to see what *Tweddle v Atkinson* and *Dunlop v Selfridge* decided. In any legal system, and at any period in history, a contract will be primarily a matter between the contracting parties. A contract will normally simply state the rights of the parties and have nothing to do with other people. However, it is undoubtedly the case that there will be a significant number of cases where the contract, if properly performed, will confer benefits on non parties. Suppose a contractor makes a contract with the Department of Transport to build a motorway from A to B; the completion of the motorway will be seen as a benefit by many drivers who plan to drive along it. If, in breach of contract, the contractor is late completing the motorway, this may well in a sense cause loss to those who would have used the motorway but in most instances, they would not have the right to sue the contractor for late performance of his contract with the Department of Transport. The main reason for this is that the contractor and the Department of Transport, when they made the contract, did not intend to create any contractual rights in anyone else.

The main difference between English law as established in 1915 and many other systems was that the third party would not derive contractual rights even if the contracting parties clearly intended to confer benefits on the third party. It is clear that in *Tweddle v Atkinson* the whole purpose of the transaction was to confer enforceable rights on the husband and that in *Dunlop v Selfridge* one

4 P 86, above; and see *Price v Easton* (1833) 4 B & Ad 433.
5 [1915] AC 847. P 86, above.

of the major purposes was to confer enforceable rights on Dunlop. What English law said was that even if the parties clearly intended by contract to confer a right on a third party, they could in general not succeed in doing so. It was this result that was unique and special to English law and which distinguished it from most other systems.

Substantial reform of the doctrine was proposed by the Law Revision Committee as long ago as 1937 in its Sixth Interim Report,[6] but this was not implemented. In *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd*,[7] Lord Scarman forcefully urged the desirability of the House of Lords reconsidering the rule and so did Steyn LJ in *Darlington Borough Council v Wiltshier*.[8] In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[9] the majority of the majority in the High Court of Australia (Mason CJ, Wilson J and Toohey J) thought the time had come to reject the privity doctrine. Gaudron J came to the same result on reasoning based on unjust enrichment principles. Brennan J, Deane J and Dawson J thought the doctrine still law.[10] Cogent criticism of the doctrine is to be found in the decision of the Supreme Court of Canada in *London Drugs Ltd v Kuehne and Nagel International Ltd*.[11]

In 1991 the Law Commission produced a Consultative Paper which suggested radical change in the law. Although the proposal to change the law obtained widespread support, the technical questions of exactly how to bring the change about proved much more difficult than had been anticipated and it was not in fact until 1999 that the Contract (Rights of Third Parties) Act[12] became law.

There is a theoretical question whether the Act should be regarded as abolishing the doctrine or merely as creating a large exception to it. On the whole, discussion of the Act seems to proceed on the basis that the Act is taken as a large exception to the doctrine of privity but this must depend on exactly what the doctrine of privity says. It is clear that both before and after the Act there will be many contracts which create rights and duties between the parties only but this can be regarded not as being the result of the doctrine of privity properly understood since the doctrine's principal thrust was that parties could not confer contractual rights on a third party even if they wanted to. Under the 1999 Act, the parties (or in practice sometimes one of them) may choose to confer rights on a third party. As we shall see, there is no doubt now that the parties enjoy the freedom to create rights in third parties and the problem is whether they have in fact done so. As we shall see, this turns on the technique used by the Act to answer this question.[13]

Finally, we should note that the doctrine of privity of contract means only that a non-party cannot bring *an action on the contract*.[14] This does not exclude the possibility that he may have some other cause of action. Thus if A buys a car from B and gives it to his wife, she will probably have no rights under the contract against B but she could have an action in tort if she suffered personal

6 Para 50(a).
7 [1980] 1 All ER 571 at 590, [1980] 1 WLR 277 at 300.
8 [1995] 3 All ER 895 at 903.
9 (1988) 80 ALR 574.
10 Kincaid 2 JCL 160.
11 [1993] 1 WWR 1; Waddams 109 LQR 349; Adams and Brownsword 56 MLR 722.
12 Merkin (ed) *Privity of Contract* (London 2000); Andrews [2001] Cambridge LJ 353.
13 See below p 513.
14 As to whether a contract can operate to afford a non-party a defence, see p 182 ff, above.

injuries because of B's negligent pre-delivery inspection.[15] Similarly if A threatens to break his contract with B unless B dismisses his servant C, C may be able to sue A in the tort of intimidation.[16]

It is also the case that if the parties think ahead and draft the contract carefully, it is often possible to structure the contract so as to sidestep the difficulties which the doctrine of privity causes.[17]

2 Qualifications to doctrine

One exception to the doctrine, admitted in the first half of the eighteenth century, when the rule itself was obscure, has since maintained its ground. If A has made a contract with B, C may intervene and take A's place if he can show that A was acting throughout as his agent, and it is irrelevant that B entered into the contract in ignorance of this fact. This right of intervention, known usually as the doctrine of the undisclosed principal, has, indeed, been attacked on the very ground that it offends the common law doctrine of privity. But criticism has been fruitless, and the undisclosed principal is a well-established character in the modern law of agency.[18]

The doctrine of privity also clashed with the needs and concepts of the law of property. A lease, for instance, is a contract, but it creates rights of property that cannot be kept within contractual bounds. If A lets land to B, the lease will contain mutual rights and duties—to pay the rent, to keep the premises in repair and many other obligations. As between the parties themselves there is privity of contract; but if either transfers his interest to a stranger, convenience demands that he in his turn shall take the benefit and the burden of the original covenants. The need was felt and a partial remedy devised as long ago as the sixteenth century, and the modern position is the result of the combined efforts of common law and statute.[19] Similar problems are raised when a freeholder sells his land and wishes to restrict its use not only by the purchaser but by anyone to whom it may be transferred.[20] Another illustration is offered by the modern case of *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board*.[1]

By a contract under seal made in 1938 the defendants agreed with eleven owners of land adjoining a certain stream to improve its banks and to 'maintain for all time the work when completed'. The landowners agreed to pay a

15 *Donoghue v Stevenson* [1932] AC 562, where the contrary theory was put to rest. This is not to say that the present complex of rules is satisfactory since the standards of liability in sale and negligence are very different and legally the wife's position would be much better if A gave her the money to buy the car herself. Jolowicz 32 MLR 1; Pasley 32 MLR 241; Legh-Jones [1969] CLJ 54.

16 *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367; Hoffman 81 LQR 116.

17 So in the case of *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, discussed below p 507, the difficulties could have been avoided entirely if the uncle, before selling the business to his nephew, had first sold a share in it to his wife for £1 and they had then jointly sold the business to the nephew. See also *Law Debenture Trust Corpn plc v Ural Caspian Oil Corp Ltd* [1993] 2 All ER 355.

18 See pp 540 ff. below. The criticism will be found in Ames *Lectures in Legal History* pp 453-463. See also the statutory agency created by Consumer Credit Act 1974, s 56(2).

19 *Spencer's Case* (1583) 5 Co Rep 16a. On the whole subject, see Cheshire and Burn *Modern Law of Real Property* (15th edn) pp 448-457.

20 P 517, below, and Cheshire and Burn *Modern Law of Real Property* (15th edn) pp 614 ff.

1 [1949] 2 KB 500, [1949] 2 All ER 179. This resulted from a combination of a common law exception and the extension of it by s 78(1) of Law of Property Act 1925. See Cheshire & Burn *Modern Law of Real Property* (15th edn) pp 609-614.

proportion of the cost. In 1940 one of the landowners conveyed her land to Smith, the first plaintiff, and in 1944 Smith leased it to Snipes Hall Farm Ltd, the second plaintiff. In 1946, owing to the defendants' negligence, the banks burst and the land was flooded.

Both plaintiffs were strangers to the contract. But the Court of Appeal held that the covenants undertaken by the defendants affected the use and value of the land, that they were intended from the outset to benefit anyone to whom the land might be transferred and that the defendants were liable. Even in this area however the principle of privity of contract is not rendered irrelevant but rather greatly diminished in importance. If it is sought to enforce a covenant over land either by or against a non-party, the factual situation must be brought within one of the rules which common law, equity and statute have developed. These rules cover much but not all of the ground.

In *Dunlop v Selfridge*, the House of Lords drew the logical inference from the common law premises. But the result may be inconvenient or even unjust. Thus it is quite common for insurances to be taken out by one person on behalf of another—a husband for his wife, or a parent for his child. Yet, even if the policy expressly confers benefits on the third party, the latter has no claim at common law.[2] A result, so inconsistent with the needs of the modern world, would seem to invite the intervention of Parliament, and from time to time Acts have been passed to redress a particular grievance. Husband and wife have thus, in reversal of the common law rule, been enabled to take out life insurance policies in favour of each other or of their children; third parties have been allowed, in certain circumstances, to sue on marine or fire insurance policies, or on the policies covering road accidents required by the provisions of the Road Traffic Act 1972.[3]

By the rules governing negotiable instruments, moreover, it has long been established—first by the custom of the law merchant, then by judicial decision and finally by statute[4] that a third party may sue on a bill of exchange or a cheque. The usages of trade and commerce have thus done something to modify the rigour of the common law doctrine. Nor is their force exhausted. It is still true that, if it is clear in any particular case that a commercial practice exists in favour of third party rights and that all concerned in the litigation have based their relations upon it, the court will do what it can to support and sanction it.[5]

Rule modified by equitable doctrine of constructive trust

Outside the law of property and the commercial world few, if any, exceptions were allowed at common law. Litigants have therefore invoked the assistance of equity. As early as 1753 Lord Hardwicke indicated the possibilities of the trust. He was prepared, in a case where A promised B to pay money to C, to regard B as trustee for C of the Benefit of the contract.[6] In 1817 Sir William Grant affirmed the suggestion in the case of *Gregory and Parker v Williams*.[7]

2 See the remarks of Lord Esher, in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 152.

3 See s 11 of the Married Women's Property Act 1882 (extended to illegitimate children by Family Law Reform Act 1969, s 19); s 14(2) of the Marine Insurance Act 1906; s 47(1) of the Law of Property Act 1925; s 148(4) of the Road Traffic Act 1972. See also Third Parties (Rights Against Insurers) Act 1930; *P Samuel & Co v Dumas* [1923] 1 KB 592; affd [1924] AC 431; *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418.

4 See Bills of Exchange Act 1882, s 29.

5 *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431 at 454–455, [1966] 1 All ER 968 at 980, per Lord Denning MR. This may provide a rationale for the enforcement of bankers' commercial credits, discussed p 66, above.

6 *Tomlinson v Gill* (1756) Amb 330. See Corbin 46 LQR 12; Williams 7 MLR 123.

7 (1817) 3 Mer 582.

> Parker owed money both to Gregory and to Williams. He agreed with Williams to assign to him the whole of his property, if Williams would pay the debt due to Gregory. The property was duly assigned, but Williams failed to implement his promise.

Gregory and Parker filed a bill in equity to compel performance of the promise, and succeeded. Sir William Grant held that Parker must be regarded as trustee for Gregory, and that the latter 'derived an equitable right through the mediation of Parker's agreement'. After the Judicature Act 1873, the propriety of this device was affirmed and its use sanctioned in any division of the High Court. In the words of Lush LJ in *Lloyd's v Harper*:[8]

> I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.

Implicit in this statement is the conclusion that if A fails in his duty, B, the beneficiary under the implied trust, may successfully maintain an action to which A and the other contracting party are joint defendants.

One particular application of this equitable doctrine was recognised as effective by the House of Lords in *Walford's* case in 1919.[9]

> Walford, as broker, had negotiated a charterparty between the owners of the *SS Flore* and the Lubricating and Fuel Oils Co Ltd. By a clause in the charterparty the owners promised the charterers to raise no objection, and the action proceeded as if they had in fact been joined. The House of Lords affirmed judgment in Walford's favour. Lord Birkenhead cited the previous decisions and declared that 'in such cases charterers can sue as trustees on behalf of the broker'.

Such decisions indicate the possibilities of the trust in evading the rigidity of the common law rule. At first sight it appears to be an effective means of evasion. It is useful to recall Maitland's definition:

> Where a person has rights which he is bound to exercise on behalf of another or for the accomplishment of some particular purpose, he is said to have those rights in trust for another or for that purpose, and he is called a trustee.[10]

It is true that the subject matter of a trust is normally some tangible property, such as land or goods, or a definite sum of money, and that, if the conception is to be applied in the present context, it is necessary to speak of the 'trust of a promise'. But Maitland's definition is wide enough to include such a phrase, and, on the assumption that the judges are resolved to avoid the limitations of the common law, the machinery would seem to be simple and adequate. The third party may ask the contracting party to sue as trustee, and, in the event of a refusal, may himself sue and join the 'trustee' as co-defendant.[11]

8 (1880) 16 ChD 290 at 321. See also *Re Flavell, Murray v Flavell* (1883) 25 ChD 89; *Royal Exchange Assurance v Hope* [1928] Ch 179.

9 *Les Affréteurs Réunis SA v Walford* [1919] AC 801.

10 Maitland *Equity* p 44.

11 It is strange that the device was not exploited by the plaintiffs in *Dunlop v Selfridge*, p 500, above. Lord Haldane had recognised its existence, and the facts in the case would seem to suggest the possibility of a trust at least as clearly as those in *Walford's* case. *Dunlop v Selfridge*, however, was fought and decided exclusively on common law principles.

But, despite its promising appearance and the positive terms in which it has occasionally been acclaimed, the device has in practice proved a disappointing and unreliable instrument.

In *Re Schebsman, Official Receiver v Cargo Superintendents (London) Ltd and Schebsman*:[12]

> S was employed by two companies. By a contract made between him and them, one of the companies agreed in certain eventualities to pay £5,500 to his widow and daughter.

It was held that the contract did not create a trust in favour of the widow and daughter. Du Parcq LJ said:[13]

> It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's life-time injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable.

A later example of the reluctance of the courts to discover a trust is offered by the case of *Green v Russell*.[14]

> The plaintiff's son, Alfred Green, was employed by the defendant's husband, Arthur Russell. Both son and husband died in a fire at their office. Mr Russell had made a contract with an insurance company in which he himself was described as 'the insured' and by which the company undertook to pay £1,000 if certain of Mr Russell's employees, including Mr Green, died as a result of bodily injuries. Nothing in the contract of employment between Mr Green and Mr Russell required such a policy to be taken out, nor did its terms confer any right or impose any obligation on Mr Green in respect of the policy. The insurance company paid the £1,000 to Mrs Russell, as her husband's administratrix, and she paid it over to the plaintiff.

The plaintiff, as the son's administratrix, sued the defendant, as the husband's administratrix, under the Fatal Accidents Acts 1846 to 1908. The defendant admitted liability in principle but claimed that the £1,000 she had paid over to the plaintiff should be deducted from the damages. The issue turned on the wording of section 1 of the Act of 1908, that 'there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance'.[15]

12 [1944] Ch 83, [1943] 2 All ER 768. See also *Gandy v Gandy* (1885) 30 ChD 57; *Vandepitte v Preferred Accident Insurance Corpn of New York* [1933] AC 70; *Re Stapleton-Bretherton, Weld-Blundell v Stapleton-Bretherton* [1941] Ch 482, [1941] 3 All ER 5; and *Re Miller's Agreement, Uniacke v A-G* [1947] Ch 615, [1947] 2 All ER 78.

13 [1944] Ch 83 at 104, [1943] 2 All ER 768 at 779.

14 [1959] 2 QB 226, [1959] 2 All ER 525. Furmston 23 MLR 373 at 377-385.

15 S 1 of the 1908 Act has now been repealed and replaced by s 2(1) of the Fatal Accidents Act 1959: 'There shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death.'

At first sight these words were conclusive. The money had certainly been paid on the death of Mr Green under a contract of insurance. But the defendant argued that the words applied only to sums to which the deceased had either a legal or an equitable right and that no such right existed. There was none at common law since the deceased was a stranger to the insurance contract, and none in equity since no trust could be inferred in his favour. The Court of Appeal held that the words were clear in themselves and that there was no reason to restrict them on the grounds suggested. This conclusion disposed of the case. But the court agreed that, had it been necessary to decide the question, they would have ruled that the policy conferred no right on the deceased and therefore none on the plaintiff. 'An intention to provide benefits for someone else and to pay for them', said Romer L.J. 'does not in itself give rise to a trusteeship'; and he stressed the incompatibility of this status with the contractual liberty enjoyed by the insured to terminate the policy without the concurrence of his employees. 'There was nothing to prevent Mr Russell at any time, had he chosen to do so, from surrendering the policy and receiving back a proportionate part of the premium which he had paid.'[16]

At one time it looked as if the trust concept might provide a convenient equitable means to circumvent the common law rule. Over the last fifty years, however, without locking the door the courts have consistently failed to open it. A trust will not now be inferred simply because A and B make a contract with the intention of benefiting C; in the few cases where trusts have been discovered, there have been much stronger indicia.[17] A variety of reasons have combined to produce this result: a feeling that the trust was a 'cumbrous fiction';[18] an insistence that intention to create a trust be affirmatively proved and a concern lest the irrevocable nature of a trust should prevent the contracting parties from changing their minds.[19]

Section 56 of the Law of Property Act 1925

Since the retreat of equity a further attempt to cut if not to unloose the technical knots was made by a bold essay in statutory interpretation. By section 56(1) of the Law of Property Act 1925, it is declared 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.

This section replaced section 5 of the Real Property Act 1845, which itself abolished a common law rule that no person could take advantage of a covenant in a deed unless he was a party to that deed; but, in replacing it, it widened its terms, especially by adding the words 'or other property' and 'or agreement'. It must also be noticed that by section 205(1) of the Law of Property Act, 'unless the context otherwise requires ... "Property" includes anything in action and any interest in real or personal property'. In a number of cases Lord Denning suggested that the section should be read as abrogating the doctrine of privity

16 Ibid at 241 and 531, respectively.
17 See *Re Webb, Barclays Bank Ltd v Webb* [1941] Ch 225, [1941] 1 All ER 321. *Re Foster Clark's Indenture Trusts, Loveland v Horsecroft* [1966] 1 All ER 43, [1966] 1 WLR 125.
18 See per Lord Wright 55 LQR 189 at 208.
19 Cf per Fullagar J. in *Wilson v Darling Island Stevedoring and Lighterage Co* (1956) 95 CLR 43 at 67. See also *Oisson v Dyson* (1969) 43 ALJR 77.

in the case of contracts in writing affecting property.[20] This view has now been rejected by the House of Lords in the case of *Beswick v Beswick*.[1]

> Peter Beswick was a coal merchant. In March 1962, he contracted to sell the business to his nephew John in consideration (1) that for the rest of Peter's life John should pay him £6 10s a week, (2) that if Peter's wife survived him John should pay her an annuity of £5 a week. John took over the business and paid Peter the agreed sum until Peter died in November 1963. He then paid Peter's widow £5 for one week and refused to pay any more. The widow brought an action against John in which she claimed £175 as arrears of the annuity and asked for specific performance of the contract. She sued (a) as administratrix of Peter's estate, (b) in her personal capacity.

The Court of Appeal held unanimously that she was entitled, as administratrix, to an order for specific performance. Lord Denning and Lord Justice Danckwerts also held that she could succeed in her personal capacity under section 56(1) of the Law of Property Act 1925.[3] The defendant appealed to the House of Lords. The House held that, as administratrix, the widow could obtain an order for specific performance which would enforce the provision in the contract for the benefit of herself;[4] but that in her personal capacity she could derive no right of action from the statute.

Their lordships admitted that, if section 56(1) was to be literally construed, its language was wide enough to support the conclusions of Lord Denning and Lord Justice Danckwerts. But they were reluctant to believe that the legislature, in an act devoted to real property, had inadvertently and irrelevantly revolutionised the law of contract. The avowed purpose of the Act of 1925, according to its title, was 'to consolidate the enactments relating to conveyancing and the law of property in England and Wales'. It must therefore be presumed that the legislature designed no drastic changes in such enactments; and this presumption was to be rebutted only by plain words. The words of section 56(1) were not plain. By section 205(1), moreover, it was provided that the definitions which it contained were to apply 'unless the context otherwise requires'. In so far as the Law of Property Act 1925 was an essay in consolidation, the context required the word 'property' to be restrictively construed, and it should not be allowed to spill over into contract. Whatever the force of this argument, the House of Lords has decisively rejected the attempt to use section 56(1) so as to enable third parties to sue upon a contract.[4]

20 *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 517; [1949] 2 All ER 179 at 189; *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 at 274, [1953] 2 All ER 1475 at 1488. Cf *Re Foster* (1938) 159 LT 279 at 282; *Re Miller's Agreement* [1947] Ch 615, [1947] 2 All ER 78; *Stromdale and Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59. See Elliott 20 Conv (NS) 43, 114; Andrews 28 Conv (NS) 179; Furmston 28 MLR 373 at 380-385; Ellinger 26 MLR 396.

1 [1968] AC 58, [1967] 2 All ER 1197. For the judgments in the Court of Appeal, see [1966] Ch 538, [1966] 3 All ER 1.

2 Salmon LJ was not prepared to accept this interpretation of the section. All three members of the Court of Appeal agreed that no trust could be found in the plaintiff's favour.

3 On the order for specific performance see p 698, below.

4 It is far from clear what the House of Lords decided that s 56(1) did mean. See Treitel 30 MLR 681. Fortunately this is now a problem for property lawyers and not for contract lawyers. See *Re Windle, (a bankrupt), ex p trustee of the bankrupt v Windle* [1975] 3 All ER 987, [1975] 1 WLR 1628. *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 2 All ER 990.

3 Enforcement by promisee

At first sight the decision in *Beswick v Beswick* appears to be a sanguinary defeat for those who would hope to see the doctrine of privity curbed, if not abolished. It is noteworthy however that the nephew was compelled to perform his promise and this shows that at least in some cases a satisfactory result can be achieved if an action is brought not by a third party beneficiary but by the original promisee. This possibility is further illuminated by the decision in *Snelling v John G Snelling Ltd.*[5]

> The plaintiff and his two brothers were all directors of the defendant company. The company was financed by substantial loans from all three brothers. As part of an arrangement to borrow money from a finance company, the three brothers made a contract, to which the company was not a party, not to demand repayment of their loans during the currency of the loan from the finance company. The agreement further provided that if any of the brothers should voluntarily resign his directorship, he should forfeit the money owing on the loan. A few months later the plaintiff resigned his directorship and sued the company for repayment of his loan.

The plaintiff argued that as the company was not a party to the agreement with his brothers, that agreement did not affect his rights against the company. The brothers applied to be joined as co-defendants to the action and Ormrod J held that although the company was not entitled to rely directly on the agreement, the co-defendant brothers were entitled to a stay of proceedings and that indeed since all the parties were before the court and the reality of the situation was that the plaintiff's claim had failed, the action should be dismissed.

It seems therefore that what cannot be obtained directly by the third party can, in appropriate circumstances, be obtained on his behalf by the promisee by specific performance, stay of proceedings or (presumably) injunction. In many circumstances, however, the only satisfactory remedy is an action for damages. It was long believed, however, that in an action for damages, the promisee could recover only for the damage he himself suffered (often only nominal) and not the damage suffered by the third party. This seems to have been assumed by the majority of the House of Lords, though not by Lord Pearce, in *Beswick v Beswick*.

The principle that a plaintiff can only recover for his own loss is certainly subject to exceptions. So, for instance, a carrier of goods may insure the full value of the goods and recover it from an insurance company, even though he himself has but a limited interest in the goods.[6] Similarly, a consignor of goods for carriage by sea may, in certain circumstances, recover the full value of the goods if the contract is broken even though, by the date of breach, he is no longer owner of the goods so long as the original contract of carriage did not contemplate that the carrier would enter into fresh contracts of carriage with transferees of the goods.[7] It will be remembered, too, that Lush LJ stated the

5 [1973] QB 87, [1972] 1 All ER 79; Wilkie 36 MLR 214. See also *Gurtner v Circuit* [1968] 2 QB 587, [1968] 1 All ER 328.

6 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418.

7 *The Albazero* [1977] AC 774, [1976] 3 All ER 129.

contrary in *Lloyd's v Harper*.[8] It has been widely thought that Lush LJ was talking only of situations of trust[9] but this was firmly denied by Lord Denning MR in *Jackson v Horizon Holidays Ltd*.[10]

> The plaintiff made a contract with the defendant for a holiday for himself, his wife and two children in Ceylon. The holiday was a disaster and the defendants accepted that they were in breach of contract.

The Court of Appeal held that the plaintiff could recover damages not only for the discomfort and disappointment he suffered himself but also for that experienced by his wife and children. This could, perhaps, have been put on the (relatively) narrow ground that the plaintiff was recovering for his own disappointment that his family's holiday was spoilt but Lord Denning MR stated clearly that the words of Lush LJ were of general application. Clearly if this is the law the doctrine of privity will be substantially neutralised in any case where the promisee can be persuaded to sue.[11]

Lord Denning MR's statement was said to be incorrect by the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd*.[12]

> The vendors agreed to sell 14 acres of land to the purchasers. The purchasers were to pay a price of £850,000 and on completion a further £150,000 to third parties, having no legal connection with the vendors. In circumstances considered more fully later in this book,[13] the vendors alleged that the purchasers had repudiated the contract and brought an action for damages. The purchasers argued that if they were liable to damages, such damages should only be nominal so far as non-payment to the third party was concerned.

