cheque was in payment of goods which in the ordinary course of business ought already to have been sold by the debtor for cash.[40]

Barwick, C.J. and Kitto, J. emphasised that their decisions were considerably influenced by the fact that the debtor appeared to have substantial and readily realizable stocks on hand. It appears, however, that the stocks supplied by the creditors in this case were perishables such as bacon, butter and eggs. It is submitted that the mere continued supply of goods of this nature, should not engender a confident expectation in a reasonably prudent businessman that such stocks would invariably be available for realization to meet the debtor's obligations. The value of such goods is regulated entirely by market demands and it was conceded in this case that ". . . fluctuations in demand . . ."[41] at times disappointed sales expectations.[42] In view of prevailing general restrictions on bank credit, creditors should have realised that the debtor might experience extreme difficulty in disposing of the goods in sufficient volume to meet its liabilities.

Barwick, C.J. and Kitto, J. were prepared to concede that dishonour of a cheque is a matter sufficiently serious to put the creditor on enquiry as to the debtor's solvency. Nevertheless in all cases bar the one payment to the Egg Marketing Board they found that the creditors satisfied the requirements of s. 95(4). It was conceded that each of the creditors was not aware that cheques in favour of other creditors were being dishonoured. Nevertheless it is submitted that where cheques are repeatedly dishonoured, a creditor should make extensive enquiries which on the facts of this case, in revealing the debtor's overall credit situation, would have been a sufficient indication of insolvency, at any rate, after 1st November, 1960, to prevent the creditors taking advantage of the protective provisions of s. 95 to the detriment of the general body of creditors.

Conclusion

One may criticize the limiting effect of the decision in the *Queensland Bacon Case* upon the operation of the preference provisions of the Bankruptcy Act. By extending the operation of the protective provisions of s. 95, the Court has, in effect, defeated the reasonable expectations of the commercial community to an equitable sharing of the assets of an insolvent debtor.

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THIRD PARTY CONTRACTS

BESWICK v. *BESWICK*
COULLS v. *BAGOT'S EXECUTOR & TRUSTEE CO. LTD.*

In both commercial and domestic transactions, agreements are made between two parties, whereby in return for consideration supplied by one, the other party contracts to confer a benefit on a third party. While as a matter of policy there would seem to be little reason for denying that third party the means of enforcing a contract made for his benefit, the courts have

[40] Menzies, J. *id.* at 29-30.
[41] *Id.* at 24.
[42] *Id.* at 24.

consistently withheld a remedy in cases of simple contracts. Controversy rages; indeed some years ago Williston, writing on this matter, could quote the German scholar Busch: "In no department of the law has a more obstinate and persistent battle between practice and theory been waged than in regard to the question: whether a right of action accrues to a third person from a contract made by others for his benefit".[1] The notion that a third party can sue on a contract made for his benefit would appear to have been dealt a fatal blow by the decision of the House of Lords in *Scruttons Ltd.* v. *Midland Silicones Ltd.*,[2] but further consideration was given to the matter in the judgments of the Court of Appeal and the House of Lords in *Beswick* v. *Beswick*.[3] It is proposed to consider this latter decision together with that of *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.*,[4] in which two of the learned judges of the High Court of Australia reviewed the law relating to privity of contract.[5]

THE DECISIONS

(a) *Beswick* v. *Beswick*[6]

Peter Beswick was an elderly coal merchant who entered into an agreement with his nephew John Joseph Beswick (the defendant in the action) for the sale of the former's business. The nephew agreed to pay Peter Beswick the sum of £6/10/- per week for the rest of his life, and after his death an annuity of £5 per week was to be paid by the nephew to Peter's wife. During his life the uncle received his promised payments, but after his death only one payment of £5 was made to his widow. The present action was brought by the widow both in her personal capacity, and also as administratrix of her late husband's estate. The Vice-Chancellor of the Chancery Court of the County Palatine of Lancaster (Burgess, V.-C.) dismissed her claim for specific performance and the case then came before the Court of Appeal.