This argument was upheld by the House of Lords.[14] Their Lordships thought that *Jackson v Horizon Holidays Ltd*[15] was probably correctly decided on its facts but that the reasons given by Lord Denning MR were clearly wrong and that Lush LJ's statement only applied where A stands in a fiduciary relationship to B.[16]

The notion that there is a general prohibition on a party recovering damages for breach of contract which reflect the loss of someone else cannot however survive three recent decisions, two of the House of Lords and the other of the Court of Appeal. The first decision of the House of Lords came in the two consolidated appeals in *Linden Gardens Trust v Lenesta Sludge Disposals* and *St Martin's Property v Sir Robert McAlpine*[17] In the *St Martin's* case:

8 (1880) 16 ChD 290, p 504, above.

9 See eg per Windever J in *Coulls v Bagot's Executor and Trustee Co* [1967] ALR 385 at 409-411, though in his illuminating judgment Windever J did not agree that the promisee could get only nominal damages.

10 [1975] 3 All ER 92, [1975] 1 WLR 1468.

11 Clearly if the promisee does recover substantial damages, the question will arise as to whether he must account to the beneficiary but any obligation to do so will not usually sound in contract.

12 [1980] 1 All ER 571.

13 See p 597, below.

14 Since the House of Lords held by a majority that the purchasers had not repudiated, the reservations on this point are technically obiter but they are clearly carefully considered.

15 [1975] 3 All ER 92, [1975] 1 WLR 1468.

16 This would include situations where A is an agent of B.

17 [1994] 1 AC 85, [1993] 3 All ER 417, see p 575, below.

> Two of the protagonists were similarly named companies which were part of the Kuwait financial empire in Great Britain and which we will call, for ease of exposition, St Martin's I and St Martin's II. St Martin's I entered into a building contract with the defendants, which was on standard JCT 1963 terms which include prohibition on assignment without the consent of the defendant. It appears to have been decided for tax reasons that it would be more efficient if the transaction were transferred to St Martin's II and a purported but invalid assignment was made without seeking the consent of the defendant. In due course, the contract was completed and it was alleged that there were serious defects in the work.

Both St Martin's I and St Martin's II brought an action against the defendant. The defendant argued that St Martin's II could not sue because the assignment was invalid. This argument was accepted by the House of Lords. The defendant also argued that although there was a technical breach of contract with St Martin's I, St Martin's I could not recover substantial damages because the loss had in fact been suffered by St Martin's II. This argument was rejected by the House of Lords. Their Lordships did not say that their earlier decisions in *Woodar v Wimpey* and *The Albazero* were wrong but they did hold that they did not apply on the facts of the present case. Lord Browne-Wilkinson, who spoke for the majority, thought there was much to be said for

> drawing a distinction between those cases where the ownership of goods or property is relevant to prove that the plaintiff has suffered loss through the breach of a contract other than a contract to supply those goods or property and the measure of damages in a supply contract where the contractual obligation itself requires the provision of those goods and services ... In my view the point merits exposure to academic consideration before it is decided by this House.[18]

He thought that in any event St Martin's I could recover in the present case because

> it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party ... [I]t seems to me proper ... to treat the parties as having entered into the contract on the footing that [St Martins I] would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance.[19]

Lord Griffiths, who had delivered a separate speech on this point alone, would have gone further. The core of his judgment can be found in the following passage:[20]

> I cannot accept that in a contract of this nature, namely for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract is dependent upon the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach. In everyday life contracts for work and labout are constantly being placed by those who have no proprietary interest in the subject matter of the contract. To take a common example, the matrimonial home is owned by the wife and the couple's remaining assets are owned by the husband and he is the sole earner. The house requires a new roof and the husband places a contract with a builder to carry out the work. The husband is not acting as agent for his wife, he makes the contract as principal because only he can pay for it. The builder fails to replace the roof properly and

18 Ibid at 112 and 435, respectively.
19 Ibid at 114 and 437, respectively.
20 Ibid at 96 and 421, respectively.

> the husband has to call in and pay another builder to complete the work. Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of the damages is the cost of securing the performance of that bargain by completing the roof repair properly by the second builder. To put this simple example closer to the facts of this appeal—at the time the husband employs the builder he owns the house but just after the builder starts work the couple are advised to divide their assets so the husband transfers the house to his wife. This is no concern of the builder whose bargain is with the husband. If the roof turns out to be defective the husband can recover from the builder the cost of putting it right and thus obtain the benefit of the bargain that the builder had promised to deliver.

This case was followed and perhaps extended by the Court of Appeal in *Darlington Borough Council v Wiltshier*.[1] In this case, the plaintiff local authority, in order to side step (legitimately) government restrictions on borrowing, decided to carry out the construction of a recreational centre by a complex scheme. It was arranged that the finance company would pay for the erection of the building and be paid by the plaintiff. The finance company entered into the construction contract with the defendant contractors. It was always intended that the building, and any rights under the construction contract, would be assigned by the finance company to the plaintiffs. It was alleged that the building, when completed, had major defects. The plaintiff duly took an assignment of the building contract from the finance company and commenced an action against the contractor. It was accepted that the plaintiff could not be better off than the finance company and the question before the Court of Appeal, and the preliminary point, was which damages could have been recovered by the finance company. The contractor argued that the finance company could not have recovered substantial damages since it had suffered no loss. It was always intended that the building would be transferred to the plaintiffs and the plaintiffs had agreed to pay the finance company in full. The finance company was in no way responsible to the plaintiff for the condition of the building. The defendant argued that the *St Martin's* case could be distinguished since that was a case of a defective assignment whereas the present case was one of a valid assignment and, further, that in *St Martin's* there had been no contemplation that the building would be transferred to someone else at the time of the contract whereas, in the present case, it was always expected by all the parties that the building would end up belonging to the plaintiffs. The Court of Appeal did not regard these distinctions as of any significance and indeed, if anything, as strengthening the case of the plaintiff.

These questions were exhaustively reconsidered in *Panatown v McAlpine Construction Ltd*.[2] All of the members of the House of Lords thought the *Linden Gardens* case correctly decided but the House was divided as to how much further this line of reasoning should go. In 1989, the claimant had entered into a contract as employer with the defendant as main contractor to build an office building and a car park in Cambridge on the 1981 JCT Design & Build contract. Panatown was a member of the UNEX group of companies, of which UNEX Corp Ltd was the parent company. The site in Cambridge belonged to another member of the group, UNEX Investment Properties Ltd (UIPL). The

1 [1995] 3 All ER 895.
2 [2000] 4 All ER 97.

group had deliberately decided that Panatown should be the employer under the building contract and this was apparently based on perfectly proper tax considerations as to the incidence of VAT. After the building had been completed it was alleged that there were major flaws in the building work done by McAlpine and Panatown brought an action for damages. So far the facts are very similar to those in *Linden Gardens* except that there no problems about assignment of the contract. However, at the time the contract was made, McAlpines had entered into a separate contract under a so called duty of care deed with UIPL under which that company acquired a direct remedy against McAlpine in respect of any failure by McAlpine to exercise reasonable care and attention in respect of any matter within their responsibilities under the building contract. (It seems to be assumed in the case, though it is not anywhere fully explained, that UIPL's rights under the duty of care deed were in certain respects less extensive than Panatown's rights under the building contract, assuming that there were no problems about Panatown's rights under the contract).

All the members of the House of Lords assumed that the *Linden Gardens* case was correctly decided. However, the majority (Lord Clyde, Lord Jauncey and Lord Browne-Wilkinson) took the view that this case was fundamentally different. They explained the earlier case on what may be called the black hole theory, that is that it was based on abhorrence of a result in which one party had a claim but had not suffered damage and another party had suffered damage but had no claim so that a contract breaker who had been guilty of a serious breach of contract could escape scot free because no-one had an effective action. This problem was not present in the *Panatown* case because the true owner of the building had a substantial remedy under the duty of care deed, even though this remedy might not be quite as attractive as allowing Panatown to sue under the building contract. Lord Goff and Lord Millett dissented. They took the view that the duty of care deed was essentially irrelevant since its commercial purpose was to provide a remedy to someone who bought the development from UIPL since the duty of care deed was expressly said to be transferrable. (It does seem to be clear that the development was always intended to be sold and not used by the UNEX Group as offices of its own.)

4 The Contracts (Rights of Third Parties) Act 1999

The Law Commission does not appear to have had much doubt that the privity doctrine was ripe for reform. Few of those consulted appear to have disagreed except for a group of lawyers in the construction industry who appear to have been very attached to the existing methods in the construction industry where sub-contracting and sub-sub-contracting is normal and where it has been clear in the past that an employer has no contract claim against sub-contractors or sub-sub-contractors nor they against him. This argument seems, with respect, to be misplaced since there is nothing in the Act which prevents the construction industry retaining this contractual model. The fundamental principle underlying the reform is that of party autonomy; the parties should be free to create a right by contract in other parties if they want to do so. There is no suggestion that they should be forced to do so.

The Law Commission had much more difficulty with deciding how the change should actually be brought about. One possibility, suggested by a

similar body in Ontario, would have been to pass a very short statute saying that the doctrine was no more and leaving it to the courts to work out the consequences of this. This course was not without attractions but it would have been an uncharacteristic piece of legislation in this jurisdiction and, perhaps more important, would have left parties unclear what the position was probably for a rather long time.

The 1937 Law Revision Committee had proposed a simple statute which in effect required parties who wished to confer contractual rights on third parties to do so expressly. This would have produced a clear and simple result for all those who had access to competent lawyers though, as the cases show, many contracts are made without such access and in general in English contract law anything which can be done expressly can also be done impliedly.

This leads to the conclusion that the circumstances in which a third party will acquire enforceable contractual rights should be set out expressly and this is what the Act does. The solution is to be found in section 1(1) and (2) which provides:

> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if–
> (a) the contract expressly provides that he may, or
> (b) subject to subsection (2), the term purports to confer a benefit on him.
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

The effect of this is that a third party may acquire contractual rights either if the contract expressly says so (section 1(1)(a)) or where the contract purports to confer a benefit on him unless as a matter of construction it appears that the parties did not intend the third party to get an enforceable right. Obviously, by far the clearest way for an intention not to confer a benefit to be demonstrated would be for the contract expressly to say so. Many standard printed forms have already acquired language clearly designed to produce this result and it appears that a competent contract draftsman should carefully consider either expressly saying that the third party is to acquire rights or that the third party is not to acquire rights.

It is clear, however, that the contract will not in practice always contain an express answer and difficult situations will arise where the arguments as to the parties' intention appear nicely balanced. We must remember that where the contract does not contain an express answer, the parties' intention is to be objectively deduced. Much may turn on the meaning given to the expression 'purport to confer a benefit'. As we have already said, there are many cases in which a third party will be better off if a contract is properly performed. It is thought, however, that something more than this is required in order to be able to say that the contract purports to confer a benefit.

The difficulties may be considered with relation to the leading decision of the House of Lords in *White v Jones*.[3] In this case, an intending testator wished to change his will and summoned his solicitor for the purpose of so doing. There was clear evidence that the purpose of the new will was to confer rights on his daughters. In what was treated as a breach of his contract with the testator, the solicitor took longer than he should have done to attend on his client and as a result the client died before the will could be revised. The

3 [1995] 2 AC 207, [1993] 3 All ER 481.

House of Lords held by a majority of three to two that on these facts the disappointed beneficiaries could maintain a tort action against the solicitor on the basis that he owed them a duty of care to carry out his contract with their father with reasonable care, skill and despatch and that, if he had done so, they would have recovered under the will. At the time, it was clear that the beneficiaries could succeed only in a tort claim in English law because they were clearly not parties to any contract with the solicitor. It is clear, however, that in 2001 there is a contract between the testator and a solicitor and that if the contract had been properly performed, the beneficiaries would have been better off. Professor Andrew Burrows, who at the time was the responsible Law Commissioner, has taken the view that the Act clearly does not stretch to giving the beneficiaries a contract right against the solicitor. This may well be correct but it is worth noting that in the American version of the common law, successful actions have been brought against lawyers in this kind of situation, sometimes in tort and sometimes in contract.

Section 1(3) of the Act provides:

> The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

If I make a contract with an insurance company which provides that on my death the insurance company should pay money to my grandchildren, this will sufficiently identify the third parties who are to benefit from the contract, whether or not the grandchildren were alive at the time the contract was made.

Section 1(6) provides:

> Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

This deals with the problem discussed above as to whether a non party can take advantage of an exemption or limitation clause in a contract of which he is not a party. It is now clear that this is possible though there will still be a question in any particular case as to whether a particular contract is intended to confer such an immunity on a particular party. So it is still possible to argue that on the facts of *Scruttons Ltd v Midland Silicones Ltd*[4] the defendant stevedores were not expressly identified in the bill of lading and were therefore not entitled to take advantage of it.

VARIATION AND CANCELLATION

It would be possible to take the view that the contracting parties, having created rights in the third party, were entitled to take those rights away. Alternatively, one might take the view that once the contract had been made, the rights of the third parties would be inviolate. The Act has not taken either of these extreme positions. Instead, it has taken an intermediate position which is set out in section 2:

> (1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not

4 [1962] AC 446, [1962] 1 All ER 1. See above p 182.

without his consent cancel the contract, or vary it in such a way as to extinguish, or alter his entitlement under, that right, if–

(a) the third party has communicated his assent to the term to the promisor,
(b) the promisor is aware that the third party has relied on the term, or
(c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

(2) The assent referred to in subsection (1)(a)–

(a) may be by words or conduct, and
(b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.

(3) Subsection (1) is subject to any express term of the contract under which–

(a) the contract may be cancelled or varied without the consent of the third party, or
(b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).

(4) Where the consent of a third party is required under subsection (1) or (3), the court may, on the application of the parties to the contract, dispense with his consent if satisfied–

(a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or
(b) that he is mentally incapable of giving his consent.

(5) The court may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.

(6) If the court dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.

(7) The jurisdiction conferred by subsections (4) to (6) is exercisable by both the High Court and a county court.

This sets out what may be regarded as the basic position but also clearly permits the parties to modify it and, in practice, it seems quite likely that the parties will want to do so. This has certainly been the position in continental systems where experience of third party rights is now extensive over many years. So one can easily imagine a contract for life insurance in which there would be power to change beneficiaries. It is likely that this power would be granted to the person who is paying the premiums since, in normal circumstances, the insurance company will have no interest in who actually receives the payments provided that it is clearly stated.

DEFENCES

A and B may make a contract intended to confer rights on a third party T but after they have made the contract things may go wrong with the performance of the contract in a way which would make it unfair simply to allow T to enforce the contract. This is dealt with by section 3 which provides:

(1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.

(2) The promisor shall have available to him by way of defence or set-off any matter that;

(a) arises from or in connection with the contract and is relevant to the term, and
(b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

(3) The promisor shall also have available to him by way of defence or set-off any matter if–

(a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and

(b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.

(4) The promisor shall also have available to him–

(a) by way of defence or set-off any matter, and

(b) by way of counterclaim any matter not arising from the contract,

that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.

(5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.

(6) Where in any proceedings brought against him a third party seeks in reliance on section 1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

It should be noted that this section is not limited to defences arising under the contract itself but is wide enough to deal also with matters of set-off, which may involve other contracts. Suppose A, a wine merchant, makes a contract with B, a business, under which it undertakes to deliver a case of wine to T. Clearly, A would normally be able to justify not having delivered the wine to T if it could show that B had not paid for the wine but A and B may have a contract which entitles A to set-off against T matters which arise from earlier transactions which he made with B.[5]

EXISTING EXCEPTIONS

Section 7(1) provides:

> Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.

This means that any of the exceptions to privity which were already established before 1999 continue in force.[6]

5 Attempts to impose liabilities upon strangers

It has long been an axiom of the common law that a contract between A and B cannot impose a liability upon C.

This rule, however, was found to be so inconvenient in the case of contracts concerning land that counter-measures had to be devised to meet it. It has already been seen that, where a lease was concerned, such measures originated at an early date in the common law itself and were subsequently extended by

5 The width of this possibility depends on the complexities of the law of set-off which are outside the scope of this book.

6 This includes the matters discussed above pp 502 ff.

statute.[7] A second modification is due entirely to equity, and it did not emerge until 1848, when the case of *Tulk v Moxhay*[8] was decided. The problem in that case was this: will a restrictive covenant, voluntarily accepted by the purchaser of land as part of the contract of sale, bind persons who later acquire the land? The facts of the case itself afford a simple illustration.

> The plaintiff, the owner of several plots of land in Leicester Square, sold the garden in the centre to one Elms, who agreed not to build upon it but to preserve it in its existing condition. After a number of conveyances the garden was sold to the defendant Moxhay, who, though he knew of the restriction, proposed to build. The plaintiff, accepting his inability at common law to recover damages from one who was not a party to the contract, sought an injunction against the erection of the proposed buildings.

The injunction was granted. The decisive factor in the view of the court was the knowledge by the defendant of the existence of the covenant. A court of equity, being a court of conscience, could not permit him to disregard a contractual obligation affecting the land of which he had notice at the time of his purchase.

Thus was established the doctrine that a restrictive covenant, binding a purchaser not to perform certain acts of ownership upon the land bought, may be enforced, not only against him as the contracting party, but also against third parties who later acquire the land. It is undesirable in a general book on contracts to specify the conditions upon which enforcement depends, but it is essential to observe that the liability of the third party soon ceased to be based exclusively on notice. There has been a radical development in the doctrine initiated by *Tulk v Moxhay*, and it has been established since the latter years of the nineteenth century that something more than mere notice by the third party of the existence of the covenant is necessary to render him liable. In particular it is essential that the covenantee, ie the original vendor, should have retained other land in the neighbourhood for the benefit and protection of which the restrictive covenant was taken. If an owner sells only a portion of his property, the selling value of what he retains will often depreciate unless restrictions are placed upon the enjoyment of the part sold, and it is only where the covenantee has retained land capable of being benefited in this way that equity will enforce a restrictive covenant against a third party.[9]

The question now arises whether this equitable doctrine may be applied where the subject matter of the contract is property other than land.[10] The relevant cases and statutes suggest that there are two different situations which require, or at least have received, different treatment.[11]

(1) Attempts to enforce against third parties restrictions upon the use of goods.
(2) Attempts to enforce against third parties restrictions upon the price at which goods may be resold.

These situations will be considered separately.

7 P 502, above.
8 (1848) 2 Ph 774.
9 See *Formby v Barker* [1903] 2 Ch 539, and *LCC v Allen* [1914] 3 KB 642.
10 Gardner 98 LQR 279.
11 This distinction was taken by Wade 44 LQR 51.

A RESTRICTIONS UPON USE

It was a restriction upon use that the court enforced in the parent case of *Tulk v Moxhay*; and within a few years of this decision the propriety of a similar restriction was canvassed in the case of a ship. In *De Mattos v Gibson* in 1858:[12]

> A chartered a ship from X. During the currency of the charterparty X mortgaged the ship to B, who knew at the time that this charterparty existed. A alleged that B now threatened, as mortgagee, to sell the ship in disregard of his contract rights and he applied for an interlocutory injunction to restrain B from doing so.

The application was refused by Vice-Chancellor Wood, but allowed on appeal by Knight Bruce and Turner LJJ. Knight Bruce LJ observed:[13]

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

Turner LJ was careful not to be involved in so comprehensive a principle. He would not go further than to grant an interlocutory injunction 'until the hearing of the cause' because of the 'difficult and important questions to be tried at the hearing'. The case then went back to Wood V-C for the cause to be heard; and he ruled that, on the facts before him, no injunction should be granted. This ruling was upheld by the Lord Chancellor, Lord Chelmsford, and the plaintiff's application thus finally failed. Lord Chelmsford emphasised, however, that his decision was based on the finding that the defendant had not in fact interfered with the performance of the charterparty. Had he done so, an injunction might well have been granted.

Five years later the same court was faced with similar facts in *Messageries Imperiales Co v Baines*.[14]

> The plaintiff had chartered a ship from X. During the currency of the charter, X sold the ship to the defendant who knew at the time of the existence of the charter but declined to allow the ship to fulfil the charter obligations.

Wood V-C now felt constrained by the observations of his brothers in the superior courts and granted the injunction for which the plaintiff asked.

For the next fifty years the sweeping assertion of Lord Justice Knight Bruce was cited from time to time but in 1914 the Court of Appeal refused to accept it as offering a catholic principle upon which it was safe to depend.

> Notwithstanding what was said by Knight Bruce LJ in *De Mattos v Gibson*, it is not true as a general proposition that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant.[15]

12 4 De G & J 276.
13 Ibid at 282.
14 (1868) 7 LT 765.
15 *LCC v Allen* [1914] 3 KB 642 at 658-59. See also *Barker v Stuckney* [1919] 1 KB 121.

However, in 1926 the case of the *Lord Strathcona Steamship Co v Dominion Coal Co* came before the Judicial Committee of the Privy Council.[16]

> B, the owner of the steamer *Lord Strathcona*, chartered her to A on the terms that, for a period of years, A should be free to use her on the St Lawrence river for the summer season and should surrender her to B in November of each year. During the currency of the charterparty, but while the ship was in B's possession, B sold and delivered her to C, who in turn resold her to D. D, though he knew of the charterparty, refused to deliver the ship to A for the summer season.

A obtained an injunction against D in the courts of Nova Scotia restraining him from using the ship in any way inconsistent with the charterparty, and D's appeal to the Privy Council was dismissed. The Privy Council quoted with approval the familiar words of Knight Bruce LJ. The advice of the Board has often been read as deciding in effect that the defendant in the case before them was caught by the rule in *Tulk v Moxhay* on the basis that he had bought a ship with notice that she was affected by a restrictive covenant in favour of the plaintiff and was therefore, in their view, in the same position as if he had bought an estate in land with notice of a similar restriction. It must be remembered, however, that in the years that had elapsed since the case of *De Mattos v Gibson* the rule in *Tulk v Moxhay* had been radically developed by the courts and had ceased to be based solely upon notice. A restrictive covenant imposed on land could no longer be enforced against later purchasers unless the original covenantee had retained a proprietary interest in other land for the benefit of which the covenant was taken. Where was the proprietary interest in the *Strathcona* case? The Privy Council recognised the necessity for its existence, but they could only assert that A enjoyed an interest in the ship for the period covered by the charterparty. But this interest was no more than that conferred by the very contract which A sought to enforce against the third party: it was certainly not the independent proprietary interest which equity requires in the case of restrictive covenants over land. Moreover, it is well established that a charterparty creates no right of property in a ship.[17]

Whether the decision in the *Strathcona* case should be accepted as valid and worthy to command the assent of English courts has been the subject of much debate.

In 1936 the Court of Appeal thought that it must in any event be confined 'to the very special case of a ship under a charter-party',[18] and the decision itself was challenged in *Port Line Ltd v Ben Line Steamers Ltd.*[19]

> In March 1955, the plaintiffs chartered a ship from X the owner, for a period of 30 months. The ship was to remain in X's possession but to be at the complete disposal of the plaintiffs. In February 1956, X sold the ship to the defendants. The defendants at once chartered it back to X so that it never ceased to be in X's possession. The plaintiffs knew of the sale and acquiesced in it since the ship was to remain available under their own

16 [1926] AC 108.

17 See Bailhache J in *Federated Coal and Shipping Co v R* [1922] 2 KB 42 at 46, and cases there cited. Except in the case of a charterparty by demise, *Baumwoll Manufacturer Von Carl Scheibler v Furness* [1893] AC 8.

18 *Clore v Theatrical Properties Ltd* [1936] 3 All ER 483.

19 [1958] 2 QB 146, [1958] 1 All ER 787.

charter. The charter between X and the defendants contained a clause that 'if the ship is requisitioned, the charter shall thereupon cease'. No such clause existed in the plaintiffs' charter. The defendants, when they bought the ship, knew of the existence of the plaintiff's charter but not of its terms. In August 1956, the Ministry of Transport requisitioned the ship and paid compensation to the defendants as owners. In November 1956, the requisition ended.

The plaintiffs now sued the defendants to obtain this compensation money and relied, inter alia, on the *Strathcona* case and the dictum in *De Mattos v Gibson*.

Diplock J gave judgment for the defendants. He thought, in the first place, that the *Strathcona* case was not good law.[20]

> The difficulty I have found in ascertaining its *ratio decidendi*, the impossibility which I find of reconciling the actual decision with well-established principles of law, the unsolved and, to me, insoluble problems which that decision raises combine to satisfy me that it was wrongly decided.

He stressed, in particular, the necessity, in the twentieth century, of finding some proprietary interest to support a claim based on *Tulk v Moxhay* and the absence of any such interest in the *Strathcona* case. In the second place, he was of opinion that, even assuming it possible to support the *Strathcona* case in principle, the facts before him did not fall within its scope. The defendants, when they bought the ship, had no actual knowledge of the plaintiffs' rights: though they knew that a charter existed, they did not know its terms. Nor were they in breach of any duty. It was not by their act but by the act of the Crown that the ship had been used inconsistently with the plaintiffs' charter. Finally, the only remedy possible under the doctrine of *Tulk v Moxhay* and therefore under the *Strathcona* case was the grant of an injunction. No damages or money compensation could be obtained.

However in *Swiss Bank Corpn v Lloyds Bank Ltd*[1] Browne-Wilkinson J thought both *De Mattos v Gibson* and the *Strathcona* case correctly decided, though he found some of the reasoning in the latter case difficult to follow. He found two lines of reasoning which might be applicable in addition to the restrictive covenant argument which he thought generally not to the point. One approach is that a purchaser who takes expressly subject[2] to the terms of an earlier contract as to the use of the property may be held to be a constructive trustee.[3] He gave greater weight to a second approach which arises out of the tort of inducing breach of contract.[4] He considered that the granting of the injunction in *De Mattos v Gibson*[5] was 'the counterpart in equity of the tort of knowing interference with contractual rights'.[6]

20 Ibid at 168 and 797 respectively.

1 [1979] Ch 548, [1979] 2 All ER 853; the judgment of Browne Wilkinson J was varied by the House of Lords [1982] AC 584, [1981] 2 All ER 449 but in such a way that that Court did not need to consider the correctness of his judgment on the present issues.

2 That is, not only knowing of, but agreeing to be bound by, the earlier contract.

3 He thought this certainly one of the grounds of decision in the *Strathcona* case, though he expressed no conclusion as to the correctness of this reason. It derives some support from cases such as *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70.

4 See eg *Winfield and Jolowicz on Tort* (14th edn) pp 517-532.

5 (1858) 4 De G & J 276.

6 [1979] Ch 548 at 575, [1979] 2 All ER 853 at 874. See also the decision of the Court of Appeal in *Sefton v Tophams* [1965] Ch 1140, [1965] 3 All ER 1 (reversed on other grounds [1967] 1 AC 50, [1966] 1 All ER 1039).

It is perhaps unfortunate that discussion of the application of real property analogies to personal property has concentrated on restrictive covenants to the exclusion of other interests, perhaps more readily applicable to chattels. Thus it is clear that an option to purchase land creates an equitable interest in the land capable of being enforced against a purchaser of the land[7] and there is authority for the application of the same principle to options to purchase chattels[8] and choses in action, such as copyrights.[9]

A question, potentially of great practical importance, is whether a contract under which possession of a chattel is transferred for a fixed term creates property rights analogous to a lease.[10] Such contracts, eg for the rental of television sets or for hire or hire purchase[11] of motor vehicles, are extremely common and it is difficult to see any good reason why the owner of the goods should be able to convert the hirer's right to possession in to a right to damages by selling the goods over his head. Holdsworth saw the position with his usual clarity over fifty years ago when he said:[12]

> It is obvious that if A has let or pledged his chattel to B and has transferred its possession to B and if he then sells it to C, C can only take it subject to B's legal rights, and since they are legal rights whether C has notice of those rights or not.[13]

B RESTRICTIONS UPON PRICE

An attempt to enforce a price restriction against a third party was made in 1904 in the case of *Taddy v Sterious*.[14]

> The plaintiffs, who were manufacturers of 'Myrtle Grove' tobacco, sought to prevent retailers from selling it below a minimum price. They attached to each packet a printed sheet, stating that the tobacco was sold 'on the express condition that retail dealers do not sell it below the prices above set forth' and adding that 'acceptance of the goods will be deemed a contract between the purchaser and Messrs Taddy & Co that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of Taddy & Co'. The plaintiffs sold tobacco under these conditions to Messrs Nutter, wholesale dealers, who resold it to the defendants, retail tobacconists. The defendants, though they had notice of the conditions, resold below the minimum price.

The plaintiffs sued in the Chancery Division for a declaration that the defendants were bound by the conditions. They put their case on two grounds.

7 See eg *London and South Western Rly Co v Gomm* (1882) 20 ChD 562.
8 *Falcke v Gray* (1859) 4 Drew 651.
9 *MacDonald v Eyles* [1921] 1 Ch 631. *Quaere* whether this depends on the contract being specifically enforceable.
10 This was not the case in *The Strathcona* since the charterer does not ordinarily get possession of the chartered ship but merely a contractual right to control its use. In the special case of a charterparty by demise, the charterer does get possession and in the leading authority on such charterparties, *Baumvoll Manufactur Von Carl Scheibler v Furness* [1893] AC 8, extensive use was made of analogies from the law of leases.
11 A hire-purchase contract also contains an option to purchase, see p 151, above.
12 49 LQR 576 at 579; see also Gutteridge 51 LQR 91 at 98; Thornely 13 JSPTL 150 at 151; Lawson *The Law of Property* (2nd edn) pp 96-97.
13 In practice C will very often have notice since A will not have possession.
14 [1904] 1 Ch 354.

First, they maintained that the printed sheet constituted a contract between themselves and the defendants and that Messrs Nutter were their agents. The court dismissed this attempt to create a contract by ultimatum. There was in truth no contract between Taddy and Sterious, Messrs Nutter were not Taddy's agents, and no unilateral declaration, however peremptory, could alter the legal position. Secondly, the plaintiffs invited the court to extend to them the protection of the rule in *Tulk v Moxhay*. The invitation was summarily rejected. In the words of Swinfen Eady J:

> Conditions of this kind do not run with goods, and cannot be imposed upon them. Subsequent purchasers, therefore, do not take subject to any conditions which the court can enforce.

Another attempt to enforce a price restriction against a third party, made later in the same year, was met by the Court of Appeal with the same uncompromising refusal.[15]

The legal position remained unchanged for half a century, but then became the subject of somewhat irresolute legislation. By section 24 of the Restrictive Trade Practices Act 1956[16] agreements for the *collective* enforcement of stipulations as to resale prices were declared unlawful. But this declaration was balanced by a new sanction given by section 25(1) of that Act to the *individual* enforcement of such stipulations. The practical importance of this provision was greatly reduced, however, some eight years later when legislation was introduced to restrict *individual* minimum resale price maintenance.[17] Section 25(1) of the 1956 Act had provided that there goods were sold by a supplier subject to a condition as to the resale price of those goods, the condition was (with certain exceptions),[18] enforceable by the supplier against any person not party to the sale who subsequently acquired the goods with notice[19] of the condition as if he had been a party to the sale; but, with the introduction of the Resale Prices Act 1964 (in the light of which section 25(1) had thereafter to be read), there was little scope for its further implementation.

By section 1(1) of the Resale Prices Act 1964,[20] any term or condition of a contract for the sale of goods by a supplier to a dealer (or of any agreement between a supplier and a dealer relating to such a sale) was unlawful. It was, accordingly, unenforceable by the supplier, either against his own dealer or against a third party to the contract. The subsection was, however, subject to provisions for exemption by the Restrictive Practices Court of particular classes of goods.[1]

The whole of this question has now become one of competition law, an outline of which is to be found above.[2]

15 *McGruther v Pitcher* [1904] 2 Ch 306.

16 The provisions of this section were re-enacted by the consolidation legislation of 1976. See Resale Prices Act 1976, Part I, ss 1 to 4.

17 Resale Prices Act 1964, s 1.

18 Thus the condition was not enforceable in respect of the resale of any goods by a person acquiring those goods otherwise than for the purpose of resale in the course of business. Ibid. s 25(2)(a). See now Resale Prices Act 1976, s 26(3)(a).

19 For the meaning of 'notice' in a case on s 25(1) of the Restrictive Trade Practices Act 1956, see *Goodyear Tyre and Rubber Co Great Britain Ltd v Lancashire Batteries Ltd* [1958] 3 All ER 7, [1958] 1 WLR 655; Wedderburn [1958] CLJ 165.

20 See now Resale Prices Act 1976, s 9(1).

1 Provision for exemption by the court of particular clauses of goods was originally contained in s 5 of the Resale Prices Act 1964. See now Resale Prices Act 1976, s 14.

2 See ch 10, above.

Chapter 15

Privity of contract under the law of agency

SUMMARY

1 The place of agency in English law

'Agency' is a comprehensive word which is used to describe the relationship that arises where one man is appointed to act as the representative of another. The act to be done may vary widely in nature. It may for example be the making of a contract, the institution of an action, the conveyance of land or, in the case of a power of attorney, the exercise of any proprietary right available to the employer himself. The following account, however, is solely concerned with the case where the agent purports to enter into a contract on behalf of his principal.

Regarded from this aspect, an agency agreement is one by which the agent is authorised to establish privity of contract between his employer, called the principal, and a third party.[1] It produces effects of two quite different kinds.

1 'The essential characteristic of an agent is that he is invested with a legal power to alter his principal's legal relations with third parties: the principal is under a correlative liability to have his legal relations altered': Dowrick 17 MLR 36. Reynolds 94 LQR 221.

First, it creates an obligation between the principal and the agent, under which each acquires in regard to the other certain rights and liabilities. In this respect agency takes its place as one of the special contracts of English law, such as the contract for the sale of goods or for the hire of a chattel.

Secondly, when acted upon by the agent, it leads to the creation of privity of contract between the principal and the third party. A contract made with a third party by the agent in the exercise of his authority is enforceable both by and against the principal. Thus the English doctrine is that an agent may make a contract for his principal which has the same consequences as if the latter had made it himself. In other words the general rule is not only that the principal acquires rights and liabilities, but also that the agent drops out and ceases to be a party to the contract.

The question sometimes arises whether a man has acted as an agent or as an independent contractor in his own interest.[2] The latter is a person who is his own master in the sense that he is employed to bring about a given result in his own manner and not according to orders given to him from time to time by his employer. Thus a retailer A, who in response to an order from a customer B, buys goods from a wholesaler C and then resells them to B, is normally acting as an independent contractor. He is a middleman, not the agent of B.

But in other situations it may be a difficult matter to decide whether a person is acting as agent or as independent contractor. What, for example, is the position in the case of a hire-purchase transaction where a dealer sells goods to a finance company which then lets them out on hire to the hire purchaser? Is the dealer the agent of the finance company? Parliament has provided that he shall be deemed the agent of the company (a) as regards any representations concerning the goods made by him in the course of negotiations with the hirer to induce or promote the agreement; (b) for the purpose of receiving notice that the offer to enter the agreement is withdrawn; (c) for the purpose of receiving notice that the agreement is rescinded.[3] But the question whether the dealer is to be regarded in general as the agent of the finance company remains unsettled. Two views have been expressed. On the one hand, Pearson LJ, in his judgment in *Financings Ltd v Stimson*[4] denied that any general rule could be laid down, and repeated the denial in *Mercantile Credit Co Ltd v Hamblin*:

> There is no rule of law that in a hire-purchase transaction the dealer never is, or always is, acting as agent for the finance company or as agent for the customer. In a typical hire-purchase transaction the dealer is a party in his own right, selling his car to the finance company, and he is acting primarily on his own behalf and not as general agent for either of the other two parties. There is no need to attribute to him an agency in order to account for his participation in the transaction. Nevertheless, the dealer is to some extent an intermediary between the customer and the finance company, and he may well have in a particular case some *ad hoc* agencies to do particular things on behalf of one or the other or it may be both of these two parties.[5]

On the other hand, Lord Denning and Lord Justice Donovan in *Financings Ltd v Stimson* considered the dealer in fact and in law to be the agent for many purposes of the finance company.[6]

2 Fridman 84 LQR 224.
3 Hire-Purchase Act 1964, ss 10 and 11; Hire-Purchase Act 1965, s 12(2) and (3) and see now Consumer Credit Act 1974, ss 56(1), (2), 57(3), 69(6), 102(1), 175.
4 [1962] 3 All ER 386, [1962] 1 WLR 1184.
5 [1965] 2 QB 242 at 269, [1964] 3 All ER 592 at 600-601.
6 [1962] 3 All ER 386, [1962] 1 WLR 1184.

In *Branwhite v Worcester Works Finance*[7] the House of Lords discussed the general position of the dealer. The discussion was not strictly necessary to the decision of the case, and divergent views were expressed. Lord Morris, Lord Guest and Lord Upjohn[8] approved the opinion given by Lord Justice Pearson in *Mercantile Credit Co Ltd v Hamblin*. Lord Wilberforce, with the concurrence of Lord Reid, supported the opposing opinion of Lord Denning and Lord Justice Donovan in *Financings Ltd v Stimson*, and set the question against the mercantile background of hire-purchase transactions.

> Such questions as arise of the vicarious responsibility of finance companies, for acts or defaults of dealers, cannot be resolved without reference to the general mercantile structure within which they arise: or if one prefers the expression, to mercantile reality. This has become well known and widely understood by the public, as well as by the commercial interests involved. So, far from thinking first of a purchase from the dealer, and then, separately, of obtaining finance from an outside source, the identity or even existence of the finance company or bank which is going to provide the money is a matter to [the customers] of indifference: they look to the dealer, or his representative, as the person who fixes the payment terms and makes all the necessary arrangements ... If this is so, a general responsibility of the finance company for the acts, receipts and omissions of the dealer in relation to the proposed transaction of hire-purchase ought to flow from this structure of relationship and expectation, built up from accepted custom and methods of dealing; a general responsibility which requires to be displaced by evidence of particular circumstances rather than to be positively established in each individual case.[9]

Until a final choice between these views is authoritatively made by the House of Lords it is submitted that the presumption of agency favoured by Lord Denning, Lord Justice Donovan and Lord Wilberforce is, in the latter's words more consistent with 'mercantile reality' and is to be preferred.[10]

Alternatively, it may be clear that A is an agent but obscure for which of two parties he acts. Thus an agent employed by an insurance company to solicit business is undoubtedly an agent of the company for some purposes but it was held in *Newsholme Bros v Road Transport and General Insurance Co Ltd*[11] that where he helped the insured to complete the proposal form, he acted as agent for the insured. This means that the insured will be liable for misrepresentation or non-disclosure where he tells the agent the truth but the agent records his statement inaccurately on the form. Granted that the insured will normally regard communication to the agent as communication to the insurer and that the agent's commission is dependent on the proposal being acceptable to the insurer this has the makings of an unsatisfactory rule in practice. It is not surprising therefore that it has been rejected in Ghana,[12] reversed by legislation in Jamaica[13] and restrictively distinguished in England.[14]

The parties may of course agree that an intermediary is to act for both of them. This is in practice quite common. So, in a transaction involving

7 [1969] 1 AC 552, [1968] 3 All ER 104.
8 Ibid at 573, 574, 576 and 113 and 115, respectively.
9 Ibid at 586-587 and 121-122, respectively.
10 Cf Hughes 27 MLR 395.
11 [1929] 2 KB 356. This conclusion is often reinforced by clauses in the proposal form.
12 *Mohamed Hiyazi v New India Assurance Co Ltd* 1969 (1) African L Rev Comm 7.
13 Insurance Act 1971, s 74(1).
14 *Stone v Reliance Mutual Insurance Society Ltd* [1972] 1 Lloyd's Rep 469; Reynolds 88 LQR 462; followed with approval by Supreme Court of Canada in *Blanchette v CIS Ltd* (1973) 36 DLR (3d) 561.

both the buying and selling of a house and the lending of money by way of mortgage to the purchase, it is often agreed that the same solicitor will act both for the purchaser and for the lender. If all goes well this will reduce the costs of the transaction but things do not always go well and there may be conflicts between the solicitor's duty to the purchaser and to the lender.

The most common problem appears to be whether the solicitor is bound to pass on to the lender information which he has discovered in pursuance of his duty to the purchaser. There is no general rule that he must pass on all such information.[15] The solicitor must carry out his express instructions from lender[16] and is under an implied obligation to do what a reasonably competent solicitor in the same position would do.[17]

Normally, in such a situation, the money which constitutes the loan will pass through the solicitor's hands on the way from the lender to the vendor (so that it is never in the hands of the borrower). In relation to this money, the solicitor is clearly a fiduciary. In *Bristol and West Building Society v Mothew*[18] the purchasers were seeking an advance of £59,000 to finance the purchase of a house for £73,000. It was a term of the loan that the borrowers would find all the £14,000 from their own resources and would not take out another loan. In fact, the borrowers had a loan of some £3,350 on a second mortgage on their existing house with Barclays Bank and arranged to transfer this to the new house. The solicitor knew of this loan but forgot to tell the lender, who argued that there had been a breach of fiduciary duty. The Court of Appeal held that although the solicitor had certainly been guilty of a negligent breach of contract, 'not every breach of duty by a fiduciary is a breach of fiduciary duty'.[19]

Of the two aspects of agency, only the second concerns a book purporting to deal with the general principles of contract law. We shall, therefore, consider the formation and termination of agency and also the position of third parties with whom the agent contracts, but shall omit all reference to the rights and liabilities of the principal and agent *inter se*.

2 Formation of agency

The relationship of principal and agent may arise in any one of five ways: by express appointment, by virtue of the doctrine of estoppel, by the subsequent ratification by the principal of a contract made on his behalf without any authorisation from him, by implication of law in cases where it is urgently necessary that one man should act on behalf of another, and by presumption of law in the case of cohabitation.

15 *Halifax Mortgage Services Ltd v Stepsky* [1996] 2 All ER 277.
16 *Bristol and West Building Society v May, May & Merriman* [1996] 2 All ER 801; *Bristol and West Building Society v Fancy & Jackson* [1997] 4 All ER 582.
17 *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All ER 836; *National Home Loans Corpn plc v Giffen Couch & Archer* [1997] 3 All ER 808.
18 [1996] 4 All ER 698.
19 [1996] 4 All ER 698 at 711-712 per Millett LJ. The lender hoped to recover more of its loss in equity than it would have done at common law.

A EXPRESS APPOINTMENT

Except in one case no formality, such as writing, is required for the valid appointment of an agent. An oral appointment is effective. This is so even though the contract which the agent is authorised to make is one that is required by law to be made in writing, such as a contract to buy or to take a lease of land. Thus if an agent appointed orally signs a contract in his own name for the purchase of land, the principal can give parol evidence to show the existence of the agency, and can then enforce the contract against either the agent or the vendor.[20]

The one exception is where the authority of the agent is to execute a deed on behalf of the principal, in which case the agency itself must be created by deed. The agent, in other words, must be given a power of attorney. Instances of transactions for which a deed is necessary are conveyances of land, leases exceeding three years, and the transfer of a share in a British ship. So if an agent is authorised to execute a conveyance of land to a purchaser, he must be appointed by deed, but this is not necessary if his authority is merely to enter into a contract for the sale of the land.

B AGENCY BY ESTOPPEL

The subject of agency by estoppel may be introduced by a quotation from Lord Cranworth:

> No one can become the agent of another person except by the will of that person. His will may be manifested in writing, or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him ... This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that belief, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed ... Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with anyone as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.[1]

While, therefore, a person cannot be bound as principal by a contract made without his authority, yet if the proved result of his conduct is that A appears to be his agent and makes a contract with a third person who relies on that appearance, he may be estopped from denying the existence of the authority. An apparent or ostensible agency is as effective as an agency deliberately created. Appearance and reality are one.

If, for instance, a member of a partnership retires without notifying the public, he will be bound by contracts made by the remaining partners with

20 *Heard v Pilley* (1869) 4 Ch App 548.

1 *Pole v Leask* (1862) 33 LJ Ch 155 at 161-162. See also *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002.

persons who had previously had dealings with the firm or who were aware of his membership, provided, of course, that they had no notice of his retirement.[2] A retiring member must give reasonable public notice of his retirement, or he will be guilty of conduct calculated to induce others to rely on his credit. Again, if P has been accustomed to accept and to pay for goods bought on his behalf by A from X, he may be liable for a purchase made in the customary manner, even though it is made by A fraudulently after he has left his employment.[3] In such a case A would appear to X to retain his former authority. Or suppose that a husband has for several years paid for articles of luxury bought by his wife at X's shop and then forbids her to pledge his credit any further in this manner; it cannot be doubted that, failing an express warning to X, he will be liable as principal if she makes similar contracts in the future.[4]

In all these cases a person who has no authority whatever to represent another is nevertheless regarded as an apparent agent. But, as we shall see later, the doctrine of estoppel, employed here to create the relationship of principal and agent, plays an even more important part where a regularly constituted agent exceeds his actual authority.[5]

C RATIFICATION

If A, without any precedent authority whatsoever, purports to contract with X for and on behalf of P, and later P ratifies and adopts the contract, the relationship of principal and agent arises between P and A.

> In that case the principal is bound by the act whether it be for his detriment or advantage, and whether it is founded on a tort or a contract, and with all the consequences which follow from the same act done by his authority.[6]

If a principal ratifies part of a contract he is taken to have ratified it *in toto*. He cannot select such of its provision as may operate to his advantage.[7] The ratification relates back to the contract made by A, and both X and P are in exactly the same position as if P had been the original contracting party. *Omnis ratihabitio retrotrahitur ac priori mandato aequiparatur.*

> Suppose that on 1 May, X offers to buy land from A who in fact is manager and agent of the property on behalf of P. On 2 May, A accepts this offer on P's behalf though he has no actual or apparent authority to do so. On 4 May, X purports to revoke the offer; on 10 May, P ratifies the acceptance of A.

Here the ratification relates back to the moment of acceptance. It follows, therefore, that X's attempted revocation is inoperative as being too late, and that P is entitled to claim specific performance.[8] There can, however, be no

2 *Scarf v Jardine* (1882) 7 App Cas 345 at 349, per Lord Selborne.
3 *Summers v Solomon* (1857) 26 LJQB 301. This case was distinguished in *Hambro v Burnand* [1903] 2 KB 399.
4 *Debenham v Mellon* (1880) 5 QBD 394 at 403.
5 Pp 546 ff, below.
6 *Wilson v Tumman* (1843) 6 Man & G 236 at 242.
7 *Cornwal v Wilson* (1750) 1 Ves Sen 509; *Re Mawcon Ltd* [1969] 1 WLR 78 at 83, per Pennycuick J.
8 *Bolton Partners v Lambert* (1889) 41 ChD 295. This case, though approved in *Lawson (Inspector of Taxes) v Hosemaster Ltd* [1966] 2 All ER 944, [1966] 1 WLR 1300, was

ratification unless the offer has been unconditionally accepted, for, unless and until this is proved, no contract exists to be ratified. If A's acceptance on 2 May was not absolute, but was expressly made subject to ratification by P, there would be no complete contract until P ratified, and a revocation by X before that date would be effective.[8]

The prerequisites of ratification are as follows:

i Contract must be professedly made on behalf of the principal

First, the person who makes the contract must profess at the time of making it to be acting on behalf of, and intending to bind, the person who subsequently ratifies the contract.[10] Ordinarily, the person making the contract will be required to name his professed principal, but it has been said to be sufficient if the principal, though not named, is 'capable of being ascertained' at the time of the contract,[11] an expression which is presumably employed here to mean 'identifiable'. So understood, it would cover, for instance, the case of a person contracting 'on behalf of my brother'.[12] It is not, however, sufficient that the person contracting should merely indicate that he is acting as agent without more. He must name, or otherwise sufficiently identify, the person for whom he professes to act. A fortiori, if he makes no allusion to agency, but gives the appearance of contracting in his own right, the contract cannot later be adopted by another for whom in truth he intended to act. This primary requirement, that an agent should be obliged to advertise his intention, though now well established, is scarcely consistent with the earlier and equally well established doctrine of the undisclosed principal, under which a principal can enforce a contract made by an agent *with his authority* even though the existence of the agency was not disclosed to the other contracting party.[13] The doctrine of ratification may be anomalous, but it is difficult to appreciate why it should not apply to an agency which is not only unauthorised, but also undisclosed, if an undisclosed principal can avail himself of an authorised act. In *Keighley, Maxsted & Co v Durant*,[14] Lord James, in repudiating this suggestion, said:

severely criticised by Fry in his *Specific Performance*, note A. He regards the contract between X and P as being one made without consensus. The court said that it was made when A accepted, but at that moment P had not consented to such a contract being made on his behalf. It was a contract made at the will of a stranger and without the will of one of the contracting parties. There is force in this criticism, though it is coloured by contemporary preoccupation with the idea of consensus. It is true that the effect of the decision is to impose a liability upon X if P so wishes, while leaving P a free choice in the matter. The decision was also doubted by the Privy Council in *Fleming v Bank of New Zealand* [1900] AC 577 at 587. Cf *Presentaciones Musicales SA v Secunda* [1994] 2 All ER 737.

9 *Watson v Davies* [1931] 1 Ch 455; *Warehousing and Forwarding Co of East Africa Ltd v Jafferali & Sons Ltd* [1964] AC 1, [1963] 3 All ER 571.

10 *Keighley, Maxsted & Co v Durant* [1901] AC 240; *Imperial Bank of Canada v Begley* [1936] 2 All ER 367.

11 *Watson v Swann* (1862) 11 CBNS 756 at 771, per Willes J; *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 255; *Eastern Construction Co Ltd v National Trust Co Ltd and Schmidt* [1914] AC 197 at 213.

12 'It is not necessary that he should be named but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract': *Watson v Swann*, above, at 771, per Willes J.

13 Pp 540-543, below.

14 [1901] AC 240.