The court granted the application for specific performance. Lord Denning, M.R. held that the remedy was available to the plaintiff as administratrix of the estate of the contracting party, and also in her personal capacity, both under the common law and under s. 56(1) Law of Property Act 1925. Danckwerts, L.J. agreed that s. 56(1) enabled the plaintiff to sue in her personal capacity, and held also that she was entitled to succeed in her representative capacity, but did not find it necessary to decide whether the plaintiff could sue at common law in her personal capacity. Salmon, L.J. denied that the plaintiff could sue in her personal capacity at common law, and preferred not to express a concluded opinion as to her rights under s. 56(1), although his judgment does incline to the view that the section would not assist the plaintiff. His Lordship agreed with the other members of the Court of Appeal that the plaintiff could succeed as representative of the contracting party.

Upon appeal to the House of Lords, it was confirmed that the widow was entitled to an order for specific performance in her capacity as executrix. However, their Lordships considered that the commonly accepted view of the doctrine of privity of contract was correct and Mrs. Beswick was not able to

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[1] (1901-02) 15 *Harv. L.R.* 767. This excerpt is a translation of Busch in "Doctrin und Praxis über die Gültigkeit von Verträgen zu Gunsten Dritter" (1860).

[2] (1962) A.C. 446.

[3] Court of Appeal: (1966) 3 All E.R. 1; (1966) 3 W.L.R. 396. House of Lords: (1967) 2 All E.R. 1197; (1967) 3 W.L.R. 932. Page references in this note are to the All England Reports.

[4] (1967) 40 A.L.J.R. 471; (1967) A.L.R. 385.

[5] It should be noted at the outset that the matter of privity of contract has been considered by the English Law Revision Committee, which recommended that a third party should be entitled to enforce in his own name an express provision in a contract purporting to confer a benefit directly on him: (1937) Cmnd. 5449, §48.

[6] *Supra* n. 3.

maintain the action in her personal capacity. Their Lordships stated *obiter* that s. 56(1) had no application to the present case.

(b) *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.*[7]

In January, 1959, a written agreement headed "Agreement between Arthur Leopold Coulls and O'Neil Construction Proprietary Limited" was entered into whereby Arthur Leopold Coulls, the owner of a property, granted to O'Neil Construction Proprietary Limited the right to quarry and remove stone from his land. The agreement stated the amount to be paid for the stone, and fixed a minimum royalty. The final clause stated: "I authorise the above Company to pay all money connected with this agreement to my wife, Doris Sophia Coulls and myself, Arthur Leopold Coulls as joint tenants (or tenants-in-common) (the one which goes to living partner)." The signatories to the document were A. L. Coulls, L. O'Neil (on behalf of the company) and D. S. Coulls. Questions as to the effect of the document arose in the administration of the deceased's estate and the matter eventually came before the High Court.

The High Court held by a majority[8] that after the death of Mr. Coulls, the company was bound to pay the royalties to the deceased's executors (Bagot's Executor & Trustee Co. Ltd.), which should receive and hold the royalties as executor of the deceased's estate. The widow was not an assignee of the royalties, nor was she held to be entitled to payment of them. Taylor and Owen, JJ. (in a joint judgment) and McTiernan, J. concluded that only A. L. Coulls and the company were parties to the contract, having regard to the fact that the contract purported expressly to be made between the deceased and the company, and there was no express promise by the company to pay the royalties to the wife.[9] The mere fact that Mrs. Coulls signed the document did not make her a party to the contract. The last paragraph was merely a revocable mandate addressed to the company to pay the royalties to the wife and it lapsed upon the death of Mr. Coulls.[10]

According to the minority judgments, the company's promise under the contract was made both to the deceased and his wife, and Mrs. Coulls was entitled as surviving joint promisee to enforce the promise.[11] Windeyer, J. and Taylor and Owen, JJ. expressed the view that the surviving joint promisee could bring the action alone, but the Chief Justice thought that the personal representative of the deceased would need to be either a co-plaintiff or joined as a defendant.[12] Barwick, C.J. and Windeyer, J. considered that the last paragraph was an integral part of the document as a whole, and was not a mere revocable mandate. They construed the transaction before them as a contract between the company on the one hand, and Coulls and his wife on the other. Accordingly, the widow could enforce the company's promise.