> To establish that a man's thoughts unexpressed and unrecorded can form the basis of a contract so as to bind other persons and make them liable on a contract they never made with persons they never heard of seems a somewhat difficult task.

It is, however, a difficulty that has been readily surmounted by the law in its evolution of the doctrine of the undisclosed principal. In the *Keighley, Maxsted* case:

> A was authorised by P to buy wheat at 44s 3d a quarter on a joint account for himself and P. Wheat was unobtainable at this price, and therefore in excess of his authority he agreed to buy from X at 44s 6d a quarter. Though he intended to purchase on the joint account, A contracted in his own name and did not disclose the agency to X. The next day P ratified the purchase at the unauthorised price, but ultimately he and A failed to take delivery.

An action brought by X against P for breach of contract failed on the ground that the purchase had not been professedly made on his behalf. Apparently ignoring the doctrine of the undisclosed principal, Lord Macnaghten remarked that 'obligations are not to be created by, or founded upon, undisclosed intentions'.

ii Must be competent principal at time of contract

The second condition of ratification is that at the time when the contract was made the agent must have had a competent principal.[15] This condition is not satisfied, for instance, if he purported to act on behalf of an alien enemy.[16] Nor is it satisfied if he purported to contract on behalf of a principal who at the time of the contract lacked legal personality, for rights and obligations cannot attach to a non-existent person. This is important in the case of contracts made on behalf of a company projected but not yet formed.

> If, for instance, it is proposed to form a motor garage company provided that a certain plot of land can be obtained, and A, purporting to act on behalf of the projected company, makes a contract for the purchase of the land, the contract cannot be ratified by the company upon its formation.

As Erle CJ said in the leading case of *Kelner v Baxter*:[17]

> When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before.

The proper course to adopt in the case of such a potential company is to provide that if the company is not registered by a certain date the contract shall be null and void, but that if it is so registered there shall be a transfer to it of the contractual rights and liabilities.

Whether a person who contracts on behalf of a non-existent principal is himself liable depends upon the circumstances. The fact that the principal when he comes into existence is not liable does not necessarily mean that the agent is in all cases an effective party to the contract. As was said in an Australian case:

15 *Kelner v Baxter* (1866) LR 2 CP 174; *Scott v Lord Ebury* (1867) LR 2 CP 255.

16 *Boston Deep Sea Fishing and Ice Co Ltd v Farnham* [1957] 3 All ER 204, [1957] 1 WLR 1051.

17 (1866) LR 2 CP at 183.

> The fundamental question *in every case* must be what the parties intended or must be fairly understood to have intended.[18]

The agent may so conduct himself as to become a party, and if this is the common intention and if it does not contradict any written instrument, then, as in *Kelner v Baxter*, the contract is enforceable by and against him. But if there is nothing in the circumstances to show that he contracted personally, there is no rule which converts him automatically into a principal merely because at the time of the contract there was nobody else capable of being bound.[19] Thus in one case, a memorandum of a contract for the sale of goods by a company was signed by the sellers: 'Yours faithfully, Leopold Newborne (London) Ltd', after which was written the name Leopold Newborne. On it appearing that the company was incapable of being a contracting party since it had not been registered when the memorandum was completed, it was held that Leopold Newborne himself could not sue the buyers for non-acceptance of the goods, since there was nothing to show that he intended himself to be the seller. The only contracting party was the company, and all that Newborne intended to do by the addition of his own name was to authenticate the signature of the company.[20]

The position has been altered by section 9(2) of the European Communities Act 1972 (now Companies Act 1985, section 361(4)) which provides:[1]

> Where a contract purports to be made by a company or by a person as agent for a company, at a time when the company has not been formed, then subject to any agreement to the contrary the contract shall have effect as a contract entered into by the person purporting to act for the company or as agent for it and he shall be personally liable on the contract accordingly.

It will be seen that this provision makes no change in the position of the company, which still cannot ratify the contract. It is clearly intended however to increase the number of cases where the agent is personally liable. How far it in fact does so depends on the meaning given to the words 'subject to any agreement to the contrary'. In *Phonogram Ltd v Lane*[2] the Court of Appeal held that an agreement to the contrary could not be inferred from the fact that the agents had signed 'for and on behalf of' [the unformed company].

iii Void contracts cannot be ratified

The third essential is that there should be an act capable of ratification. Any contract made by A professing to act on behalf of P is capable of ratification, even though A acted fraudulently and with intent to benefit himself alone,[3] provided, however, that it is a contract which P could validly have made. A contract that is void in its inception cannot be ratified. It would seem on principle that a forgery is incapable of ratification not because it is a legal nullity, as indeed it is, but because a forger does not profess to act as an agent. The question arose in *Brook v Hook*:[4]

18 *Summergreene v Parker* (1950) 80 CLR 304 at 323, per Fullager J. See also *Black v Smallwood* (1965) 39 ALJR 405. For a general discussion, see Baxt 30 MLR 328.
19 *Hollman v Pullin* (1884) Cab & El 254; *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708.
20 *Newborne v Sensolid (Great Britain) Ltd* above, criticised by Gross 87 LQR 367 at 382-385.
1 See Prentice 89 LQR 518 at 530-533; Farrar and Powles 36 MLR 270 at 277.
2 [1982] QB 938, [1981] 3 All ER 182.
3 *Re Tiedemann and Ledermann Freres* [1899] 2 QB 66.
4 (1871) LR 6 Exch 89.

> P's name was forged by A to a joint and several promissory note for £20 purporting to be made by P and A in favour of X. In order to save A, P later signed the following memorandum:
>
> I hold myself responsible for a bill dated November 7th for £20 bearing my signature and that of A.

What A had written in effect was: 'Here is P's signature written by himself.' He did not say or imply, 'I make this note as agent of P.' The majority of the court, therefore, repudiated the suggestion that P was liable as having ratified the contract of 7 November, for as Kelly CB observed in an interlocutory remark: 'The defendant could not ratify an act which did not profess to be done for him or on his account.'[5]

D AGENCY OF NECESSITY

There is a limited class of case in which, on the ground of urgent necessity, one person may be bound by a contract made by another on his behalf but without his authority. This doctrine, which the courts are reluctant to extend,[6] probably applies only where there is already some existing contractual relationship between the principal and the person who acts on his behalf, as there is for instance between the owner and the master of a ship. It is extremely doubtful whether a person can be bound by the act of a complete stranger.[7] It is well settled, however, that the master of a ship is entitled, in cases of accident and emergency, to enter into a contract which will bind the owners of the cargo, notwithstanding that it transcends his express authority, if it is *bona fide* made in the best interests of the owners concerned.[8] The same power is possessed by a land carrier in respect of perishable goods.[9]

A person who seeks to bind a principal on these grounds bears the onus of proving that the course adopted by the carrier was reasonably necessary in the circumstances, and also that it was practically impossible to communicate with the cargo owners.

E PRESUMED AGENCY IN THE CASE OF COHABITATION

Marriage does not give the wife any innate power to bind her husband by contracts with third persons, but where she is living with him there is a presumption, though no more, that she is entitled to pledge his credit for necessaries which are suitable to his style of living and which fall within the domestic department usually confided to the care of the wife.[10]

5 See also per Lord Blackburn in *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 99.
6 *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983.
7 *Jebara v Ottoman Bank* [1927] 2 KB 254 at 271, per Scrutton LJ.
8 *The Argos* (1873) LR 5 PC 134; *Notara v Henderson* (1872) LR 7 QB 225.
9 *Sims v Midland Rly Co* [1913] 1 KB 103 at 112; *Sachs v Miklos* [1948] 2 KB 23 at 35, [1948] 1 All ER 67 at 68. The wife's agency of necessity was abolished by Matrimonial Proceedings and Property Act 1970, s 41. It is thought that the repeal of this section by Matrimonial Causes Act 1973, Sch 3 has not revived the doctrine. O'Neill 36 MLR 638 at 642, 37 MLR 360; Cartwright Sharp 37 MLR 240, 480.
10 *Debenham v Mellon* (1880) 6 App Cas 24 at 36; *Miss Gray Ltd v Earl of Cathcart* (1922) 38 TLR 562.

> There is a presumption that she has such authority in the sense that a tradesman supplying her with necessaries upon her husband's credit and suing him, makes out a prima facie case against him, upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husband's credit in respect of matters coming within those departments.[11]

The presumption applies equally in the case of a woman living with a man as his mistress.[12]

Necessaries for this purpose have been authoritatively defined as 'things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife'.[13] It is the ostensible not the justifiable mode of living that sets the standard, and if a husband chooses to live beyond his means his liability may be correspondingly increased.[14] Necessaries include clothing, both for the wife and her children, articles of household equipment, food, medicines and medical attendance, and the hiring of servants. The liability of the husband, however, is always subject to the proviso that the goods are suitable and reasonable not only in kind but also in quantity. An action cannot be maintained against him in respect of extravagant orders.[15]

The tradesman bears the burden of proving affirmatively to the satisfaction of the court that the goods supplied to the wife are necessaries.[16] If he is unable to do this, as for instance where the goods consist of jewels[17] or articles of luxury such as a gold pencil case or a guitar,[18] his only action lies against the wife, unless he can show an express or implied assent by the husband to the contract.

> If a tradesman is about to trust a married woman for what are not necessaries, and to an extent beyond what her situation in life requires, he ought in common prudence to enquire of the husband if she has his consent for the order she is giving.[19]

It was held in 1870 that a judge may withdraw a case from a jury if he considers that there is no reasonable evidence upon which they could classify the goods as necessaries.[20]

Even where the goods, however, are undoubtedly necessaries the husband is only presumptively liable, and he may rebut the presumption and so escape liability. The presumption is rebutted if he proves that he expressly warned the tradesman not to supply goods on credit; that his wife was already supplied with sufficient articles of that kind[1] or with a sufficient allowance with which to purchase them;[2] or that he had expressly forbidden her to

11 *Debenham v Mellon* (1880) 5 QBD 394 at 402, per Thesiger LJ.
12 *Ryan v Sams* (1848) 12 QB 460.
13 *Phillipson v Hayter* (1870) LR 6 CP 38 at 42, per Willes J.
14 *Waithman v Wakefield* (1807) 1 Camp 120.
15 *Lane v Ironmonger* (1844) 13 M & W 368.
16 *Phillipson v Hayter* (1870) LR 6 CP 38 at 42.
17 *Montague v Benedict* (1825) 3 B & C 631.
18 *Phillipson v Hayter*, above.
19 *Montague v Benedict* (1825) 3 B & C 631 at 636, per Bayley J.
20 *Phillipson v Hayter* (1870) LR 6 CP 38 at 40.
1 *Seaton v Benedict* (1828) 5 Bing 28.
2 *Morel Bros & Co Ltd v Earl of Westmoreland* [1904] AC 11.

pledge his credit.[5] The reason why an express prohibition not communicated to the tradesman is a sufficient rebuttal is that the right of a wife to bind her husband rests solely upon the law of agency and, as we have seen, no one can occupy the position of a principal against his will. At the same time it is important to observe that if the husband has held his wife out in the past to the plaintiff so as to invest her with apparent authority under the doctrine of estoppel, a mere private prohibition addressed solely to her will not relieve him from liability in respect of her future purchases of a similar nature. In such a case it is his duty to convey an express warning to the tradesman.

3 Position of principal and agent with regard to third parties

The question to be considered here is whether the principal or the agent is capable of suing, or of being sued, by the third party with whom the agent has completed the contract. The position of the agent with regard to such a third party varies according to the circumstances. Presuming that the agent is authorised to make the contract, there are three possible cases.

First, the agent may not only disclose to the third party the fact that he is a mere agent, but may also name his principal.

Secondly, he may disclose the fact of the agency but withhold the name of the principal.

Thirdly, he may conceal both facts, in which case the third party will believe, contrary to the truth, that the agent is himself the principal and that nobody else is interested in the contract.

In considering the question whether the principal or the agent is a competent party to litigation the courts have gradually evolved certain general rules which vary with each of these three cases. The prima facie rule is, for instance, that if the contract is made for a named principal, then the principal *alone* can sue or be sued. It is important, however, to recognise at once that these rules are of a purely general character—mere rebuttable presumptions that are capable of being displaced by proof that the parties intended otherwise. Too much force must not be attributed to them, for at bottom the question whether the agent or the principal is competent to sue or to be sued is one of construction dependent inter alia upon the form of the contract between the agent and the third party. In short, the intention of the parties, so far as it appears from the circumstances, is decisive, but if no clear intention is evidenced then the question is determined by certain general principles that have been laid down to meet the three different cases.

Our discussion of the matter is based upon the following classification:

A The agent has authority and is known to be an agent, and his principal is (1) named, (2) not named.

B The agent has authority in fact but he does not disclose the existence of the agency.

5 *Jolly v Rees* (1864) 15 CBNS 628

A THE AGENT HAS AUTHORITY AND IS KNOWN TO BE AN AGENT

1 HIS PRINCIPAL IS NAMED

The general rule in this case is traditionally stated as follows:

> The contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue is the principal and the only person who can be sued is the principal.[4]

Normally the agent possesses neither rights[5] nor liabilities[6] with regard to third parties. This general rule, however, though constantly repeated, is, as we have said, far from inflexible. It may be excluded by the express intention of the parties. In the words of Wright J:

> Also, and this is very important, in all cases the parties can by their express contract provide that the agent shall be the person liable either concurrently with or to the exclusion of the principal, or that the agent shall be the party to sue either concurrently with or to the exclusion of the principal.[7]

Thus, an agent may sue or be sued upon a written contract in which he states: 'I for my own self contract', though of course, the principal also remains liable and entitled.[8]

So too cases have arisen where a seller, when asked by an agent to supply goods to a named principal, refuses to do so unless the agent assumes sole liability for payment. In such a case, of course, the agent makes himself liable if he accepts the condition, and the seller cannot afterwards charge the principal. The judges have sometimes explained the position by saying that the seller is held to an election made at a time when he was free to choose between the one party and the other.[9]

Further, the intention to make the agent a party may be inferred as well as expressed, and it is purely a question of construction in each case, dependent upon the form and terms of the particular contract and upon the surrounding circumstances, whether such an intention is disclosed.

> The intention for which the court looks is an objective intention of both parties, based on what two businessmen making a contract of that nature, in those terms and those surrounding circumstances must be taken to have intended.[10]

The tenor of the decisions is that if a man signs a contract in his own name without any qualification, something very strong indeed on the face of the contract is needed to exclude his personal liability;[11] but if his signature is qualified by such expressions as 'on account of', 'for and on behalf of' or 'as agent', his personal liability is certainly negatived.[12]

4 *Montgomerie v United Kingdom Steamship Association* [1891] 1 QB 370 at 372, per Wright J.
5 *Fairlie v Fenton* (1870) LR 5 Exch 169.
6 *Paquin v Beauclerk* [1906] AC 148.
7 *Montgomerie v United Kingdom Steamship Association* [1891] 1 QB 370 at 372.
8 *Fisher v Marsh* (1865) 6 B & S 411 at 415, per Blackburn J.
9 *Calder v Dobell* (1871) LR 6 CP 486 at 494, citing *Addison v Gandassequi* (1812) 4 Taunt 574; *Paterson v Gandasequi* (1812) 15 East 62.
10 *The Swan* [1968] 1 Lloyd's Rep 5 at 12, per Brandon J.
11 *Cooke v Wilson* (1856) 1 CBNS 153 at 162, per Cresswell J. *Gadd v Houghton* (1876) 1 Ex D 357 at 360.
12 *Gadd v Houghton*, above; *Universal Steam Navigation Co Ltd v James McKenvie & Co* [1923] AC 492; *Lester v Balfour Williamson Merchant Shippers Ltd* [1953] 2 QB 168, [1953] 1 All ER 1146. It is a little difficult to reconcile *The Swan* [1968] 1 Lloyd's Rep 5, with these authorities; see Legh-Jones 32 MLR 327, *contra* Reynolds 85 LQR 92.

To infer the intention of parties is seldom a simple matter, but in this particular context the chief sources of enlightenment are, first, the description of the parties in the body of the contract and, secondly, the signature of the agent.

If in *both* places the agent is referred to as agent, it is almost impossible to regard him as a contracting party; but if in neither place is there any mention of the agency, it is almost impossible to deny that he is a contracting party.

If he is described as agent in one part of the contract only, whether in the body or in the signature, it is presumed that he is not a contracting party, but the presumption may be rebutted from the context.

2 HIS PRINCIPAL IS NOT NAMED

Does the mere non-disclosure of the name of the principal vary the position of the parties? Once more the general rule is that the agent drops out, but once more whether he does so or not depends essentially upon the intention of the parties. It is still a question of construction, dependent inter alia upon the form of the contract or the nature of the agent's business, whether they intended that the agent should possess rights and liabilities. Where, however, the name of the principal has not been disclosed an intention that the agent shall be a contracting party will more readily be inferred. Obviously, where there has been no such disclosure, greater significance is to be attached to the rule already cited that, if a man signs a contract in his own name, there must be something very strong on the face of the contract to deprive him of rights and liabilities. But the contract is construed according to its natural meaning and, if it clearly shows that the agent must have been understood to have contracted merely as an agent, then, despite the fact that the principal for whom he acted has not been named, effect is given to the natural meaning of the words, and he drops out of the transaction.

The position may be illustrated by the case of *Southwell v Bowditch*:[15]

A broker issued a contract note couched in these terms:

> Messrs Southwell. I have this day sold by your order to my principals, etc. 1 per cent brokerage.
>
> (Signed) W A Bowditch.

It will be observed that the defendant, though referring to principals, signed this contract in his own name without any additional words to show that he signed in the capacity of agent, but nevertheless it was held that he was not personally liable for the price of the goods sold. In the course of his judgment Jessel MR said:

There is nothing whatever on the contract to show that the defendant intended to act otherwise than as broker. No doubt it does not absolutely follow from the defendant appearing on the contract to be a broker that he is not liable as principal. There are two ways in which he might so be made liable: first, intention on the face of the contract making the agent liable as well as the principal; secondly, usage.

15 (1876) 1 CPD 374. For a parallel situation in an oral contract, see *N and J Vlassopulos Ltd v Ney Shipping Ltd, The Santa Carina* [1977] 1 Lloyd's Rep 478.

SPECIAL CASES

Whether the principal has been named or not, there are three exceptional cases in each of which the position of the agent is determined by special rules. These are where the agent executes a deed in his own name; where he puts his name to a negotiable instrument; and where there is some relevant trade usage. We will take these cases separately.[14]

i Contracts under seal

If an agent makes a contract *under seal* on behalf of another it has long been established that he is personally liable and entitled under it, and that the principal has neither rights nor obligations.[15] That is what is called a 'technical rule', ie to quote the words of Martin B, a rule 'which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed established rule to be acted upon, and only discussed as regards its application'.[16]

It formerly produced this inconvenient result, that a man who gave a power of attorney to another in order, for instance, that his affairs might be administered during his absence or illness, could neither sue nor be sued upon contracts made under its authority if they were made by deed. This particular inconvenience has, however, been removed by legislation.[17]

The technical rule, however, is subject to this limitation, that if the agent enters into a sealed contract as *trustee* for the principal, whether the trust is disclosed on the face of the contract or not, and he refuses to enforce it against the other party, then the principal, *qua* beneficiary, may himself enforce any proprietary right to which he is entitled by bringing an action against the third party and the agent.[18] It would seem to follow that in such a case the principal is equally liable to be sued by the third party.

ii Negotiable instruments

An agent contracts no personal liability under a negotiable instrument in the issue of which he is implicated unless he adds his name as a party to it; but if he does appear as a party then his liability depends upon whether he signs as acceptor or in some other capacity such as drawer or endorser.

Where he appears as acceptor the crucial question is whether the bill is drawn on him or not. If it is drawn on him in his own name, his acceptance renders him personally liable even though he adds words to his signature describing himself as agent. To escape liability he must add words indicating that he is acting in a purely ministerial capacity.[19] In one case, for instance, Charles, the agent of a company, wrote the following across the face of a bill which had been drawn on him, not on the company:

14 Some of these cases may occur when the agent is acting for an undisclosed principal, but as this is not likely to happen in practice, it seems more convenient to deal with them here. It was formerly thought that a fourth exceptional case is where an agent contracts on behalf of a foreign principal; p 538, below.

15 *Re International Contract Co, Pickering's Claim* (1871) 6 Ch App 525; *Schack v Anthony* (1813) 1 M & S 573.

16 *Chesterfield Colliery Co v Hawkins* (1865) 3 H & C 677 at 691-692.

17 Law of Property Act 1925, s 123.

18 *Harmer v Armstrong* [1934] Ch 65. In such a case the rights and liabilities of the parties are governed by the doctrine discussed, pp 503 ff, above.

19 Bills of Exchange Act 1882, s 26.

> Accepted for the company. W Charles. Purser.

It was held that he was personally liable.[20]

If, however, the bill is not drawn on the agent, his acceptance, even though unqualified, does not render him liable.[1] Thus, for instance, if a bill is drawn on a company, the directors incur no personal liability if they write the following on the instrument:

> Accepted. X and Y, Directors of the company.

Where an agent draws or endorses a negotiable instrument the position is as follows. If he signs his name without any qualification he is personally liable.[2] If he adds a qualification there are two classes of cases. A qualification which clearly indicates that he is contracting as agent for another, as, for example, where he writes: 'For and on behalf of Jones, as agent', relieves him of personal liability;[3] but an ambiguous qualification, which leaves it doubtful whether he is acting in a purely representative capacity or not, renders him liable. The endorsement, for instance, 'X and Y, Directors', will render X and Y liable, for the word 'Directors' does not necessarily show that they were acting as agents, but may equally well have been used to explain why their names appeared on the bill at all.[4]

iii Trade usage

The position of an agent as a contracting party may be determined by a trade usage. In one case, for instance, X and Y, who were brokers in the Colonial fruit trade, signed the following contract:

> We have this day sold for your account to our principal, etc.
>
> (Signed) X and Y, Brokers.

The principal, whose name was disclosed before delivery, refused to accept the whole of the goods, and an action of non-acceptance succeeded against the agent on proof of a custom in the fruit trade that a broker was personally liable if the name of the principal was not inserted in the written contract.[5] A custom, however, is disregarded if it is inconsistent with the contract.[6]

FOREIGN PRINCIPAL

One of the trade usages established by the law merchant was that a person who contracted as agent for a foreign principal was to be regarded as having contracted as principal to the exclusion of the foreigner. In 1873, Blackburn J said:

> Where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that

20 *Mare v Charles* (1856) 5 E & B 978.
1 *Stacey & Co Ltd v Wallis* (1912) 106 LT 544.
2 *The Elmville* [1904] P 319.
3 *Elliott v Bax-Ironside* [1925] 2 KB 301 at 307, per Scrutton LJ.
4 *Kew v Pettet* (1834) 1 Ad & El 196; *Elliott v Bax-Ironside*, above.
5 *Fleet v Murton* (1871) LR 7 QB 126.
6 *Barrow and Bros v Lyster, Nalder & Co* (1884) 13 QBD 635.

> the foreign constituent has not authorised the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain shewing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner.[7]

The law merchant, however, is not immutable, and with the vast increase in international trade this particular usage has steadily waned in importance and has now disappeared. As long ago as 1917, its continued existence was doubted by such an experienced judge as Bray J.[8] and its final extinction has now been confirmed.[9] In every case, foreign element or no foreign element, the question whether the agent becomes a party to the contract or whether privity of contract has been created between his principal and the third party must be determined in the light of the intention of the parties as disclosed by the terms of the contract and the surrounding circumstances. The nationality or domicile of the principal is merely one of those circumstances, and even so it is only of minimal importance. The statement of Lord Blackburn no longer represents the law.[10] A case in which the intention of the parties was disclosed by the terms of the contract itself was *Miller, Gibb & Co v Smith and Tyrer Ltd*,[11] where the facts were these:

> A firm called Smith & Tyrer Ltd executed the following instrument on behalf of a foreign principal:
>
> Contract by which our principals sell through the agency of Smith & Tyrer Ltd. wood brokers, Liverpool, and Messrs Miller, Gibb & Co. of Liverpool, buy, etc.
>
> (Signed) By authority of our principals
> Smith & Tyrer Ltd.
> Chas H Tyrer, managing director, as agents.

The Court of Appeal had no difficulty in holding that the intention was to exclude the personal liability of the agents.

> It seems to me difficult for the parties to have used clearer words to show that the principals were to be liable and the agents were not to be liable ... The agents were not professing to contract at all, the principals were: and the agents state expressly that they have authority from their principals to sign the contract.[12]

Indeed, to have denied that the agents had acted in a purely representative capacity would have flatly contradicted the tenor of the instrument.

7 *Elbinger Act. für Fabrication von Eisenbahn Materiel v Claye* (1873) LR 8 QB 313 at 317, and see the authorities there cited.

8 *Miller, Gibb & Co v Smith and Tyrer Ltd* [1917] 2 KB 141; see also *H O Brandt v H N Morris & Co* [1917] 2 KB 784 at 797.

9 *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 53; affd [1968] 2 QB 545, [1968] 2 All ER 886. See Hudson 29 MLR 353.

10 *Holt and Moseley (London) Ltd v Cunningham Partners* (1949) 83 Ll L Rep 141 at 145; *Rusholme, Bolton and Roberts, Hadfield Ltd v S G Read & Co (London) Ltd* [1955] 1 All ER 180, [1955] 1 WLR 146, 150, where the foreign principal was undisclosed; *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd*, above.

11 [1917] 2 KB 141.

12 Ibid at 165, per Bray J.

WHERE AGENT IS IN FACT PRINCIPAL

It remains to consider a peculiar situation that may arise where a man, though purporting to be an agent, is in fact himself the principal. Here there is no doubt that he is personally liable.[13] This seems to be common sense. As Scrutton LJ once remarked 'I am sure it is justice. It is probably the law for that reason.'[14]

Moreover the agent in such a case can himself enforce the contract, provided that the supposed principal has not been named and also that the terms of the contract show that the identity of the party is not material. This was decided in *Schmaltz v Avery*,[15] where the facts were these:

> A charterparty was executed between X, the owner of the ship, and A, which expressly stated that A was acting as agent of the freighters. It contained these words: 'This charterparty, being concluded on behalf of another party, it is agreed that all responsibility on the part of A shall cease as soon as the cargo is shipped.' Actually A was himself the freighter, and he later brought an action against X.

It was argued that the action would not lie, since X had relied for the fulfilment of the contract upon the undisclosed freighters with whom he believed himself to be dealing. This argument failed and the action was allowed. It was obvious, in accordance with the doctrine of the undisclosed principal, that the freighters, if they had actually existed, could have enforced the contract. The only question was whether one person can fill the characters both of principal and agent, or rather, whether he can repudiate that of agent and assume that of principal. It is no doubt true that the identity of the other party is often a matter of vital importance, but in this case the court was of opinion that as the name of the freighter had never been demanded it was impossible to presume that X would not have made the contract had he known A to be the principal.

A person who has contracted as agent cannot, however, assume the character of principal if the name of his supposed principal has been given.[16]

B THE AGENT HAS AUTHORITY IN FACT BUT HE DOES NOT DISCLOSE THE EXISTENCE OF THE AGENCY

Where an agent, having authority to contract on behalf of another, makes the contract in his own name, concealing the fact that he is a mere representative, the doctrine of the undisclosed principal comes into play. By this doctrine either the agent, or the principal when discovered, may be sued; and either the agent or the principal may sue the other party to the contract.

There is nothing remarkable in this doctrine so far as it concerns the agent. The existence of an enforceable contract between him and the third party is scarcely deniable, for he purports to act on his own behalf and the other party

13 *Jenkins v Hutchinson* (1849) 13 QB 744 at 752, per Lord Denman.
14 *Gardiner v Heading* [1928] 2 KB 284.
15 (1851) 16 QB 655; followed in *Harper v Vigers Bros* [1909] 2 KB 549.
16 *Fairlie v Fenton* (1870) LR 5 Exch 169. Where there is undoubtedly a contract which calls for acts to be done by the agent of one party, it may be, as a matter of construction that those acts cannot be done by the principal himself: *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581.

is content with this apparent state of affairs. At any rate it is well settled that the contract is enforceable either by[17] or against[18] the agent. The primary liability that rests upon him as being a party to the contract is not destroyed by the fact that the principal also may be added as a party.[19] Parol evidence is admissible to introduce a new party, ie the principal, but is never admissible for the purpose of discharging an apparent party, ie the agent.

What is more curious about the doctrine is that the principal should be allowed to intervene, for at first sight it seems inconsistent with elementary principles that a person should be allowed to enforce a contract that he has not in fact made. On the other hand this right of intervention is in many cases both just and convenient. If, for instance, the agent of an undisclosed seller were to go bankrupt after delivery of the goods but before the payment of the price, the money, unless it were demandable by the seller direct from the buyer, would go to swell the assets divisible among the general creditors of the agent. Considerations of this nature ultimately produced the rule, though without any manifest enthusiasm on the part of the business community, that a principal may disclose his existence and may himself maintain an action against the person with whom his agent contracted.[20] Thus, for example, if two or more arrange that one of themselves shall buy goods in his own name on their joint behalf, they may jointly or severally sue the vendor in the event of a breach of contract.[1]

These rights possessed by the agent and by the principal against the third party are independent rights, except that the rights of the agent are subordinate to those of the principal.[2] If, for example, an action for breach of contract brought by the agent against the third party is dismissed, this does not preclude a similar action by the principal. It cannot be said that the agent sued on behalf of his principal and that therefore the latter is estopped from taking further proceedings.

The right of action possessed by the undisclosed principal is, however, subject to two limitations:

First, the authority of the agent to act for the principal must have existed at the time of the contract.[3]

Secondly, if the contract, expressly or by implication, shows that it is to be confined in its operation to the parties themselves, the possibility of agency is negatived and no one else can intervene as principal.[4] Whether this is the intention of the parties is a matter of construction. Thus it has been held that for an agent to describe himself as 'owner'[5] or 'proprietor'[6] of the subject matter of the contract precludes the principal, whether disclosed or not, from suing or being sued. In such a case the other party contracts upon the basis that the person with whom he is dealing is sole owner of the subject matter, and as Lord Haldane once said:

17 *Sims v Bond* (1833) 5 B & Ad 389.
18 *Saxon v Blake* (1861) 29 Beav 438.
19 *Higgins v Senior* (1841) 8 M & W 834.
20 *Scrimshire v Alderton* (1743) 2 Stra 1182.
1 *Skinner v Stocks* (1821) 4 B & Ald 437.
2 *Pope v Evans* [1969] 2 Ch 255, [1968] 2 All ER 743.
3 *Knights, Maxsted & Co v Durant* [1901] AC 240 at 251, per Lord James of Hereford. See the remarks of Diplock LJ in *Garnac Grain Co Inc v H M F Faure and Fairclough Ltd and Bunge Corpn* [1966] 1 QB 650 at 648, [1965] 3 All ER 273 at 286. See pp 528-532, above.
4 See two notes by PAL in 61 LQR 130-133; 62 LQR 20-22. See also Goodhart and Hamson 4 CLJ 320 at 352-358. Cf *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213.
5 *Humble v Hunter* (1848) 12 QB 310 at 317.
6 *Formby Bros v Formby* (1910) 102 LT 116.

> Where it is a term of the contract that he should contract as owner of that property, you cannot show that another person is the real owner.[7]

On the other hand, the description of a person as 'charterer'[8] or 'tenant'[9] or 'landlord'[10] no more negatives the existence of agency than would the description 'contracting party'.

As a corollary to the right of intervention by an undisclosed principal it is well established that when discovered he may be sued upon the contract made by his agent.[11] Nevertheless the third party must elect which of these two inconsistent rights he will enforce, for the contract cannot be enforced against both the principal and the agent.

> If a man is entitled to one of two inconsistent rights it is fitting that where with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.[12]

Whether the conduct of the third party shows an unequivocal election to resort to the agent alone or to the principal alone is a question of fact that must be decided in the light of all the relevant circumstances. For instance, the initiation by him of proceedings against one of the two parties is strong evidence of a final election. Yet it is not necessarily conclusive, for further evidence may show that the right of action against the other party had not been abandoned.[13] This was the decision reached by the Court of Appeal in *Clarkson Booker Ltd v Andjel*.[14] The plaintiffs supplied air tickets to the value of £728 7s 6d to the defendant, a travel agent, with whom, on several occasions in the past, they had dealt as principal. Later, P & Co, also operating as travel agents, disclosed that the defendant had in fact acted solely as their agent.

> The plaintiffs wrote separate letters to the defendant and to P & Co threatening proceedings if payment were not made. After waiting for some five weeks they issued a writ against P & Co, but on learning two months later that the company was insolvent they proceeded no further with the action. They then issued a writ against the defendant and judgment was given in their favour in the court of first instance. The defendant appealed on the ground that the plaintiffs, by serving the earlier writ on P & Co had elected to exonerate him personally from liability.

It was held that no such election had been made. The threat to proceed against the defendant had never been withdrawn; his position had not been prejudiced by the action against P & Co; and above all it was to him alone that in the past the plaintiffs had always looked for payment.

Had the plaintiffs obtained judgment against P & Co they would, indeed, have been precluded from suing the defendant, not because they had made a final election, but because the law does not countenance the co-existence

7 *Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic* [1919] AC 203 at 207.
8 Ibid.
9 *Danziger v Thompson* [1944] KB 654, [1944] 2 All ER 151.
10 *Epps v Rothnie* [1945] KB 562, [1946] 1 All ER 146.
11 *Thomson v Davenport* (1829) 9 B & C 78.
12 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30, per Lord Atkin.
13 *Clarkson Booker Ltd v Andjel* [1964] 2 QB 775, [1964] 3 All ER 260. For a critique of the doctrine of election, see Reynolds 86 LQR 318.
14 [1964] 2 QB 775, [1964] 3 All ER 260.

of two judgments in respect of the same debt or cause of action.[15] There shall not be more than one judgment on one entire debt.[16] If, for instance, the third party obtains judgment against a defendant who is in fact an agent, he cannot sue the principal, even though at the time of the action against the defendant he was ignorant of the principal's existence and even though the judgment remains unsatisfied.[17] He must first get that judgment set aside and then sue the principal.[18]

The juridical basis of the doctrine of the undisclosed principal has aroused considerable controversy.[19] The anomalous feature of the doctrine is that it allows 'one person to sue another on a contract not really made with the person suing'.[20] This patently ignores the common law requirement of privity of contract, and the view of Lord Lindley, that 'the contract is in truth, although not in form, that of the undisclosed principal himself', has found few supporters.[1]

If, therefore, we look no further than the common law, the rule that the undisclosed principal can sue or be sued must find its justification in business convenience, though this will not warrant the conclusion that privity of contract exists between him and the third party. However, it has been suggested by high authority that the doctrine can be rationalised as avoiding circuity of action if the aid of equity is invoked. 'For the principal could in equity compel the agent to lend his name in an action to enforce the contract against the contractor, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract.'[2]

C THE EFFECT OF A PAYMENT TO THE AGENT

It may happen that either the principal or the third party settles with the agent, who, however, by reason of bankruptcy or fraud, fails to pass the money on to the creditor. The question then arises whether the payer is liable to pay over again. There are two separate cases.

First, the principal, having instructed his agent to buy goods, pays the purchase price to the agent, who fails to pay the seller.

Secondly, the principal instructs his agent to sell goods; the agent sells to a buyer and receives payment from him, but does not pay the principal.

In the first case, the general rule is that the principal remains liable to the seller, provided at least that the agent was known by the seller to be acting as an agent.[3] The seller, however, may be estopped by his conduct from taking

15 *Kendall v Hamilton* (1879) 4 App Cas 504 at 515, per Lord Cairns.
16 *Hammond v Schofield* [1891] 1 QB 453 at 457, per Vaughan Williams J; *Moore v Flanagan* [1920] 1 KB 919 at 925-926.
17 *Kendall v Hamilton* (1879) 4 App Cas 504 at 514.
18 *Partington v Hawthorne* (1888) 52 JP 807.
19 3 LQR 359; Ames *Lectures on Legal History* pp 453–463; Goodhart and Hamson 4 CLJ 320; Higgins 28 MLR 167.
20 Pollock 3 LQR 359.
1 *Keighley Maxsted & Co v Durant* [1901] AC 240 at 261. The fallacy of the view has been exposed by Goodhart and Hamson 4 CLJ 320.
2 *Freeman and Lockyer v Buckhurst Park Properties (Magnal) Ltd* [1964] 2 QB 480 at 503, per Diplock LJ.
3 *Irvine v Watson* (1879) 5 QBD 102; affd 5 QBD 414.

advantage of this rule. If his conduct unequivocally showed that he looked to the agent alone for payment and thereby induced the principal, after the debt became due, to settle with the agent, resort cannot afterwards be had to the principal.[4] To gain this immunity the principal must show that he was reasonably misled by the seller's conduct into settling with the agent. If, for instance, the seller takes security from the agent and gives him a receipt for the purchase price, the principal will be discharged if he settles with the agent on the faith of the receipt.[5] The whole subject was reviewed in *Irvine v Watson*,[6] where the facts were these:

> P employed A, a broker, to buy oil for him. A bought from S, telling him that he was buying for a principal but not disclosing the name. The terms of the sale were that payment should be made 'by cash on or before delivery', but, despite this, S delivered the oil without receiving payment. P, unaware that S had not been paid, in good faith paid A. A became insolvent, whereupon S sued P. It was proved that it was not the invariable custom in the oil trade to insist upon pre-payment even where the terms were cash on or before delivery.

It was argued on behalf of P that, since he knew that the contract provided for payment in cash on or before delivery, he was justified in presuming that S would not have made delivery without receipt of the money. This argument did not prevail. The clause in the contract providing for cash on or before delivery was not sufficient to raise an estoppel, since S had a perfect right to deliver without requiring pre-payment. Had the invariable custom been to exact pre-payment, the conclusion might well have been different.

The question remains whether the rule is different if the seller is unaware of the agency and deals with the agent as sole principal. If the person who is in fact principal *bona fide* settles with the agent, does he remain liable for the price? It was decided in *Heald v Kenworthy*[7] that even here the general rule applies and that failing estoppel the principal may be compelled to make a second payment. In that case:

> An undisclosed principal, who had authorised an agent to buy goods on his behalf, was sued for the price by the seller. He pleaded that within a reasonable time after the sale and not unduly early he had *bona fide* paid his agent in full.

It was held on demurrer that this plea was bad. The general rule was stated as follows in the head note:

> Where a principal authorises his agent to pledge his credit, and the latter makes a purchase on his behalf and thereby creates a debt, the principal is not discharged by payment to the agent if the money is not paid over to the seller, unless the latter by his conduct makes it unjust that the principal should be sued, eg, where the seller by his words or conduct induces the principal to believe that a settlement has been come to between the seller and the agent, in consequence of which the principal pays the amount of the debt to the agent.

4 *Macfarlane v Giannacopula* (1858) 3 H & N 860.
5 *Wyatt v Marquis of Hertford* (1802) 3 East 147.
6 (1879) 5 QBD 102; affd 5 QBD 414.
7 (1855) 10 Exch 739.

This rule, however, was somewhat rudely disturbed sixteen years later by the decision in *Armstrong v Stokes*.[8] In that case:

> P & Co employed A & Co, commission merchants, who acted sometimes for themselves and sometimes as agents, to buy goods on their behalf. A & Co bought from S, with whom they had often had dealings in the past. S did not inquire whether A & Co were on this occasion acting for principals. P & Co in accordance with their usual custom paid A & Co in full on the next settling day, but the money did not reach S.

An action brought by S against P & Co failed. The court considered that, as P & Co had paid A & Co at a time when S still gave exclusive credit to A & Co, S could not afterwards claim from P & Co. On the surface, therefore, *Armstrong v Stokes* is a flat reversal of *Heald v Kenworthy*. Which decision represents the modern law? Was the later distinguished from the earlier decision by some form of estoppel? On the whole it is safer to follow *Heald v Kenworthy*. *Armstrong v Stokes* was severely criticised by the Court of Appeal in *Irvine v Watson*, where its reconsideration at some later date was foreshadowed,[9] and the better opinion is that it turned in some measure upon the fact that A & Co were not normal agents but commission merchants.

The second case in which the effect of a settlement with an agent requires consideration is where the agent, having sold his principal's goods, receives payment from the buyer but does not pay the money over to his principal. Whether the buyer is in these circumstances liable to pay over again depends entirely upon whether the agent is authorised to receive the purchase money. If he possesses this authority, the buyer is discharged from further liability; if not, the liability remains. The general rule is that an agent authorised to sell is not authorised to receive payment.[10] The buyer, therefore, who seeks to avoid a double payment, must prove that the authority existed in fact. If the principal has expressly authorised the agent to accept payment, the matter is of course clear; but failing this the buyer must prove either that what he did was the usual and well-recognised practice in that particular type of agency, or that the agent had ostensible authority to receive the money.[11]

The right to set-off one debt against another raises a similar problem. If an agent authorised to sell goods owes a personal debt to the buyer, can the latter set this off against the purchase price that is due to the principal? The answer is that he enjoys this right only if he has been led to believe by the conduct of the principal that the agent is himself the owner of the goods sold. The law has been summarised by Martin B in the following words:

> Where a principal permits an agent to sell as apparent principal and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of disclosure of the real principal as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal.[12]

8 (1872) LR 7 QB 598.

9 (1880) 5 QBD 414 at 421. For a reappraisal of the decision, see Higgins 28 MLR 167 at 175-178.

10 *Drakeford v Piercy* (1866) 7 B & S 515; *Butwick v Grant* [1924] 2 KB 485. So an estate agent does not normally have apparent authority to receive a deposit on behalf of the vendor of a house. *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371; Reynolds 92 LQR 484.

11 *Butwick v Grant*, above.

12 *Isberg v Bowden* (1853) 8 Exch 852 at 859.

The question generally arises when the principal has entrusted the agent with possession of the goods.[13] In this case the buyer is entitled to a set-off if he proves that the agent sold the goods in his own name as if they were his own, that he himself *bona fide* believed the agent to be the principal in the transaction, and that before he was undeceived in this respect the set-off had accrued.[14]

It is clear, therefore, that no right of set-off exists if the buyer knows the agent to be an agent though ignorant of the principal's identity, or if he knows that the agent sometimes deals as agent, sometimes on his own account, but does not trouble to ascertain the capacity in which he is acting in the present transaction.[15]

4 Unauthorised acts of the agent

A THE POSITION OF THE PRINCIPAL

It is obvious that the principal is bound by every contract or disposition of property made by the agent with his authority. The reverse is equally obvious. If a man acts as agent without any authority whatsoever, or if an agent exceeds his authority, the principal (apart from ratification), is not liable at all in the first case and in the second is not liable for the excess. Thus, if the managing committee of a club has no authority to buy goods on credit, an order given for wine by one of the members does not bind his colleagues. The same rule applies where an agent is adjudicated bankrupt after having disposed of his principal's goods contrary to instructions. In this case the principal is not reduced to proving in the bankruptcy equally with the other creditors, but can recover the whole price if the agent has wrongfully sold goods, and can recover in full money or property which may have passed to the trustee in bankruptcy.[16] A similar rule applied at common law to a wrongful disposition by an agent of goods which had been entrusted to him by a principal.[17] This rule, however, and the maxim upon which it was based—*nemo dat quod non habet*—has been largely modified by subsequent legislation.[18]

Nevertheless, to say that a principal is liable only for what has been done within the authority of his agent leaves open the critical question: What is the meaning of 'authority' in the eyes of the law? The meaning is not self-evident, for what has not in fact been authorised may none the less be regarded by the law as authorised. The position with regard to this matter has been restated and clarified by two modern decisions of the Court of Appeal.[19] These show that a distinction must be drawn between the agent's *actual* authority on the one hand, and his *apparent or ostensible* authority on the other.

13 *George v Clagett* (1797) 7 Term Rep 359.
14 *Montagu v Forwood* [1893] 2 QB 350 applied *Lloyds and Scottish Finance Ltd v Williamson* [1965] 1 All ER 641, [1965] 1 WLR 404.
15 *Cooke & Sons v Eshelby* (1887) 12 App Cas 271.
16 *Taylor v Plumer* (1815) 3 M & S 562; *Re Strachan, ex p Cooke* (1876) 4 ChD 123.
17 *Cole v North Western Bank* (1875) LR 10 CP 354 at 362, per Blackburn J.
18 Pp 548 ff, below.
19 *Freeman and Lockyer v Buckhurst Park Properties (Magnal) Ltd* [1964] 2 QB 480, [1964] 1 All ER 630, especially the judgment of Diplock LJ; *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 3 All ER 98.

instructions that they are not to be disposed of but are to be retained pending further directions. The factor, however, in breach of his authority, sells or pledges the goods to a third party who acts *bona fide* and for value. Is the principal to be allowed to rely upon the maxim *nemo dat quod not habet*, and to succeed in an action of trover against the third party? The common law doctrine of ostensible ownership, analogous to the doctrine of ostensible agency, could indeed have settled this problem without any aid from the legislature, for it was designed to meet just such a case as that proposed above.

> The doctrine is that if the owner of goods acts in such a way as to induce the belief in a third party that the ownership is vested in X, and if in *bona fide* reliance upon this belief the third party enters into some transaction with X under which he acquires the goods for value, the owner is estopped from disputing the validity of the transaction.

In such circumstances the apparent ownership is in the eye of the law equivalent to real ownership. Since a factor is a mercantile agent whose ordinary course of business is to dispose of the goods of which he is in possession, it is obvious that to put him in possession must induce the belief in the business community that he enjoys the powers of disposition usually exercised by this type of agent. The courts, indeed, recognised this fact to a large extent, for they held that if a factor *sold* the goods of which he was in possession his principal was estopped from denying his authority to sell. They refused, however, to make other forms of disposition equally binding upon the principal. Although the well-established custom was for factors who had received goods for disposal to advance money to the owner and then to pledge the goods in order to keep themselves in funds, the courts persistently held that a pledge, as distinct from a sale, did not raise an estoppel against the owner so as to confer a good title on an innocent pledgee. Lord Ellenborough said:

> It was a hard doctrine when the pawnee was told that the pledger of goods had no authority to pledge them, being a mere factor for sale; and yet since the case of *Paterson v Tash*[15] that doctrine has never been overturned.[16]

The Factors Act, however, now affords adequate protection to persons who *bona fide* enter into transactions with mercantile agents as defined by the Act.[17] Section 2(1) provides as follows:

> Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has no authority to make the same.

This provision is extended by a later section to the case where a buyer, having obtained goods with the consent of the seller, later transfers their possession

15 (1743) 2 Stra 1178.

16 *Pickering v Busk* (1812) 15 East 38 at 44.

17 The statutory definition is: 'A mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.' See Factors Act 1889, s 1(1).

to a person who receives them in good faith under a sale, pledge or other disposition. In this event, the buyer in making the disposition is placed in the same position by the Act as if he were a mercantile agent in possession of the goods with the consent of the owner. It is irrelevant that such is not his true description.[18]

Finally, it must be stressed that once 'an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal'.[19] Limitation is in fact imposed upon the powers of the agent and ignored by him and will not exonerate the principal from liability, unless, of course, their existence is known to the third party to the transaction[20] or the third party has not relied upon the ostensible authority of the agent.[1]

B THE POSITION OF THE AGENT

If a man contracts as agent without any authority in that behalf, the question arises whether he acquires either benefits or liabilities under the transaction.

With regard to benefits, the rule is that if a man contracts as agent for a *named* principal who has given no authority and who does not later ratify the contract, the self-styled agent acquires no rights whatsoever, since the solvency of the supposed principal may have induced the third party to enter into the transaction.[2] Thus, a purchaser at an auction sale signed a memorandum as agent for a named principal, and later sued in his own name to recover the deposit. He attempted to give evidence proving that he was the principal in the transaction, but the evidence was held to be inadmissible.[3]

On the other hand, if a man without any precedent authority contracts as agent but does not disclose the name of his supposed principal, it has been held in *Schmaltz v Avery*[4] that he is entitled to maintain an action in his own name on the contract.

The position with regard to the liability of an unauthorised agent is clear. It varies according to the state of his belief.

If he knows that he possesses no authority to act as agent, but nevertheless makes a representation to the contrary and in consequence causes loss to the party with whom he contracts, he may be sued in tort for the deceit.[5]

If, on the other hand, he mistakenly though innocently believes that he possesses authority, he cannot be liable in tort for deceit. Nor can he be made liable upon the contract which he purported to make on behalf of the principal, since this was not his contract, nor was it regarded as such by the third party. Thus in *Smouth v Ilbery*:[6]

18 Factors Act 1889, s 9; substantially reproduced in s 25(2) of the Sale of Goods Act 1893: *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560, [1964] 3 All ER 532.
19 *National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176 at 209, per Lord Blackburn.
20 *Watteau v Fenwick* [1893] 1 QB 346.
1 *Nationwide Building Society v Lewis* [1998] 3 All ER 143.
2 *Bickerton v Burrell* (1816) 5 M & S 383; *Fairlie v Fenton* (1870) LR 5 Exch 169.
3 *Bickerton v Burrell*, above.
4 (1851) 20 LJQB 228, followed in *Harper & Co v Vigers Bros* [1909] 2 KB 549.
5 *Polhill v Walter* (1832) 3 B & Ad 114.
6 (1842) 10 M & W 1.

> A wife, acting as the authorised agent of her husband, continually bought goods from the plaintiff, an English tradesman. The plaintiff knew that the husband was in China. The husband died without the knowledge of the parties, and the plaintiff sued the wife to recover the price of goods supplied to her after her authority had been revoked by the death of the principal.

The plaintiff sued on the contract of sale but failed, for it was clear that both in fact and in intention it was the husband, not the wife, who was the buyer.

A contractual basis upon which the agent himself can be held liable was, however, ultimately established in *Collen v Wright*.[7] In that case:

> A, describing himself as the agent of P, agreed in writing to lease to the plaintiff a farm which belonged to P. Both the plaintiff and A believed that A had the authority of P to make the lease, but this in fact was not the case. The plaintiff, having failed in a suit for specific performance against P, later sued to recover as damages from A's executors the costs that he had incurred in the suit.