The Chief Justice stated that if the contract could be construed as an agreement made with the deceased coupled with a mere authority to pay the royalties to himself and his wife, "that authority terminated with death, notwithstanding that according to its terms the deceased contemplated that it would be operative beyond his death".[13] Windeyer, J. agreed with this

[7] *Supra* n. 4.
[8] McTiernan, Taylor and Owen, JJ.; Barwick, C.J. and Windeyer, J. dissenting.
[9] McTiernan, J. at 479; Taylor and Owen, JJ. at 481.
[10] *Ibid.*
[11] It is significant to note that the company was quite willing to perform its contractual obligations; the case arose upon an originating summons taken out by the executor seeking a determination as to rights arising out of the contract.
[12] 40 A.L.J.R. 471 *per* Windeyer, J. at 483; Taylor and Owen, JJ. at 480; Barwick, C.J. at 477.
[13] *Id.* at 476.

view.[14] However, if the last clause could be construed as part and parcel of a contract by which Mrs. Coulls was a third person to be benefited, the company was still bound to pay the royalties to her, "for, whatever difficulties she may have in compelling it to do so, it would break its contract if it did not do so".[15]

All five Justices overruled the finding of Mayo, J. in the Supreme Court of South Australia[16] that the last paragraph of the document operated as an immediate assignment by the deceased of the royalties accruing under it.[17]

ANALYSIS OF THE DECISIONS

(a) *Privity of Contract and Consideration*

It would seem to be settled law that a person cannot sue on a contract made for his benefit unless he is a party to it. Thus in 1861, Wightman, J. said ". . . it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit".[18] In *Beswick* v. *Beswick* Lord Denning, M.R. accepted that a third party cannot in such circumstances sue in his own name, but should instead bring an action in the name of the contracting party.[19] The learned Master of the Rolls relied on an earlier decision of the Court of Exchequer Chamber in *Dutton* v. *Poole*[20] as a ground for distinguishing *Tweddle* v. *Atkinson*.[21] In *Dutton* v. *Poole*, Sir Edward Poole proposed to cut down some timber trees on his land, and to sell them for the benefit of his younger children. The eldest son, wishing to inherit the trees, promised his father that he would pay £1000 to the daughter, Grizel, if the trees were left standing. The trees were not cut down, but after Poole's death, the son refused to pay the money to Grizel. It was held that the daughter Grizel could sue and recover under the contract, although she was not a party to it. As Windeyer, J. has noted,[22] *Dutton* v. *Poole* is actually an illustration of an older notion of consideration, viz., that a person could sue on a contract made for his benefit if he were closely related by blood to the promisee. In *Tweddle* v. *Atkinson*, Wightman, J. noted that this view could no longer be supported. The decision in *Dutton* v. *Poole* has been distinguished by Windeyer, J.[23] who considers that having regard to the present day doctrine of consideration, the son could now be compelled to perform his promise, but only in an action brought by the father's representative.

Although Lord Denning, M.R. seems to have approved *Dutton* v. *Poole*, and expressed the view that it has never been overruled,[24] it will be noticed that even if the rejection of that line of thought in *Tweddle* v. *Atkinson* was

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[14] *Id.* at 482.
[15] *Id.* at 488.
[16] *In the Estate of Coulls* (1965) S.A.S.R. 317.
[17] It was not a valid statutory assignment of the benefit of the promise made to the deceased, as the requisite intention was lacking, and her right to the entire interest was conditional upon her husband predeceasing her: *per* McTiernan, J. at 479. (The statutory requirements are contained in s. 15 Law of Property Act 1936-1965 (S.A.), the equivalent of s. 12 Conveyancing Act 1919-1967 (N.S.W.)). The last paragraph did not operate immediately to transfer to Mrs. Coulls the entire interest of the deceased in the royalties. It was further held that the last paragraph did not constitute an equitable assignment, as a matter of construction of the document. Even if it could be read as a purported equitable assignment, there was no consideration supplied by Mrs. Coulls to support the assignment. (For the principles governing equitable assignments, see generally the judgment of Windeyer, J. in *Norman* v. *Commissioner of Taxation* (1963) 109 C.L.R. 9 at 23 *et seq.*)
[18] *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393 at 397; 121 E.R. 762.
[19] (1966) 3 All E.R. 1 at 7.
[20] (1678) T. Raym. 302; 89 E.R. 352.
[21] (1861) 1 B. & S. 393; 121 E.R. 762.
[22] *Coulls' Case* (1967) 40 A.L.J.R. 471 at 485.
[23] *Ibid.*
[24] (1966) 3 All E.R. 1 at 6.