The action succeeded. The court inferred from the circumstances a separate and independent contract by which A promised that he possessed the authority of P and in consideration of this promise the plaintiff agreed to take a lease of the farm. Willes J, in delivering the judgment of the majority of the Exchequer Chamber, said:

> The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to, or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have done in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise.

The decision, in other words, is an early example—perhaps the forerunner—of the so-called 'collateral contract'[8] which has been discussed in an earlier chapter,[9] though it has frequently been regarded as having established a particular doctrine called 'implied warranty of authority'. This is a misleading description of the reasoning in the case. The court did not imply a term of warranty in an already existing contract. It constructed a new and independent contract based upon the exchange of promises; on the one side that the authority existed and on the other that a lease would be taken.

The doctrine thus propounded in *Collen v Wright* was at once accepted by the profession and it has since been given wide currency. It is not confined to contracts, but extends to every business transaction into which a third party is induced to enter by a representation that the person with whom he is dealing has authority from some other person.[10] As Bramwell LJ put it in a later case: 'If a person requests and, by asserting that he is clothed with the necessary authority induces another to enter into a negotiation with himself and into a transaction with the person whose authority he represents that he

7 (1857) 8 E & B 647 at 657. See Fifoot *English Law and its Background* pp 174-177.

8 See Wedderburn [1959] CLJ 68.

9 Pp 69 ff, above.

10 *Firbank's Executors v Humphreys* (1886) 18 QBD 54; *Starkey v Bank of England* [1903] AC 114; V/O *Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1. *Penn v Bristol and West Building Society* [1997] 3 All ER 470.

has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction.'[11]

The result is the same if an authority that has been expressly conferred is ended by some event, such as the death or the lunacy of the principal, which supervenes without the knowledge of the agent. This occurred, for instance, in *Yonge v Toynbee*,[12] where the facts were these:

> P instructed A, a solicitor, to defend an action on his behalf, but he became insane before the action was begun. In ignorance of P's insanity A entered an appearance, delivered a defence and took other steps in connection with the litigation. When the plaintiff learned of P's condition he got the proceedings struck out and then sued to recover his costs from A, who, he contended, had defended the action without authority.

This contention was upheld. Although the solicitor's authority had automatically terminated with the insanity of the principal, his conduct tacitly guaranteed its continued existence. 'I can see no difference of principle', said Buckley LJ, 'between the case where the authority never existed at all and the case in which the authority has once existed and has ceased to exist.'[13]

5 Termination of agency

Agency is determinable either by act of the parties or by operation of law. It is determined by act of the parties if there is a mutual agreement to that effect; or if the authority of the agent is renounced by him or revoked by the principal. Determination by operation of law occurs by the happening of some event which renders the agency unlawful and also by the death, insanity or bankruptcy of one of the parties. We will consider these methods *seriatim*.

A TERMINATION BY ACT OF THE PARTIES

An agent who renounces his authority or a principal who revokes the authority may find that he has rendered himself liable for breach of contract. In deciding whether a breach has been committed, much will depend upon whether or not the actual relationship between the parties is akin to that which exists between an employer and an employee.

If the result of their agreement is to create an immediate and continuing *nexus* between them, as for example where the agent has promised to devote his time and energy on behalf of the principal in return for reward, their relationship bears a close analogy to that between an employer and employee. The agent has agreed to serve the principal; the principal has agreed to accept and to pay for that service. It is clear, therefore, that any unilateral termination of the relationship by either party will be wrongful unless it is in accordance with the contract. If there is an express term dealing with the matter, *cadit quaestio*. If not, all depends upon the construction of the contract. In the case of every contract, whether it be one of agency or not, the common intention

11 *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1 at 5.
12 [1910] 1 KB 215.
13 Ibid at 226.

of the parties with regard to the power of termination must be ascertained in the light of all the admissible evidence.

> An agreement which is silent about determination will not be determinable unless the facts of the case, such as the subject matter of the agreement, the nature of the contract or the circumstances in which the agreement was made, support a finding that the parties intended that it should be determinable.[14]

Thus in *Martin-Baker Aircraft Co v Canadian Flight Equipment*:[15]

> A was appointed sole selling agent on the North American Continent of all the products of P & Co. He agreed to use his best endeavours to promote sales in that territory, to act as general marketing consultant for P & Co and not to become interested in the sale of competitive products. His remuneration was to be a commission at the rate of 17½% on orders obtained by him.

P & Co desired to determine the relationship, but A contended that it was terminable only by mutual consent. There could be no doubt that the mutual promises constituted a contract binding upon both parties. There was express provision for the summary termination of the relationship in two particular events, but no similar provision to meet other circumstances. McNair J construed the contract as being closely analogous to one between master and servant and therefore as one that could not rationally be regarded as establishing a permanent bond between the parties. One party alone could not, indeed, terminate it summarily, but he could terminate it by serving reasonable notice on the other, that is to say in the instant case, twelve months' notice.

The presence or absence of a power of termination is a question which raises formidable difficulties throughout the law of contract—difficulties endemic in the application of rules of construction. Such rules are not docile servants and are the more intractable where unaccompanied by some initial presumption. Buckley J in *Re Spenborough UDC's Agreement*[16] denied the existence of any presumption either in favour of or against terminability. He was, indeed, confronted with inconsistent dicta in two House of Lords cases[17] and he may well have felt reluctant to choose between them. Neither of them was in fact concerned with problems of agency or employment, and in these two types of contract at least the possibility of termination is tolerably well settled.[18]

In many cases of agency, the relationship between the parties, unlike that between employer and servant, imposes no binding obligation upon either party. This is so, for instance, where an owner puts the sale of his property into the hands of an estate agent on commission terms. Here, the agent is not bound to do anything. Nor, at the outset, is the principal bound to do anything, for his only promise is to pay commission if and when the agent has brought

14 *Re Spenborough UDC's Agreement* [1968] Ch 139 at 147, [1967] 1 All ER 959 at 962, per Buckley LJ.

15 [1955] 2 QB 556.

16 [1968] Ch 139 at 147.

17 *Llanelly Rly and Dock Co v London and North Western Rly Co* (1875) LR 7 HL 550; *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331.

18 The question of terminability in the law of contract as a whole is discussed by Carnegie 85 LQR 392. He argues cogently in favour of a general presumption of terminability in all contracts of unspecified duration.

about the intended result.[19] Only then does a contractual *nexus* arise between the parties. This is another example of a promise that ripens into a contract upon the performance of a specified act, as in the case where a reward is offered for the supply of information. We have seen that the revocability of such offers is the subject of debate but it is clear that the property owner may revoke his mandate before his obligation to pay matures, ie at any time before the authorised act is performed by the agent.[20] Thus a commission agreement is a speculative contract under which the agent must take the risk that the prospective purchaser whom he has introduced may not be accepted as such by his principal.[1]

The general principles that govern the contract between the principal and agent in such a case were stated by Lord Russell of Killowen in *Luxor (Eastbourne) Ltd v Cooper*:

> (1) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything.[2]

The second and, in the present context, the most important observation of Lord Russell is in effect that the principal's liability for the payment of commission depends on whether, on the proper interpretation of the contract between him and the agent, the event has happened upon which the commission is to be paid.[3] The agent is not entitled to claim payment for work as such, but only for an event, ie the event required by his contract with the principal. Moreover, there is no implied condition that the principal will do nothing to prevent the agent from earning his commission. The effect, therefore, of this ruling is that the principal may terminate the contract at any time before the agent has accomplished what he undertook to do. This was decided in the *Luxor* case[4] itself, where the facts were these:

> P authorised A to negotiate for the sale of certain properties and promised to pay him a commission of £10,000 'on completion of the sale' if a price of £175,000 were procured. A obtained an offer to purchase at this price and the offer was accepted by P. Both the offer and acceptance, however, were made 'subject to contract', a formula which, as we have seen, postpones the creation of a binding contract.[5] P availed himself of this rule and refused to proceed further with the transaction.

A was unable to recover £10,000 by way of commission, since there had been no *completion of the sale*, the stipulated event that was to convert P's promise into

19 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 124, 141, 153, [1941] 1 All ER 33 at 45, 55, 65. Murdoch 91 LQR 357.
20 *Motion v Michaud* (1892) 8 TLR 253; affd 8 TLR at 447. See pp 64-66, above.
1 See Ash *Willing to Purchase* p 3.
2 [1941] AC 108 at 124, [1941] 1 All ER 33 at 45.
3 *Ackroyd & Sons v Hasan* [1960] 2 QB 144 at 154, per Upjohn LJ.
4 [1941] AC 108, [1941] 1 All ER 33.
5 P 43, above.

an obligation. The action was brought, therefore, to recover damages for breach of an implied term alleged to be contained in the agency contract. It was argued that P had implicitly promised that he 'would do nothing to prevent the satisfactory completion of the transaction so as to deprive the [agent] of the agreed commission'.

This attempt to invoke the doctrine of *The Moorcock*[6] failed. The contract did not lack business efficacy merely because it left P free to ignore or disown what A had done. The chances are that an agent of this type will reap substantial profit for comparatively little effort, and the possibility that he may lose the fruits of his labour at the caprice of the principal is a business risk that in practice is recognised and accepted. Moreover, it would be almost impossible to frame an implied term that would fairly and reasonably provide for the varying contingencies that may complicate such an agency, as for example the habit of entrusting the sale of a house to several agents each acting on a commission basis.

Thus the guiding rule in every case is 'that before you find the commission payable you must be satisfied that the condition on which it is payable has been satisfied'.[7] The intention of the parties as to the exact meaning of the condition must be ascertained by construing the actual words by which it is defined in the contract. Broadly speaking the intention which as a matter of probability the court should impute to the parties is that if no sale in fact results from the agent's efforts no commission shall be payable. This is the normal expectation of the vendor. Where the condition is described in general or ambiguous terms, such is the intention that the courts have usually attributed to the parties.[8] Examples of descriptive words that have led to this construction are where the agent has agreed to introduce 'a purchaser';[9] 'a person willing and able to purchase';[10] 'a person ready, able and willing to purchase';[11] 'a person prepared to enter into a contract to purchase'.[12]

Nevertheless, if the condition upon which commission is payable is defined in clear and unambiguous terms, effect will be given to it even though for some reason or other the sale turns out to be abortive.[13] Thus in *Midgley Estates Ltd v Hand*,[14] the bargain was that commission should be payable as soon as a

6 (1889) 14 PD 64; pp 157-162, above.

7 *A L Wilkinson Ltd v Brown* [1966] 1 All ER 509 at 510, [1966] 1 WLR 194 at 197, per Harman LJ; *Jacques v Lloyd D George & Partners Ltd* [1968] 1 WLR 625 at 630, per Lord Denning MR.

8 *Midgley Estates Ltd v Hand* [1952] 2 QB 432 at 435-436, [1952] 1 All ER 1394 at 1396, per Jenkins LJ.

9 *Jones v Lowe* [1945] KB 75, [1945] 1 All ER 194.

10 *Dellafiora v Lester* [1962] 3 All ER 395, [1962] 1 WLR 1208.

11 *Dennis Reed Ltd v Goody* [1950] 2 KB 277, [1950] 1 All ER 919. But cf *Christie Owen and Davies Ltd v Rapacioli* [1974] QB 781, [1974] 2 All ER 311.

12 *Ackroyd & Sons v Hasan* [1960] 2 QB 144, [1960] 2 All ER 254; *A L Wilkinson Ltd v Brown* [1966] 1 All ER 509, [1966] 1 WLR 194. In the former of these cases Winn J in the court of first instance, [1959] 1 WLR 706 at 711, insisted that any such phrase as 'introduce a person who is prepared to enter into a contract' must always be construed as 'a person who *does* enter into a contract'. This view was not favoured by the Court of Appeal, but it has been vigorously defended by Peter Ash in *Willing to Purchase* pp 91 ff.

13 *Midgley Estates Ltd v Hand* [1952] 2 QB 432 at 436.

14 [1952] 2 QB 432; applied in *Sheggia v Gradwell* [1963] 3 All ER 114, [1963] 1 WLR 1049, Lord Denning dissenting. This surprising decision was criticised by Salmon LJ in *Wilkinson Ltd v Brown* [1966] 1 All ER 509 at 515, [1966] 1 WLR 194 at 202-203.

purchaser introduced by the agent 'shall have signed a legally binding contract within a period of three months from this date'. The agents satisfied this condition and were held to be entitled to their commission notwithstanding the ultimate failure of the sale owing to the financial collapse of the purchaser.

Where a sale fails owing to the default of the principal, commission is payable if the default is wilful, but not if it is due merely to his inability to prove his title to the *res vendita*.[15]

One clear case in which an authority cannot be unilaterally revoked by the principal is where it is coupled with an interest held by the agent. If, for instance, a borrower, in consideration of a loan, authorises the lender to receive the rents of Blackacre by way of security, the authority remains irrevocable until repayment of the loan in full has been effected.

> Where an agreement is entered into on a sufficient consideration, [or by deed] whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable.[16]

This doctrine applies, however, only where the authority is created in order to protect the interest of the agent; it does not extend to a case where the authority has been given for some other reason and the interest of the agent arises later. This was the issue in *Smart v Sandars*,[17] where the facts were as follows:

> Goods were consigned by the principal to a factor for the purpose of being sold. The factor later advanced £3,000 to the principal. The principal then countermanded his instructions to sell the goods, but nevertheless they were sold by the factor.

In the action that was subsequently brought against him, the factor argued that the authority to sell which he had undoubtedly been given had become irrevocable, since in his capacity as lender he had acquired an interest in the proceeds of sale. This argument did not prevail. The authority arose prior to and independently of the creation of the interests, and therefore it was not irrevocable under the general doctrine, but could become so only if an express agreement to that effect were made. Had a contract of loan been concluded between the parties by which the factor had been put into possession of the goods with authority to sell them and to repay himself out of the proceeds, the authority would have been irrevocable.

The solution to problems of this kind will often now be different because of the Commercial Agents Regulations 1993. This gives effect to the European Directive on Commercial Agents and introduce a whole new notion into English law, which is that where the agent has participated in the building up of the business, the agent has a quasi property interest in the business which should be protected. It follows that in the area covered by the Directive, broadly situations where A has power to buy and sell on P's behalf, A is entitled to be compensated for invasions of this quasi property interest. The interest is protected even against express terms in the agency contract. The details are

15 *Blake & Co v Sohn* [1969] 3 All ER 123, [1969] 1 WLR 1412.
16 *Smart v Sandars* (1848) 5 CB 895 at 917, per Wilde CJ.
17 (1848) 5 CB 895.

complex but the regulations represent a major change in English agency law.[17] They are largely based on Continental systems, particularly German law.

Such, then, is the position where the principal revokes the authority of the agent. The fact that similar rules apply in the reverse case where the agent renounces his employment scarcely needs elaboration. If the revocation is in breach of contract, the principal may successfully institute an action for damages.[18]

B TERMINATION BY OPERATION OF LAW

A contract of agency is automatically determined by the occurrence of some event which renders the continuance of the relationship unlawful, as for example, where the principal becomes an alien enemy owing to the outbreak of war.[20]

The death of the principal determines the agency and relieves his estate from liability upon contracts made by the agent after his death, even though made in the honest belief that he was still alive.[1] On the other hand the agent is liable in such a case under the doctrine of the independent or 'collateral' contract.[2] In the case of a power of attorney, however, it has been enacted that if the attorney makes any payment or does any act in good faith in pursuance of the power, he shall not thereby incur liability by reason that without his knowledge the principal has died, or become bankrupt or has revoked the power.[3]

The death of the agent likewise determines the agency.[4]

A difficult question arises where an agent makes a contract with a third party after his principal has become insane. There are only two relevant authorities: *Drew v Nunn*[5] and *Yonge v Toynbee*.[6] In *Drew v Nunn*:

> The defendant, when sane, gave his wife authority to act for him and held her out to the plaintiff, a tradesman, as clothed with that authority. He became insane and was confined in an asylum. During this period, his wife bought goods on credit from the plaintiff who was unaware that the defendant had become mentally deranged. The defendant recovered his reason and resisted an action to recover the price of the goods supplied to his wife.

Two questions required an answer.

First, does insanity terminate the authority of the agent? This received an affirmative answer from Brett LJ and Bramwell LJ, though Cotton LJ felt some doubt. Since the husband could no longer act for himself, his wife could no longer act for him. The effect of this ruling is that the insanity of the principal

18 *Page v Combined Shipping and Transport Co Ltd* [1997] 3 All ER 656; *Moore v Piretta Pte Ltd* [1999] 1 All ER 174.
19 *Hochster v De La Tour* (1853) 2 E & B 678.
20 *Stevenson v Aktiengesellschaft fur Cartonnagen-Industrie* [1918] AC 239.
1 *Blades v Free* (1829) 9 B & C 167.
2 *Yonge v Toynbee* [1910] 1 KB 215; p 552, above.
3 Law of Property Act 1925, s 124(1).
4 *Friend v Young* [1897] 2 Ch 421.
5 (1879) 4 QBD 661.
6 [1910] 1 KB 215.

renders the contract *between the principal and agent* void, so that for instance no commission is payable on transactions later effected by the agent.

The second question then arose: What is the effect where the principal, having held out another as his agent, becomes insane and a third person deals with the agent without notice of the insanity? The court held that the principal remains liable for what the agent has done in his capacity as agent. Having held him out in that capacity, he has made a representation upon which third parties are entitled to act and to continue to act if they have no notice of the insanity. In the words of Bramwell LJ:

> Insanity is not a privilege, it is a misfortune, which must not be allowed to injure innocent persons: it would be productive of mischievous consequences, if insanity annulled every representation made by a person afflicted with it without any notice being given of his malady.[7]

It is submitted that the decision accords with common sense and with the view that a distinction must be drawn between the *authority* and the *power* of the agents, ie between his authority to act for the principal and his power to put his principal in a contractual relationship with third parties. The latter may continue after the former has ceased.[8]

But though the rule laid down in *Drew v Nunn* may be regarded as satisfactory, it has been confused by the decision of the Court of Appeal in *Yonge v Toynbee*.[9] The facts in this case, which have already been given,[10] were broadly similar to those in *Drew v Nunn*, except that the agent was ignorant of his principal's insanity when he contracted with the third party. The court applied the rule in *Collen v Wright*[11] and held that the agent was personally liable as having impliedly warranted the existence of his authority. The application of this rule would seem to be in conflict with the decision in *Drew v Nunn* that in similar circumstances the agent is still empowered to create a contractual relationship between his principal and a third party. If an agent has indeed this power, the principal could not possibly have been held liable, since a person under a disability may not defend any proceedings except by his guardian *ad litem*.[12] Secondly, and this carried great weight with Swinfen Eady J, the agent was a solicitor, an officer of the court upon whom the judiciary and other parties to litigation place great reliance. Much confusion would ensue 'if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one'.[13]

An agency is terminated by an act of bankruptcy committed by the principal, if he is later adjudicated bankrupt upon a petition presented within three months after the commission of the act. In other words the adjudication relates back to the act of bankruptcy, provided that it is followed within three months by a successful petition. Despite this general rule, however, every act done or contract made by the agent before the receiving order is valid in favour of a

7 *Drew v Nunn* (1879) 4 QBD 661 at 668.
8 Powell *The Law of Agency* (2nd edn) pp 5-6 and 389-391. See Higgins 1 Tasmanian L Rev 569, where the distinction is examined in a most helpful article.
9 [1910] 1 KB 215.
10 P 352, above.
11 P 351, above.
12 RSC Ord 80, r 2(1); replacing Ord 16B, r 2(1).
13 *Yonge v Toynbee* [1910] 1 KB 215 at 233, per Swinfen Eady J. This reasoning did not impress Buckley LJ, ibid at 228-229.

third person dealing with him for value and without notice of an act of bankruptcy,[14] and is also valid in favour of the agent in the sense that he is freed from personal liability if, at the time of acting, he had no notice of an available act of bankruptcy.[15]

14 Bankruptcy Act 1914, s 45. *Re Dougias, ex p Snowball* (1872) 7 Ch App 534
15 *Elliott v Turquand* (1881) 7 App Cas 79

assignor clearly is that the contractual right shall become the property of the assignee, then equity requires him to do all that is necessary to implement his intention. The only essential and the only difficulty is to ascertain that such is the intention. Lord MacNaghten, speaking of an equitable assignment, said:

> It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain.[12]

Where there is a contract between the owner of a chose in action and another person which shows a clear intention that such person is to have the benefit of the chose, there is without more a sufficient assignment in the eye of equity. It follows, therefore, that to perfect the title *as between assignor and assignee* no notice to the debtor is necessary.[13] The object of notice, as we shall see later, is to prevent the debtor from paying the assignor, and also to give the assignee priority over other assignees.[14]

Our next inquiry is to ascertain the exact effect of an equitable assignment as regards the assignee's right of action against the debtor. Can an equitable assignee always sue the debtor by bringing an action in his own name? The answer to this question depends, first, upon the nature of the right assigned, ie whether it is a legal or an equitable chose in action; secondly, upon the nature of the assignment, ie whether it is absolute or non-absolute.

A legal chose in action is a right that can be enforced by an action at law, as, for example, a debt due under a contract. An equitable chose in action is a right that was enforceable before the Judicature Act 1873 only by a suit in equity. It is a right connected with some form of property, such as trust property, over which Chancery formerly had exclusive jurisdiction, and it is exemplified by a legacy or by an interest in a trust fund.

An absolute assignment is one by which the entire interest of the assignor in the chose in action is for the time being transferred unconditionally to the assignee and placed completely under his control. To be absolute it is not necessary, however, that the assignment should take the form of an out and out transfer which deprives the assignor for ever of all further interest in the subject matter. Thus, it is now well settled that a mortgage in the ordinary form, ie an assignment of a chose in action as security for advances, with a proviso for redemption and reassignment upon repayment of the loan, is an absolute assignment.[15] In such a case the whole right of the mortgagor in the subject matter passes for the time being to the mortgagee, and the fact that there is an express or implied right to reassignment upon redemption does not destroy the absolute character of the transfer. In *Hughes v Pump House Hotel Co*:[16]

12 *Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454 at 462. *Re Wale* [1956] 3 All ER 280 at 283, [1956] 1 WLR 1346 at 1350; *Letts v IRC* [1956] 3 All ER 588 at 592, [1957] 1 WLR 201 at 212-214. Cf *Hobbs v Marlowe* [1978] AC 16, [1977] 2 All ER 241. In principle, it would seem that the assignor need not inform the assignee of what he has done. The decisive factor is the assignor's intention, see *Comptroller of Stamps (Victoria) v Howard-Smith* (1936) 54 CLR 614 at 622.

13 *Corringe v Irwell India Rubber Works* (1886) 34 ChD 128.

14 P. 371, below.

15 *Tancred v Delagoa Bay and East Africa Rly Co* (1889) 23 QBD 239; *Hughes v Pump House Hotel Co* [1902] 2 KB 190.

16 [1902] 2 KB 190.

> A building contractor executed a written instrument by which, in consideration of his bankers allowing him an overdraft, and by way of security to them for all money due or falling due in the future under his account, he assigned to them all moneys due or to become due to him under his building contracts. He also empowered the bankers to settle all accounts in connection with the buildings and to give receipts for money paid for work done by him.

It was held that the written instrument, since it unconditionally assigned for the time being all moneys due or to become due under the building contracts, constituted an absolute assignment.

From absolute assignments must be distinguished, firstly, conditional assignments; secondly, assignments by way of charge; and thirdly, assignments of part of a debt.

A conditional assignment is one which is to become operative or to cease to be operative upon the happening of an uncertain event. An example of this occurred in *Durham Bros v Robertson*[17] where:

> A firm of builders executed the following document in favour of the plaintiffs: 'Re Building Contract, South Lambeth Road. In consideration of money advanced from time to time we hereby charge the sum of £1,080, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the abovementioned sum *until the money with added interest be repaid to you.*'

It was held that this was merely a conditional assignment. At first sight, perhaps, it appears difficult to reconcile this decision with that given in *Hughes v Pump House Hotel Co.*[18] but if the position of the respective debtors is considered, the difference between the two cases becomes apparent. In the present case the whole sum due from Robertson was not assigned to the plaintiffs, but only so much of it as would suffice to repay the money actually advanced together with interest. The document stated in effect that when that amount was paid, which was an uncertain event, the interest of the assignee was automatically to cease. Thus the debtor, Robertson, became directly concerned with the state of accounts between the assignor and assignee, for he would not be justified under the document in making a payment to the latter after the money actually lent with interest had been repaid. In *Hughes v Pump House Hotel Co*, on the other hand, the debt was in terms transferred completely to the assignee. There was no limitation of the amount for which the assignment should be effective, there was to be no automatic reverter to the assignor upon repayment of the loan, and therefore the debtors, until they received notice of redemption and actual reassignment, would be entitled to make payments to the assignee without reference to the state of accounts between him and the assignor.