not sufficient, both the High Court and the House of Lords have indicated their disapproval of *Dutton* v. *Poole*. In *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*,[25] Fullagar, J. said "it must be taken to have been long since overruled". With this opinion, Dixon, C.J. concurred[26] and in *Scruttons Ltd.* v. *Midland Silicones Ltd.*[27] Viscount Simonds quoted the judgment of Fullagar, J. and agreed "with every line and every word of it".

Lord Denning has long been trying to mitigate the severity of the common law rules relating to privity of contract,[28] but it appears that the common law on this point is still accurately represented by the pronouncements of Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[29] and Viscount Simonds in *Scruttons' Case*. In *Dunlop* v. *Selfridge*, Lord Haldane stated:

> In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*.[30]

and Viscount Simonds said in *Scruttons' Case*: "A principle which is . . . as well established as any in our law . . . that only a person who is a party to a contract can sue on it".[31] This was recognised in *Coulls' Case* by Barwick, C.J.[32] and Windeyer, J. who, after a thorough review of the authorities in point, rejected Lord Denning's conclusion on this matter.[33]

Before the House of Lords, counsel for the respondent (the widow) in *Beswick* v. *Beswick* conceded that Mrs. Beswick was not entitled to sue the nephew at common law, and their Lordships did not expressly decide upon this point. However, Lord Reid noted that the "view more commonly held in recent times" is that the third party could not sue on a contract made for his benefit, and since he did not feel that this was an appropriate case to solve the question, he proceeded "on the footing that the commonly accepted view is right".[34] Lord Upjohn indicated that he favoured the traditional view.[35]

The doctrine of privity of contract was considered in a recent decision of the Supreme Court of N.S.W. (in its Commercial Causes jurisdiction) in *Concrete Constructions Pty. Ltd.* v. *Government Insurance Office of N.S.W.*[36]

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[25] (1956) 95 C.L.R. 43 at 67.

[26] *Id.* at 52.

[27] (1962) A.C. 446 at 472.

[28] See for example the dicta of Denning, L.J. (as he then was) in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* (1949) 2 K.B. 500 at 514-5. However, in *Green* v. *Russell* (1959) 2 Q.B. 226, Romer, L.J. (with whom Pearce, L.J. agreed on this point) rejected these views, as they were based on an incomplete review of the authorities before *Tweddle* v. *Atkinson* (*supra* n. 21).

[29] (1915) A.C. 847.

[30] *Id.* at 853.

[31] (1962) A.C. 446 at 467.

[32] (1967) 40 A.L.J.R. 471 at 477.

[33] *Id.* at 483-486. Note that Barwick, C.J. and Windeyer, J. were the only members of the High Court who found it necessary to discuss the doctrine of privity of contract. In *Beswick's Case*, Lord Denning sought to distinguish *Dunlop* v. *Selfridge* as a case in which the third person had no "legitimate interest" to enforce the contract.

[34] (1967) 2 All E.R. 1197 at 1201.

[35] *Id.* at 1217.

[36] (1966) 85 W.N. (Pt. 1) (N.S.W.) 104. The facts of the case are involved, but the relevant issue for present purposes is as follows: Erma Construction Co. Pty. Ltd. was a sub-contractor employed by Concrete Constructions on the erection of a certain building. An employee of Erma Constructions who was injured while work was in progress, brought an action against Erma Constructions alleging failure to take reasonable care to protect him from injury. Upon being served with a third party notice claiming contribution or indemnity, Concrete Constructions made an application under s. 7B Commercial Causes Act 1903-1965 (N.S.W.) for a declaration that Concrete Constructions

In the course of his judgment (which was delivered before *Beswick's Case* reached the House of Lords), Macfarlan, J. reviewed the authorities in point, and considered the law to be that laid down in *Scruttons' Case*[37] and *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[38] It is evident from His Honour's judgment that he did not support the views of Lord Denning in *Beswick* v. *Beswick*.[39] It thus appears that, while a contract made for the benefit of a third party is itself valid,[40] the law will deny to the third party beneficiary a right to sue in his own name.

Let us accept, then, that a person cannot sue on a contract made for his benefit unless he is a party to it. This raises a fundamental question: is a person a party to a contract if the promise is made to him, or is his right of action contingent upon his having supplied consideration? It has been thought that a promisee must show that consideration has moved from him before he may sue on the contract.[41] It has been suggested[42] that in fact there is no distinction in the case of simple contracts between the doctrine of privity of contract and the rule that consideration must move from the promisee. The suggestion is that, if the two rules are really one, "it would follow that a person could only be a party to a simple contract where he had given consideration. . . . It is submitted that in fact the two rules are identical."[43]

Two separate fact situations illustrating the views are contained in the current edition of Cheshire & Fifoot's *Law of Contract*:[44]

> The plaintiff may be a party to an agreement without furnishing any consideration.
>
> A, B and C may all be signatories to an agreement whereby C promises A and B to pay A £100 if B will carry out work desired by C.
>
> On the other hand, the person anxious to enforce the promise may not be a party to the agreement at all.
>
> B and C may make an agreement whereby B promises to write a book for C and C promises to pay £100 to A. In neither case may A sue C.

While previous editions of Cheshire & Fifoot have accepted these two rules as being separate and distinct, the learned authors of the current edition now consider the two statements as being "but two ways of saying the same thing".[45] M.P. Furmston has severely criticised the view that the two rules are separate.[46] In his view, a promise by A to C "to pay him £100 if B carries out work is not a contract but a mere gratuitous promise", even though B has bargained for and bought the promise.

The weight of judicial authority seems to favour the view that the two rules are in fact separate. Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[47] stated the two rules as separate well-established principles. Consider, too, the words of Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*:[48] ". . . no doubt at common law no one can sue on a contract except those who are contracting parties

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was insured by Erma Constructions against its liability to pay damages at common law. Macfarlan, J. found that Erma Constructions and the Government Insurance Office were the only parties to the contract of insurance. Accordingly Concrete Constructions could not take any benefit under the contract to which it was not a party.

[37] *Supra* n. 27.

[38] (1956) 95 C.L.R. 43.

[39] (1966) 85 W.N. (Pt. 1) (N.S.W.) 104 at 119.

[40] *Re Schebsman* (1943) 1 Ch. at 372 (Uthwatt, J.); on appeal (1944) 1 Ch. 101.

[41] J. A. Andrews, "Section 56 Revisited" (1959) 23 *Conveyancer* 179 at 192.

[42] By M. P. Furmston (1960) 23 *Mod. L.R.* 373 at 382.

[43] *Ibid.*

[44] Australian edition by J. G. Starke and P. F. P. Higgins, 157.

[45] *Id.* at 158; Sixth (English) ed. at 65. For the earlier view, see Fifth (English) ed. at 67.

[46] *Supra* n. 42 at 382-4.

[47] (1915) A.C. 847 at 853.

[48] (1933) A.C. 70 at 79.

and (if the contract is not under seal) from and between whom consideration proceeds." The English Law Revision Committee recognised the distinction between the two rules,[49] and this view was accepted by the editor of the current edition of Anson's *Law of Contract*.[50]

In *Coulls* v. *Bagot's Executor & Trustee Co. Ltd.*, four of the five Justices of the High Court[51] considered the widow's rights in the case where, as a matter of construction, the company's promise was made to both the deceased and his wife. Their attitude on this point was indicated by Windeyer, J.:

> Still, it was said, no consideration moved from her. But that . . . mistakes the nature of a contract made with two or more persons jointly. The promise is made to them collectively. It must, of course, be supported by consideration, but that does not mean by considerations furnished by them separately. It means a consideration given on behalf of them all, and therefore moving from all of them. In such a case the promise of the promisor is not gratuitous; and, as between him and the joint promisees, it matters not how they were able to provide the price of his promise to them.[52]

It might be noted that while no recent authority was cited by the High Court in support of this view, some *obiter* remarks of Lord Atkin in *McEvoy* v. *Belfast Banking Co. Ltd.*[53] (with which Lord Thankerton appeared to agree) are to the same effect. Lord Atkin stated that in the case of a contract between A and a bank, in which A deposits money in the names of A and B payable to A or B, ". . . B can sue the bank. The contract on the face of it purports to be made with A and B, and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself, and the consideration supports such a contract."[54]

Barwick, C. J. and Windeyer, J. have maintained the distinction between the rules relating to privity and consideration. While they accept that consideration must move from the promisee, their Honours were nevertheless prepared to give a right of action to a person who did not furnish consideration, but on whose behalf consideration was presumed to have been given by the other joint promisee.