The distinction, then, is this: Where a reassignment is necessary, as it is in the case of an assignment by way of mortgage, 'notice of the reassignment will be given to the original debtor, and he will thus know with certainty in whom the legal right to sue him is vested. On the other hand, where the assignment

17 [1898] 1 QB 765
18 [1902] 2 KB 190

is conditional, the original debtor is left uncertain as to the person to whom the legal right is transferred."[19]

An assignment by way of charge is one which merely entitles the assignee to payment out of a particular fund and which, unlike the case of a mortgage, does not transfer the fund to him.[20] Thus in *Jones v Humphreys*:[1]

> A schoolmaster assigned to a money-lender so much of his salary as should be necessary to repay a sum of £ which he had already borrowed and any further sums which he might borrow.

It was held that this was not an absolute assignment of the salary, but a mere security which entitled the money-lender to have recourse to the salary according to the state of the schoolmaster's indebtedness.

After considerable conflict of judicial opinion it is now settled that the assignment of a definite part of a debt is not an absolute assignment.[2] To be absolute an assignment must transfer the chose in action in its entirety.

Effect of equitable assignment

We are now in a position to state the effect of an equitable assignment upon the right of recovery vested in the assignee. The effect may be stated in three rules.

(a) *Absolute assignment of equitable chose: assignee may sue in his own name* An absolute assignment of an *equitable* chose in action entitles the assignee to bring an action in his own name against the debtor.[3] If, for instance, A assigns to B the whole of his beneficial interest in a legacy, B can sue the executor in his own name. The common law prohibition of assignments has, of course, never applied to a chose that was within the exclusive jurisdiction of equity, and since the absolute character of the transfer makes it unnecessary to examine the state of accounts between the parties, there is no reason why the assignor should be a party to the action.

(b) *Non-absolute assignment of equitable chose: assignor must be party to an action* The non-absolute assignment of an *equitable* chose in action does not entitle the assignee to sue in his own name, but requires him to join the assignor as a party. This joinder of the assignor is necessary on practical grounds, for in every case where an assignment is not absolute, as, for instance, where it is conditional or by way of charge, the state of accounts between the parties is the critical factor. The debtor occupies the position of a stakeholder who is willing to pay the person rightfully entitled, but as neither he nor the court knows what the exact rights of the parties are it is essential that the assignor should be a party

19 Ashburner *Principles of Equity* (2nd edn) p 238.

20 *Tancred v Delagoa Bay and East Africa Rly Co* (1889) 23 QBD 239 at 242, per Denman J; *Burlinson v Hall* (1884) 12 QBD 347 at 350.

1 [1902] 1 KB 10. Where there is no intention to assign a debt to X, he may in certain circumstances be able to maintain an action for money had and received against the debtor; *Shamia v Joory* [1958] 1 QB 448, [1958] 1 All ER 111, p 733, below.

2 *Re Steel Wing Co Ltd* [1921] 1 Ch 349; *Williams v Atlantic Assurance Co* [1933] 1 KB 81; *Walter and Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584, [1955] 1 All ER 843. The title to the part assigned, however, passes to the assignee in equity. Cf *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686.

3 *Colin v Croydon Canal Co* (1843) 4 Y & C Ex 393 at 393-394.

to the action in order that his interest may be bound. Again, if an assignment affects part only of the assignor's interest, the court cannot adjudicate finally without the presence of both parties.

> The absence of such parties might result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning such debt.[4]

By the same reasoning the assignor cannot recover the amount remaining due to him from the debtor without joining the assignee as a party to the action.[5]

(c) *Assignment of legal chose: assignor must be a party to an action* An assignment, whether absolute or not, of a *legal* chose in action does not entitle the assignee to sue in his own name, but requires him to join the assignor as a party to any action he may bring for the recovery of the right assigned. The reason for this is due to the different views taken by common law and equity. A legal chose is one that would be recoverable only in a common law court, and since the rule at law was that a contractual right was incapable of assignment, it followed that the court could not allow an assignee to sue in his own name. The solution was for the assignor to sue personally or to join in the action brought by the assignee, and the Court of Chancery would compel him to collaborate in this fashion in order to complete the equitable title that he had transferred. This would necessitate the institution of a suit in Chancery as a preliminary to the common law action.[6] Such, however, is no longer the case, and the practice has long been for the assignee to join a contumacious assignor as co-defendant with the debtor.[7] The assignor cannot sue in his own name alone.[8]

These equitable rules with regard to the assignment of choses in action were adequate except in one respect. Where the assignment related to a legal chose in action the machinery of recovery was unnecessarily complicated, since the assignee might be compelled to initiate Chancery proceedings before he was qualified to sue at law. There is no reason in nature why the assignee of an ordinary debt should, as regards his right of recovery, be in any different position from the assignee of a purely equitable right such as a share in a trust fund; yet owing solely to a conflict between law and equity he was compelled in the former case to sue in collaboration with the assignor, while in the latter he could sue alone. This was an anachronism which called for abolition when the Judicature Act 1873 amalgamated the superior courts of law and equity into the Supreme Court of Judicature. The main purpose of this legislation 'was to enable a suitor to obtain by one proceeding in one court the same ultimate result as he would previously have obtained either by having selected the right court, as to which there frequently was a difficulty, or after having been to two courts in succession, which in some cases he had to do under the old system'.[9] In pursuance of this policy, section 25(6) of the Act introduced a statutory form of assignment which enabled the assignee of a legal chose in action to sue in

4 *Re Steel Wing Co* [1921] 1 Ch 349 at 357, per P O Lawrence J.
5 *Walter and Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584, [1955] 1 All ER 845.
6 *Wood v Griffith* (1818) 1 Swan 43 at 55-56, per Lord Eldon.
7 *Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86 at 91, per Warrington J.
8 *Three Rivers District Council v Bank of England* [1995] 4 All ER 312.
9 *Torkington v Magee* [1902] 2 KB 427 at 430, per Channell J.

his own name, subject to certain conditions. This provision has now been replaced by the Law of Property Act 1925,[10] in a section which runs as follows:

> Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice:
> (a) the legal right to such debt or thing in action;
> (b) all legal and other remedies for the same; and
> (c) the power to give a good discharge for the same without the concurrence of the assignor.

The phrase in the statute 'debt or other legal thing in action' is misleading. It might be supposed that it bore the same meaning as before the Judicature Act 1873, and that it was confined to such *choses in action* as were recoverable only in a common law court. It has, however, been interpreted judicially to mean 'all rights the assignment of which a court of law or equity would before the Act have considered *lawful*', and it therefore includes equitable as well as legal *choses in action*.[11]

Essentials of statutory assignment

There are three conditions that must be satisfied if an assignment is to derive validity from the statute:

it must be absolute;
it must be written; and
written notice must be given to the debtor.

If there is a failure to comply with either of the last two conditions, or if compliance with the first is impossible, as, for instance, where the assignment is conditional or by way of charge, the transaction is not void. It is void as a statutory assignment but it still stands as a perfectly good equitable assignment. This means that the assignee of the legal chose in action cannot take advantage of the new machinery set up by the Act and bring an action in his own name, but must fall back upon the rules governing equitable assignments and join the assignor as a party. It is still the law that an assignee of a legal chose in action, who for some reason or other cannot prove a good statutory assignment, must make the assignor either a co-plaintiff or a co-defendant to any action that he brings.[12]

The statute has not altered the law in substance. It is merely machinery. It does not confer a right of action which did not exist before, but enables the right of action that has always existed to be pursued in a less roundabout fashion.[13]

10 S 136.

11 *King v Victoria Insurance Co Ltd* [1896] AC 250 at 254; *Re Pain, Gustavson v Haviland* [1919] 1 Ch 38 at 44-45.

12 *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 14, 20, 30-31.

13 *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104 at 112-113. In Australia it has been held that since the introduction of a statutory form of assignment, all assignments must follow the statutory form. Thus the statutory rules displace the equitable rules though an imperfect assignment may in some cases take effect as a contract to assign. *Olsson v Dyson* (1969) 120 CLR 365. This is not an illogical view but it clearly does not represent English law, which treats the statutory rules as supplementing and not supplanting those of equity.

It 'has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own names without joining the assignor'.[14] Again it 'does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree'.[15]

An assignment, whether of a legal or an equitable chose in action, which satisfies the requirements of the statute, transfers the title by virtue of the statute itself and requires no consideration.[16] A question, however, that has been much canvassed is whether a non-statutory, ie an equitable assignment, is effective as between assignor and assignee if made for no consideration.[17] Is a gift of the chose in action valid and irrevocable? The answer depends upon a distinction, fundamental throughout equity, between a completed and an incomplete assignment.

The equitable assignment of a chose, *if completed*, even though it is unsupported by consideration, is just as effective and just as irrevocable as the gift of personal chattels perfected by delivery of possession.[18] It is, indeed, almost superfluous to say that 'a person *sui juris*, acting freely, fairly and with sufficient knowledge, has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversion'.[19]

On the other hand it is equally clear that a gratuitous agreement to assign a chose in action, like a gratuitous promise to give any form of property, is *nudum pactum* unless made under seal, and creates no obligation either legal or equitable.

> The rule in equity comes to this: that so long as a transaction rests in expression of intention only, and something remains to be done by the donor to give complete effect to his intention, it remains uncompleted, and a Court of Equity will not enforce what the donor is under no obligation to fulfil. But when the transaction is completed, and the donor has created a trust in favour of the object of his bounty, equity will interfere to enforce it.[20]

Thus the question in each case is whether the transaction upon which the voluntary assignee relies constitutes a perfect and complete assignment or not, and this in turn depends upon the meaning of a completed assignment. The general principle of law is that a gift is complete as soon as everything has been done by the donor that, according to the nature of the subject matter, is necessary to pass a good title to the donee. A good title is vested in the donee if he has been placed in such a position that he is free to pursue the appropriate proprietary remedy on his own initiative, without the necessity of seeking the further collaboration of the donor. Whether the

14 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 424, per Lord Lindley.
15 *Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454 at 461, per Lord MacNaghten.
16 *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104 at 112-113.
17 Marshall *The Assignment of Choses in Action* ch 4; Megarry 59 LQR 58, 208; Holland 59 LQR 129; Hall [1959] CLJ 99.
18 *Spellman v Spellman* [1961] 2 All ER 498 at 501, [1961] 1 WLR 921 at 925, per Danckwerts J; Diamond 24 MLR 789.
19 *Kekewich v Manning* (1851) 1 De GM & G 176 at 188, per Knight Bruce LJ. *Re McArdle* [1951] Ch 669 at 674, [1951] 1 All ER 905 at 908.
20 *Harding v Harding* (1886) 17 QBD 442 at 444, per Wills J.

donee has been put in this position depends upon the nature of the *res donata*. If, for instance, A delivers a chattel to B with the intention of passing the ownership, he has done all that the law requires for the transfer of the property in the chattel, and it is clear that B has obtained a title which he can protect by an action of trover. But if the donative intention has not been fulfilled by delivery of the chattel or alternatively by the creation of a trust in favour of the donee, the gift remains incomplete and the intended donee is remediless. He cannot compel the donor to fulfil the promise to give. The promise is *nudum pactum* at common law for want of consideration, and it is a well-established principle of equity that the court will not perfect an imperfect gift—will not constrain a donor to take the requisite steps for the transfer of ownership.[1]

Applying these principles to the gift by way of equitable assignment of an existing *chose in action*, all that is necessary is to ascertain whether the donee is in a position to pursue the appropriate remedy against the debtor without the necessity of any further act on the part of the assignor. If so, the gift is complete and its efficacy remains undisturbed by the absence of consideration.[2] Whether the donee is in this position depends upon the nature of the equitable assignment.

An equitable assignment is one that does not satisfy the requirements of the Law of Property Act.[3] It may fail in this respect for two different reasons.

First, it may be defective in form because not made in writing.[4] Secondly, it may not be absolute.

To take the first defect, it is now clear that a mere failure to observe the statutory form is immaterial in the present context. it does not prevent the assignment from being perfect and complete in the eyes of equity. An absolute assignment of an existing *chose in action*, whether legal or equitable, is complete as soon as the assignor has finally and unequivocally indicated that it is henceforth to belong to the assignee. Nothing more is necessary.

This has always been true of the equitable *chose in action*, since this was a species of property formerly within the exclusive jurisdiction of Chancery and therefore free from the restrictions of the common law. It was not, however, formerly true of the legal *chose in action*. This was recoverable only by an action at law and, since common law did not recognise the assignment of contractual rights, the assignee, though admitted by equity to have acquired a good title, was inevitably obliged to sue in the name of the assignor. To this extent, the collaboration of the assignor was necessary to perfect the transaction. But when the existing practice was admitted of allowing the assignee to satisfy the requirement of joinder of parties by merely adding the assignor as a defendant,[5] nothing remained to be done by the assignor to complete the transaction. At the present day, therefore,

1 *Ellison v Ellison* (1802) 6 Ves 656. *Milroy v Lord* (1862) 4 De GF & J 264 at 274, per Turner LJ.

2 *Re McArdle* [1951] Ch 669 at 677, [1951] 1 All ER 905 at 909-910.

3 P 567, above.

4 The statutory requirement of written notice to the debtor is irrelevant in the present context, for notice is not necessary to perfect the assignment between the assignor and assignee: *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 4-5, [1942] 1 All ER 404 at 407, though it is necessary for other reasons.

5 *E M Bowden's Patents Syndicate Ltd v Herbert Smith & Co* [1904] 2 Ch 86 at 91.

the absolute assignment of a legal or equitable *chose in action*, though not in the statutory form, is effective despite the want of consideration.[6]

The second class of equitable assignment is one which is not of an absolute character, though it may be in writing as required by the statute. In this case the assignment is not yet complete, for something still remains to be done to complete the title of the assignee. If it is conditional, as when its efficacy depends upon the consent of a third party, it remains incomplete until the condition is satisfied;[7] if it is by way of charge, as in *Jones v Humphreys*,[8] nothing definite is due until the state of accounts between the assignor and assignee has been finally settled and divulged to the debtor. Since the assignment is unsupported by consideration and since the assignee is not yet entitled to demand payment from the debtor, there is no escape from the rule that equity will not perfect an imperfect gift.

Another possible defect, distinct in nature, is that the assignment may relate to future property, such as a share of money that may fall in on the death intestate of a person now living, or the damages that may be recovered in a pending action. In such a case what purports to be an assignment is nothing more than an agreement to assign, under which even in equity nothing is capable of passing until the subject matter comes into present existence. The agreement binds the conscience of the assignor, and, if supported by consideration, it binds the subject matter when it comes into existence.[9] Until this event occurs, however, the agreement cannot be converted into a completed assignment, for there is nothing definite capable of forming the subject matter of a transfer.[10] It followed, therefore, that the donee of a future chose in action is remediless. He cannot allege a completed assignment, and he cannot enforce a gratuitous promise.

6 *Harding v Harding* (1886) 17 QBD 442; *Re Patrick, Bills v Tatham* [1891] 1 Ch 82; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404; *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905. The dictum of Parker J in *Gegg v Bromley* [1912] 3 KB 474 at 491, that 'If there be no consideration there can be no equitable assignment', must be confined to the assignment of a *future* debt, with which alone the case was concerned, see per Lush LJ in *German v Yates* (1915) 32 TLR 52. *Re McArdle*, the facts of which have been given at p 83, above, is in one respect a difficult case. The so-called assignment was written and therefore it satisfied the statute as regards form. On the assumption, however, that the document was what it purported to be, ie an agreement to transfer a specific sum of £488 in consideration of the promisee carrying out certain future improvements, the Court of Appeal was apparently prepared to treat it as a valid equitable assignment of the £488 (at 677, 910 respectively). This seems a curious approach to what would have been a normal and valid contract. Why should the promisee do more than sue for breach? If the document had in terms assigned the £488 in consideration of improvements already executed, it would indeed have been necessary to plead an assignment, for the past nature of the consideration would have prevented any claim in contract. But it would have been a statutory assignment.

7 *Re Fry, Chase National Executors and Trustees Corpn v Fry* [1946] Ch 312, [1946] 2 All ER 106.

8 P 565, above.

9 *Re Trytel, ex p the Trustee of the Property of the Bankrupt v Performing Rights Society Ltd and Soundtrac Film Co Ltd* [1952] 2 TLR 32.

10 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 546, per Lord MacNaghten; *Gegg v Bromley* [1912] 3 KB 474 at 489.

B RULES THAT GOVERN ASSIGNMENTS, WHETHER STATUTORY OR EQUITABLE

1 NOTICE

Written notice to the debtor or other person from whom the right assigned is due is necessary to complete the title of one who claims to be a statutory assignee under the Law of Property Act. It becomes effective at the date on which it is received by or on behalf of the debtor.[11] The written notice is an essential part of the statutory transfer of the title to the debt and therefore it is ineffective unless strictly accurate—accurate, for instance, as regards the date of the assignment and *semble* as regards the amount due from the debtor.[12]

On the other hand, notice is not necessary to perfect an equitable assignment. Even without notice to the debtor the title of the assignee is complete, not only against the assignor personally,[13] but also against persons who stand in the same position as the assignor, as, for instance, his trustee in bankruptcy, a judgment creditor or a person claiming under a later assignment made without consideration.[14]

Nevertheless, there are at least two reasons why failure to give notice may seriously prejudice the title of an equitable assignee.

Firstly, an assignee is bound by any payments which the debtor may make to the assignor in ignorance of the assignment.[15]

Secondly, it is established by the rule in *Dearle v Hall*[16] that an assignee must give notice to the debtor in order to secure his title against other assignees. An assignee who, at the time when he completes the transaction, has no notice of an earlier assignment and who himself gives notice of the transaction to the debtor, gains priority over an earlier assignee who has failed to give a like notice. The fact that he has discovered the existence of the prior assignment at the time when he gives notice is immaterial, provided that he had no actual or constructive knowledge of it when his own assignment was completed.[17]

The form of the notice depends upon the nature of the right assigned. If what is assigned is an equitable interest in land or in personalty then notice is required by statute to be in writing,[18] but in other cases no formality is required. The one essential in all cases is that the notice should be clear and unambiguous. It must expressly or implicitly record the fact of assignment, and must plainly indicate to the debtor that by virtue of the assignment the assignee is entitled to receive the money.[19] If it merely indicates that on grounds of convenience payment should be made to a third party as agent of the creditor, the debtor is not liable if he pays the creditor direct.[20]

11 *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 5-6, [1942] 1 All ER 404 at 407-408.
12 *W F Harrison & Co Ltd v Burke* [1956] 2 All ER 169, [1956] 1 WLR 419.
13 *Gorringe v Irwell India Rubber Works* (1886) 34 ChD 128.
14 *Re Tyrtel, ex p the Trustee of the Property of the Bankrupt v Performing Right Society Ltd and Soundtrac Film Co Ltd* [1952] 2 TLR 32. See Kiss 39 Conv (NS) 261.
15 *Stocks v Dobson* (1853) 4 De GM & G 11. See also *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105.
16 (1828) 3 Russ 1.
17 *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460.
18 Law of Property Act 1925, s 137(3). See *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607, [1968] 3 All ER 825.
19 *James Talcott Ltd v John Lewis & Co Ltd and North American Dress Co Ltd* [1940] 3 All ER 592.
20 Ibid at 596.

2 AN ASSIGNEE TAKES SUBJECT TO EQUITIES

An assignee, whether statutory or not, takes subject to all equities that have matured at the time of notice to the debtor. This means that the debtor may plead against the assignee all defences that he could have pleaded against the assignor at the time when he received notice of the assignment.

> The authorities upon this subject, as to liabilities, show that if a man does take an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands.[1]

A simple illustration is afforded by *Roxburghe v Cox*:[2]

> Lord Charles Ker, an army officer, assigned to the Duke of Roxburghe the money that would accrue to him from the sale of his commission. This money, amounting to £3,000, was paid on 6 December to the credit of his account with his bankers, Messrs Cox. On that date his account was over drawn to the extent of £647. On 19 December the Duke gave notice of the assignment to Messrs Cox.

It was held that Messrs Cox could set-off the debt of £647 against the right of the Duke to the sum of £3,000. In the course of his judgment, James LJ said:

> Now an assignment of a chose in action takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception. Therefore the question is, Was this right of set-off existing at the time when the notice was given by the Duke of Roxburghe? Under the old law the proper course for the Duke to take would have been, not to come into a Court of Equity, but to use the name of Lord Charles Ker at law ... In that case set-off could have been pleaded as against the assignor, and in the present mode of procedure that defence is equally available.[3]

Even unliquidated damages may by way of counterclaim be set-off by the debtor against the assignee, provided that they flow out of and are inseparably connected with the contract which has created the subject matter of the assignment.[4] Thus if a builder assigns to the plaintiff money that will be due from the defendant upon completion of a building, the defendant may set-off against the claim of the plaintiff any damage caused to him by the delay or by the defective work of the builder.[5] But nothing in the nature of a personal claim against the assignor can be used to defeat the assignee.[6]

The question was recently considered by Templeman J in *Business Computers Ltd v Anglo-African Leasing Ltd*[7] who said:

> The result of the relevant authorities is that a debt which accrues due before notice of an assignment is received, whether or not it is payable before that date,

1 *Mangles v Dixon* (1852) 3 HL Cas 702 at 735, per Lord St Leonards.
2 (1881) 17 ChD 520.
3 Ibid at 526.
4 *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199 at 213.
5 *Young v Kitchin* (1878) 3 Ex D 127.
6 *Stoddart v Union Trust Ltd* [1912] 1 KB 181.
7 [1977] 2 All ER 741.

or a debt which arises out of the same contract as that which gives rise to the assigned debt, or is closely connected with that contract, may be set off against the assignee. But a debt which is neither accrued nor connected may not be set off even though it arises from a contract made before the assignment.'

In *Pan Ocean Shipping Ltd v Creditcorp Ltd, The Trident Beauty*,[9] the appellants were time-charterers under a time charterparty which provided for the hire to be payable 15 days in advance. The charterparty had the usual hire clauses which meant that the hire was repayable where the ship was, for various reasons, not available for the charterers' use. Under the charterparty there was a contractual scheme by which such repayable sums would normally be deducted from the next due payment.

The owners had irrevocably assigned the right to receive advance payments of hire to the respondents. Notice of this assignment had been given to the time-charterers and the time-charterers had made the payment of hire direct to the respondents. The time-charterers now claimed that they were entitled to recover these sums from the respondents. All the judges who considered the case agreed that the advance hire could have been recovered by the charterers from the owners. There is an important explanation in the House of Lords by Lord Goff as to why this right of recovery is contractual rather than restitutionary in the circumstances of the case.[10] The charterers had not, however, claimed recovery from the owners, apparently because the owners were not worth suing. They claimed recovery from the respondents. The House of Lords agreed with the Court of Appeal that there was no right to recover in the circumstances. The debt which the owners had assigned to the respondents in the present case was payable at the time when it was paid. The assignment did not impose on the respondents any contingent duty to repay the money and there was no reason why the charterers should have a right to recover from two people because the owners had chosen, as part of their own financial arrangements, to assign the sum to the respondents.

3 RIGHTS INCAPABLE OF ASSIGNMENT

The rights that are incapable of assignment include pensions and salaries payable out of national funds to public officers, and alimony granted to a wife, but the most important examples are a bare right of litigation and rights under contracts that involve personal skill or confidence.

It used to be said that any assignment is void if it savours of maintenance, ie if it amounts to assistance given to one of the parties to an action by a person who has no legitimate interest in that action. This was the stated basis of the rule that a 'bare right of action' is unassignable.[11]

This rule involved the drawing of a somewhat arid distinction between a bare right of litigation and one which was attached to a property interest.[12] This difficulty has been removed by the decision of the House of Lords in *Trendtex Trading Corpn v Credit Suisse*[13] where it was held that the assignment

8 Ibid at 748.
9 [1994] 1 All ER 470, [1994] 1 WLR 161.
10 Ibid at 475 and 166, respectively.
11 Marshall *The Assignment of Choses in Action* pp 49-65.
12 *Prosser v Edmonds* (1835) 1 Y & C Ex 481; *Defries v Milne* [1913] 1 Ch 98.
13 [1982] AC 679, [1981] 3 All ER 520.

was valid if the assigner had a genuine commercial interest in taking the assignment. For this purpose the court should look at the totality of the transaction.[14]

It may be added that there is nothing objectionable in the assignment of the fruits of litigation, which for this purpose are on all fours with other forms of property. In *Glegg v Bromley*[15] for instance, a wife mortgaged to her husband whatever damages she might recover in her pending action against X. This was an assignment of future property under which nothing would pass to the husband unless and until the property came into existence upon the successful conclusion of the action. Therefore, no question of maintenance could ever arise.

If A purports to assign the benefit of a contract which he has made with B, it is essential to consider whether the position of B, the person liable, will be prejudicially affected. No man can be compelled to perform something different from that which he stipulated for, and any assignment that will put him in this position is void.[16] If, for instance, the contract between A and B involves personal skill or confidence, each party can insist upon personal performance by the other, for otherwise he would not receive that to which he is entitled. Thus an agreement by an author to write a book for a publisher is a personal contract, the benefit of which cannot be assigned by the publisher without the consent of the author.[17] In fact, the rule would seem to be that assignment 'is confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it'.[18] In *Kemp v Baerselman*[19] for instance:

> The defendant, a provision merchant, agreed to supply the plaintiff, a cake manufacturer, with all the eggs that he should require for manufacturing purposes for one year, there being a stipulation that if supplies were maintained the plaintiff would not buy eggs elsewhere. At the time of the contract the plaintiff had three places of business, but four months later he transferred his business to the National Bakery Company, to which he purported to assign the benefit of his contract with the defendant.

It was held that the contract was intended to be a personal one, and that it could not be assigned against the will of the defendant. The eggs were to be supplied as the plaintiff, whose needs throughout the year could be estimated at the

14 For further discussion of maintenance and champerty see above, p 417 ff. And see the further consideration of the question in *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499 and *Camdex International Ltd v Bank of Zambia* [1996] 3 All ER 431. In *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd* [1998] 1 All ER 218, a company assigned a cause of action to an individual in circumstances where the individual would be eligible for legal aid when the company would not and where the company might have been required to give security for costs when the individual would not. This motivation was held by the House of Lords not to make the assignment contrary to public policy.

15 [1912] 3 KB 474.

16 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 670.

17 *Stevens v Benning* (1854) 1 K & J 168; affd 6 De GM & G 223; *Reade v Bentley* (1857) 3 K & J 271; *Griffiths v Tower Publishing Co* [1897] 1 Ch 21.

18 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668, per Collins MR.

19 [1906] 2 KB 604.

time of the contract, should require; and again, the plaintiff was not to purchase eggs elsewhere. This last provision would cease to benefit the defendant, and would, indeed, become meaningless, if the contract were assigned to another person.[20]

What is the position if the contract sought to be assigned itself prohibits assignment? Such prohibitions are common, for example, in contracts of hire purchase and in building and engineering contracts.[1] Much must depend on the precise wording of the prohibition but it is thought that only very clear words will make the assignment ineffective between assignor and assignee. There is clear authority, however, that such a prohibition renders an assignment ineffective against the debtor.[2]

In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[3] the plaintiffs were leaseholders of premises in Jermyn Street, London. They had acquired their leasehold interests by assignment. Before the assignment, the assignors made a contract with the defendants for the carrying out of alteration work on the JCT 63 Form which contains a clause providing that 'The Employer shall not without the written consent of the contractor assign this contract'. The first defendants were nominated sub-contractors for the removal of blue asbestos who had entered into a collateral contract with the plaintiffs. The third defendants were contractors whose scope of works also included the removal of blue asbestos. The plaintiffs wished to complain of the work done by the defendants for the removal of blue asbestos. In this case all the building work had been completed before the assignment of the lease to the plaintiffs. (In fact the assignment took place in stages as different floors of the building were transferred at different times.) Apparently completion took place in March 1980: the first discovery of significant remaining quantities of blue asbestos was in January 1985 when an agreement for remedial work with the third defendants was made. The first assignment of part of the building took place on 1 April 1985 and the original lessees issued a writ against the first defendants in July 1985. In January 1987 and 1988 further blue asbestos was found in the premises.

In this case there had not only been an assignment of the lease but an assignment of the original lessee's causes of action against the contractors or sub-contractors.

The Court of Appeal held that the clause in the JCT contracts prohibited the assignment of the benefit of the contract but did not prohibit the assigning of benefits arising under the contract. Accordingly, the contractual clause did not interfere with the general law about the assignment of rights of action. It

20 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1900] KB 660, which at first sight seems difficult to reconcile with the general rule, was decided on the ground that the terms of the contract, when properly construed, provided for assignment: see *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1026; [1940] 3 All ER 549 at 552, per Lord Simon.

1 See Guest *The Law of Hire Purchase* para 700; Atiyah 5 Business L Rev 24; *Re Turcan* (1888) 40 ChD 5; *United Dominions Trust v Parkway Motors Ltd* [1955] 2 All ER 557; [1955] 1 WLR 719; *Spellman v Spellman* [1961] 2 All ER 498; [1961] 1 WLR 921; Diamond 24 MLR 789; *Wicknam Holdings Ltd v Brooke House Motors Ltd* [1967] 1 All ER 117; [1967] 1 WLR 295; Diamond 30 MLR 322.

2 *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262; Goode 42 MLR 553; Mundas [1979] CLJ 50; Kloss 43 Conv (NS) 135.

3 [1994] 1 AC 85; [1993] 3 All ER 417; Furmston, 23 University of Western Australia Law Review, 251.

was clear that all the relevant breaches of contract had taken place at a time when the assignor was the owner of the property. It was therefore perfectly permissible for the assignor to assign the rights of action which had accrued during his period as lessee to the new lessee when the lease was assigned. It did not matter that the assignor no longer had a proprietary interest in the property at the time when he made the assignment nor that at that time nobody knew the full extent of the claim.

The House of Lords rejected the reasoning of the majority of the Court of Appeal. Lord Browne-Wilkinson, delivering the only speech on this point said:[4]

> I accept that it is at least hypothetically possible that there might be a case in which the contractual prohibitory term is so expressed as to render invalid the assignment of rights to future performance but not so as to render invalid assignments of the fruits of performance ... In the context of a complicated building contract, I find it impossible to construe cl 17 as prohibiting only the assignment of rights to future performance, leaving each party free to assign the fruits of the contract. The reason for including the contractual prohibition viewed from the contractor's point of view must be that the contractor wishes to ensure that he deals, and deals only, with the particular employer with whom he has chosen to enter into a contract. Building contracts are pregnant with disputes: some employers are much more reasonable than others in dealing with such disputes.

The House of Lords also considered and rejected an argument, which has not been addressed to the lower courts, that it was contrary to policy to allow prohibitions or restraints on the ability to assign contractual rights. The argument drawn from analogy with real property rights was that the right of ownership was so important that it should not be tethered by restraints on the ability to transfer ownership. It was held that the relationship between the contracting parties was such that not only may each party legitimately insist on the personal performance of the other party, but each party may legitimately wish to be obliged to perform its duties only to the other party. Construction contracts are a good example of the practical application of this policy since, in many construction contracts, there will be claims on both sides. So a contractors' claim for payment may be qualified by an employer's claim in respect of defective work or late completion. An employer may wish to restrict the contractor from assigning the right to be paid because of a wish to dispose in a single proceeding of the contractor's claims and its own claims. Conversely, the contractor may wish to restrict the employer from assigning because the operation of the contract in practice depends heavily on the behaviour of the parties and some employers are easier to co-operate with than others.

In *Don King Promotions Inc v Warren*[5] a contract was made between the plaintiff company, which was the corporate vehicle of a leading American boxing promoter and the defendant who was a leading English promoter. The purpose of the contract was to create a partnership for the promotion and management of boxing in Europe. In pursuance of the contract, Warren purported to assign to the partnership all his existing promotion and management contracts with boxers. These assignments were ineffective as assignments because many of the contracts contained prohibitions on

4 Ibid at 105 and 429, respectively.

5 [1999] 2 All ER 218. See also *Foamcrete (UK) Ltd v Thrust Engineering Ltd*, Court of Appeal 21/12/2000 (2001) 6 Finance & Credit Law 1.

assignment and in any case the relationship between a boxer and his manager is of a personal nature not permitting of assignment. Nevertheless, the Court of Appeal held that the ineffective assignments should be treated as declarations of trust because it was clear that the intention of the contract was that the management contracts should be held for the benefit of the partnership and treating the partners as trustees was the effective way to produce this result.

C NOVATION DISTINGUISHED FROM ASSIGNMENT

The assignment of a debt as described in the preceding pages, which operates as an effective transfer without the consent or the collaboration of the debtor, is distinguishable from novation, a transaction to which the debtor must be a party.

Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made. The new contract may be between the original parties, eg where a written agreement is later incorporated in a deed; or between different parties, eg where a new person is substituted for the original debtor or creditor.[6] It is this last form, the substitution of one creditor for another, that concerns us at the moment. The effectiveness of such a substitution was concisely illustrated by Buller J.

> Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover the sum against A.[7]
>
> In this case a contract is made between A, B and C, by which the original liability of A to B is discharged in consideration of his promise to perform the same obligation in favour of C, the other party to the new contract. A transaction of this nature, however, is not effective as a novation unless an intention is clearly shown that the debt due from A to B is to be extinguished. Otherwise the novation fails for want of consideration.[8]

Thus novation, unlike assignment, does not involve the transfer of any property at all, for it comprises (a) the annulment of one debt and then (b) the creation of a substituted debt in its place.[9]

D NEGOTIABILITY DISTINGUISHED FROM ASSIGNABILITY

A negotiable instrument is like cash in the sense that the property in it is acquired by one who takes it *bona fide* and for value. Just as the true owner cannot recover stolen money once it has been honestly taken by a tradesman in return for goods, so also the *bona fide* holder for value obtains a good title to a negotiable instrument even though the title of the previous holder is defective. This is one of the cases in which the maxim *nemo dat quod non habet*

6 *Scarf v Jardine* (1882) 7 App Cas 345 at 351, per Lord Selborne.
7 *Tatlock v Harris* (1789) 3 Term Rep 174 at 180.
8 *Liversidge v Broadbent* (1859) 4 H & N 603.
9 *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52 at 84, 86, affd [1961] AC 1007, [1960] 2 All ER 332, HL.

has no application. One who delivers either cash or a negotiable instrument can pass a better title than he himself possesses. The law on negotiability has passed through three historical stages. It began as a body of custom among merchants; it was later incorporated by the courts into the common law; it was then consolidated by the Bills of Exchange Act 1882.

For an instrument to be negotiable, two things must concur:

(1) it must be one which is transferable by delivery by virtue either of statute or of the law merchant.
(2) it must be in such a state that nothing more than its delivery is required to transfer the right which it contains to a transferee.

We may illustrate these attributes from the case of a cheque. According to the usage of bankers as recognised by the courts, it has long been established that the mere delivery of a cheque is capable of transferring to the deliveree the right to demand the amount for which it is drawn. Whether delivery, without more, will transfer this right depends, however, upon the state of the cheque. If a cheque for £100 is made payable to 'Edward Coke *or bearer*' it is negotiable in the fullest sense of the term, for by its very terms its mere delivery to William Blackstone entitles the latter to demand £100 from the bank. The position, however, is different if the cheque is made payable to 'Edward Coke *or order*'. The words 'Edward Coke *or order*' means that the bank will pay any person to whom Coke, by a declaration of his intention on the back of the instrument, orders payment to be made. Before this intention has been declared, however, the cheque is not a negotiable instrument, for delivery alone does not entitle the deliveree to demand payment. An order, called an *endorsement*, must be added by the payee Coke. If he merely signs his own name on the back, he is said to endorse the cheque *in blank*, and the result is that the bank will pay any person who tenders the instrument and demands payment. In other words, the effect of an endorsement in blank is to render the cheque payable to bearer and thus to confer upon the holder for the time being a good title.[10] Coke, however, may *specially endorse* the cheque, ie in addition to signing his own name he may write on the back 'Thomas Littleton *or order*'. The effect of this is that the bank will pay Littleton or any person designated by him, so that if he merely signs his own name the cheque once more becomes negotiable. The law has been summed up by Blackburn J in the following words:[11]

> It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding in *pro tempore*, then it is entitled to the name of a negotiable instrument ... The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes a holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.

A cheque remains freely transferable notwithstanding that it is crossed 'not negotiable'. The effect of the crossing merely is that a later holder can acquire no better title than the person from whom he took it. Again, the transferability

10 S 2 of the Cheques Act 1957, however, has now removed the necessity for an endorsement in blank where a cheque payable to order is cashed at the payee's own bank or credited to his account there.

11 *Crouch v Credit Foncier of England* (1873) LR 8 QB 374 at 381-382, adopting a passage in *Smith's Leading Cases* (13th edn) pp 533-534.

of a cheque is unaffected even if crossed 'account payee' or 'account payee only'. The significance of these words is that if the cheque is paid into the account of some person other than the payee the bank is put on enquiry.[12]

An instrument does not possess the benefit of negotiability merely because it contains an undertaking by one of the parties to pay a definite sum of money to any holder for the time being. To rank as negotiable it must be recognised as such either by statute or by the law merchant. Cheques, bills of exchange and promissory notes are now negotiable by virtue of the Bills of Exchange Act 1882, but there are certain other instruments which still derive their negotiability from the law merchant. This part of the law is of comparatively recent origin.

> It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience; the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it.[13]

A custom of the mercantile world by which a certain document is treated as negotiable, if proved to be of a sufficiently general nature, may be adopted by the courts, and it is by this process that the list of negotiable instruments has gradually been increased. In determining whether a custom has become so well established as to be recognisable by the courts, the length of time for which it has prevailed is of great importance; but in the modern world a still more important factor is the number of transactions of which it has formed the basis, and, if its adoption by merchants is frequent and widespread, the fact that it is of very recent origin does not prevent its judicial recognition.[14] Among the instruments which owe their negotiability to the usage of merchants are Exchequer Bills, certain bonds issued by foreign governments or by English or foreign companies, and debentures payable to bearer.

The transfer of a negotiable instrument differs from the assignment of a contractual right in three important respects.

Firstly, since one of the characteristics of a negotiable instrument is that the person liable for payment, as for instance, the acceptor of a bill of exchange or the banker in the case of a cheque, is under a duty to pay the holder for the time being, it follows that upon a transfer of the instrument there is no necessity that he should be notified by the new holder of the change of ownership.

Secondly, unlike the assignee of a contractual right, the transferee of a negotiable instrument does not take subject to equities. A holder for value who takes an instrument without notice of any defect in the title of the person who negotiated it to him acquires a perfect title. Thus in *Miller v Race*:[15]

12 *Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* [1965] 2 All ER 98, [1965] 1 WLR 691.

13 *Goodwin v Robarts* (1875) LR 10 Exch 337 at 346, per Cockburn CJ.

14 *Edelstein v Schuler* [1902] 2 KB 144 at 154, per Bingham J.

15 (1758) 1 Burr 452.

> On 11 December 1756, the mail coach from London to Chipping Norton was robbed and a bank note that had been posted by a London debtor to his creditor in the country was stolen. The next day the note was cashed by the plaintiff, who took it in the usual course of his business and without any notice that it had been stolen. It was held that the plaintiff was entitled to recover payment from the Bank of England.

Thirdly, the rule that consideration must move from the promisee, which as we have seen applies to contracts in general,[16] does not apply to a negotiable instrument, for the holder can sue for payment without proof that he himself gave value. The only essential is that consideration should have been given at some time in the history of the instrument. The Bills of Exchange Act provides that:

> Where value has *at any time* been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time, ie prior to the time at which value was given.[17]

If, for instance, A accepts what is called an *accommodation bill* in favour of B, ie makes himself liable to pay (say) £100 to B or to B's order without receiving consideration, he is not liable without more to pay this amount to B; but if B negotiates the bill to C in payment for goods received, C acquires a right of action against A and B: and further, if C makes a gift of the bill to D the latter has a similar right of action against A and B.

As regards consideration, there is another respect in which negotiable instruments are free from a general principle of contract law. The general rule requires proof by a plaintiff to an action for breach of contract that he has given consideration, but in the case of a negotiable instrument the consideration is presumed to have been given. The burden is on the defendant to prove that none has been given.[18]

Moreover, the holder is presumed to have taken the instrument in good faith and without notice of any illegality or other defect in the title of the person who negotiated it to him. There is this difference, however, between a plea of no consideration and a plea of illegality, that, once it has been shown that the instrument is vitiated by illegality as between previous parties, the burden of proving that he himself took in good faith passes to the holder.[19]

2 The assignment of contractual liabilities[20]

The question that arises here is whether B can assign the obligation that rests upon him by virtue of his contract with A to a third person, C, so that the contractual liability is effectively transferred from him to C. Can he substitute somebody else for himself as obligor? English law has unhesitatingly answered this question in the negative. In the words of Collins MR:

> It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another

16 Pp 85-88, above.
17 S 27(2).
18 *Mills v Barker* (1836) 1 M & W 425.
19 See pp 347-348, above, where the subject is illustrated by reference to wagering contracts.
20 Furmston 13 J Contract Law 42; Hunter 13 J Contract Law 51.

> without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all three, and involves the release of the original debtor.[1]

Novation, therefore, is the only method by which the original obligor can be effectively replaced by another. A, B and C must make a new contract by which in consideration of A releasing B from his obligation, C agrees that he will assume responsibility for its performance. This transaction is frequently required upon the retirement of one of the partners of a firm. B, the retiring partner, remains liable at law for partnership debts contracted while he was a member of the firm; but if a particular creditor, A, expressly agrees with him and with the remaining members to accept the sole liability of the latter for past debts in place of the liability of the firm as previously constituted, the right of action against B is extinguished. As is said in the head-note to *Lyth v Ault and Wood*:[2]

> The acceptance by a creditor of the sole and separate liability of one of two or more joint debtors is a good consideration for an agreement to discharge all the other debtors from liability.

An agreement by a creditor, A, to accept the liability of C in substitution for that of his former debtor, B, need not be express. Acceptance may be inferred from his conduct. Whether this inference is justifiable depends, of course, upon the circumstances. Thus, if a trader knows that a certain partner has retired, but nevertheless continues to deal with the newly constituted firm, the inference, in the absence of further rebutting circumstances, is that he regards the existing partners as solely liable.[3]

Except by novation, then, it is impossible for a debtor, B, to make a contract with C, by which he extinguishes his existing obligation to A and assigns it to C. The assignment may well be binding between himself and C, but it cannot *per se* deprive A of his right to proceed against B as being the contracting party. On the other hand, there are many cases in which vicarious performance is permissible in the sense that the promisee, A, cannot object that the work has been done by a third person, provided always, of course, that it has been done in accordance with the terms of the contract.

> Much work is contracted for, which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf.[4]

If, for instance, B, who has contracted to deliver goods to A or to do work for A, arranges that C shall perform this obligation, then A is bound to accept C's act as complete performance, if in fact it fulfils all that B has agreed to do.[5] A cannot disregard the performance merely because it is not the act of B personally. *Qui facit per alium facit per se.*

The essential fact to appreciate, however, in this case of delegated performance is that the debtor, B, who has assigned his liability to C, is not

1 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668.
2 (1852) 7 Exch 669.
3 *Hart v Alexander* (1837) 2 M & W 484; *Bilborough v Holmes* (1876) 5 ChD 255.
4 *British Waggon Co Ltd v Lea* (1880) 5 QBD 149 at 154, *per curiam*.
5 *British Waggon Co Ltd v Lea* (1880) 5 QBD 149; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 417, per Lord MacNaghten.

relieved from his obligation to ensure due performance of his contract with A. B still remains liable to A, and C cannot be sued by A in contract for non-performance or for defective performance.[6] The legal effect of the delegation is that A cannot repudiate a performance which satisfies the terms of the contract merely because it has not been completed by the original contracting party, B. In other words, the so-called assignment of an obligation is not an assignment in the true sense of the term, since it does not result in the substitution of one debtor for another. In the case of rights one creditor may be substituted for another, but the principle with regard to obligations is that they cannot be 'shifted off the shoulders of a contractor on to those of another without the consent of the contractee'.[7]

It is not, however, permissible in all cases to delegate the task of performance to another person. Each case depends upon its own particular circumstances. In the words of Lord Greene:

> Whether or not in any given contract performance can properly be carried out by the employment of a sub-contractor, must depend on the proper inference to be drawn from the contract itself, the subject matter of it and other material surrounding circumstances.[8]

For instance, a contract of carriage may normally be sub-contracted by the carrier, but this will not avail the contractor if the subject matter of the load is an easy and a frequent target for lorry thieves.[9]

Moreover, it is clear that delegation is not permissible if personal performance by B, the promisor, is the essence of the contract. If it can be proved that A relied upon performance by B and by B only, the inability or unwillingness of B to perform his obligation discharges A from all liability, even though performance has been completed by a third person in exact accordance with the agreed terms.[10] Vicarious performance of a personal contract is not performance in the eye of the law. It neither discharges the debtor nor binds the creditor. If it can be shown that A has contracted with B because he reposes confidence in him, as for example where he relies upon his individual skill, competency, judgement, taste or other personal qualification,[11] or if it is clear that he has some private reason for contracting with B and with B only,[12] then the inference is that the contract is one of a personal nature which does not admit of vicarious performance. Thus, it has been held that the personal skill and care of the warehouseman is of the essence of a contract for the storage of furniture, and that if he employs a sub-contractor he does so at his own risk.[13] A case which goes perhaps to the verge of the law is *Robson and Sharpe v Drummond*,[14] where the facts were these:

6 *Schmaling v Thomlinson* (1815) 6 Taunt 147. In certain cases there might be a tortious action, for example, where C's negligence causes personal injury or property damage to A.

7 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668, per Collins MR.

8 *Davies v Collins* [1945] 1 All ER 247 at 250.

9 *Garnham, Harris and Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 2 All ER 940, [1967] 1 WLR 940 (copper wire).

10 *British Waggon Co Ltd v Lea* (1880) 5 QBD 149 at 153.

11 *Robson and Sharpe v Drummond* (1831) 2 B & Ad 303.

12 *Boulton v Jones* (1857) 2 H & N 564, p 258, above.

13 *Edwards v Newland & Co (E Burchett Ltd Third Party)* [1950] 2 KB 534, [1950] 1 All ER 1072.

14 (1831) 2 B & Ad 303.

> B agreed to build a carriage and to hire it out to A for five years for a yearly payment of 75 guineas. B was to keep the carriage in repair, to paint it once within the five years and to supply new wheels when required. More than two years later B retired from business and he purported to assign to his successor, C, all his interest in the contract with A.

It was held that the contract was personal and that A was entitled to reject the performance offered by C. Although Parke J expressed his unhesitating opinion that A was entitled to the benefit of the judgment and taste of B himself throughout the five years, it might perhaps have been objected that, as the carriage had been designed and built by B to the satisfaction of A, the only detail which in any sense depended upon these personal qualifications was the painting. In a later case the Court of Appeal refused to apply the principle of this decision to a contract by which B had agreed to hire out railway wagons to A and to keep them in repair for seven years.[15]

In *Southway Group Ltd v Wolff*,[16]

> In January 1989, Southway owned and occupied a property in North London (Hendon) which consisted of a warehouse and a small amount of adjoining land. In January 1989 it contracted to sell the property for £1.2 million to a company called Brandgrange Ltd. Brandgrange was a shell company wholly owned by Initiative Co-Partnership Ltd, a company itself owned as to 49% by a Mr Ormonde, and as to 51% by Initiative Developments Ltd, a company owned by Mr Obermeister and his wife. Mr Obermeister was an architect and Mr Ormonde was a property developer with particular expertise in devising and financing development schemes, obtaining property rights for development and obtaining planning permission for development. Under the contract of sale, completion was to be on 30 April 1990, or earlier on 27 days' written notice to Southway, such notice not to be given earlier than 5 December 1989. Notice, which was treated as being good, was given on 17 November 1989 to complete on 5 March 1990.
>
> By a contract dated 21 December 1989, Brandgrange agreed to sell the property to the defendants who were mother and son and the trustees of the Wolff Charity Trust. This second contract contained an undertaking by the vendor to carry out re-development works to the property, the content and scope of these works being described in a specification attached to the contract which was skeletal in the extreme.
>
> Brandgrange failed to complete on 5 March 1990 and on the same day Southway served notice to complete in accordance with clause 22 of the National Conditions of Sale. On 21 March 1990 Southway and Brandgrange entered into a deed of assignment, by which the notice of 5 March 1990 was withdrawn and a new completion date of 17 April 1990 was fixed, time being expressed to be of the essence.
>
> This deed of assignment contained provisions by which Brandgrange assigned to Southway the benefits of the re-sale contract to the Trustees and Southway gave notice of that assignment to the Trustees.
>
> Brandgrange failed to complete on 17 April 1990. On 19 April 1990 Southway accepted this failure as repudiation and terminated the contract. Southway then decided that it would carry out itself or through its own

15 *British Waggon Co Ltd v Lea* (1880) 5 QBD 149.
16 [1991] 28 Con LR 109.

contractors the works which had been set out in the contract of 21 December 1989 between Brandgrange and the Trustees. The Trustees indicated to Southway that, 'If you proceed without my approval, you do so at your own risk'. Southway therefore sought declarations that if it carried out work which complied with the specification within the time provided by the contract and tendered a valid transfer of the building, it would be entitled to the purchase price under the contract between Brandgrange and the Trustees. The Trustees argued that the essence of the re-sale contract was the confidence which the Trustees placed in particular in Mr Ormonde and that they were not bound to accept the performance of the refurbishment contract by anyone else. In other words, the Trustees argued that the contract was one which called for personal and not vicarious performance.

This argument was accepted by the Court of Appeal. The Court held that in the present circumstances, where the content of the contract was extremely vague (verging according to some members of the Court on the contract being void for uncertainty), it was clear that personal performance was essential. It was not that the Trustees expected Mr Ormonde to do the building work himself, but they expected that the development and refurbishment of the building would be done in a style which involved close and daily co-operation, and it was inconceivable that the Trustees would have entered into an agreement of this kind with someone with whom they did not have personal contact.