It is thus considered that the rules relating to consideration and those regarding privity of contract are separate aspects of English law. It would further appear that the strictness of the rule that consideration must move from the promisee has been judicially relaxed.

A further issue arises in the case of a third party contract as to whether the contracting parties are entitled to rescind or vary the contract by agreement between themselves. When the English Law Revision Committee reviewed the topic in 1937, they recommended that the right of the third party should be subject to the cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct.[55] It is clear that Lord Greene, M.R. in *Re Schebsman*[56] considered that that the parties could rescind, as did Sugerman, J. in *Cathels* v. *Commissioner of Stamp Duties*.[57]

It would seem to be settled that the parties can rescind in the absence of any trust. This is expressly stated in the judgments of Lord Reid and Lord

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[49] (1937) Cmnd. 5449, §37.
[50] 22nd ed. (ed. A. G. Guest), 89-90.
[51] Taylor and Owen, JJ. (*obiter*); Barwick, C.J. and Windeyer, J.
[52] (1967) 40 A.L.J.R. 471 at 483.
[53] (1934) All E.R. Rep. 800.
[54] *Id.* at 805. It appears that *Dunlop* v. *Selfridge* (*supra* n. 29) was cited neither in argument nor by the House in the course of its judgment in *McEvoy's Case*.
[55] (1937) Cmnd. 5449, §47, 48.
[56] (1944) Ch. 83 at 93.
[57] (1962) S.R. (N.S.W.) 455 at 457.

Upjohn in *Beswick* v. *Beswick*,[58] and Windeyer, J. in *Coulls' Case*.[59] In the Court of Appeal, Salmon, L.J. and Lord Denning appear to have agreed that the parties could have varied the agreement without reference to the third party, although this would seem inconsistent with the latter's view of s. 56(1), according to which the third party's rights apparently become irrevocable *ab initio*.[60]

(b) *Section 56 (1) Law of Property Act*

It was contended for the plaintiff in *Beswick* v. *Beswick* that s. 56(1) Law of Property Act[61] entitled her to enforce the promise in her personal capacity. The section is as follows:

> 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.

Section 36C(1) Conveyancing Act (N.S.W.) substantially adopts s. 56(1), and adds the following sub-section (2) (which does not appear in the English Act):

> Such person may sue, and shall be entitled to all rights and remedies in respect thereof as if he had been named as a party to the assurance or other instrument.[62]

Lord Denning and Danckwerts, L.J., as an additional ground for their decision, said that s. 56(1) did entitle the plaintiff in her personal capacity to enforce the nephew's promise. The Master of the Rolls considered that the section prevented the defendant from denying the widow the benefit of the contract simply because she was not a party to it.[63] The third member of the Court of Appeal, Salmon, L.J., apparently entertained misgivings about the meaning of the section and preferred not to express a concluded opinion. Upon appeal to the House of Lords, it was held that s. 56(1) had no application to the present case. In considering the interpretation given to the section by their Lordships, it will be necessary to review the section's history.

The Law of Property Act 1925 was a Consolidation Act, consolidating *inter alia* the Law of Property Act 1922,[64] the Law of Property (Amendment) Act 1924,[65] and the Real Property Act, 1845.[66] Section 56(1) of the Law of Property Act was intended to replace s. 5 of the Real Property Act 1845.

The state of the common law prior to 1845 is expressed in the judgment of Lord Upjohn.[67] In an indenture under seal expressed to be made *inter partes*, a grantee or covenantee used not be able to take an immediate interest as grantee nor the benefit of a covenant as covenantee unless also named as a party to the indenture. The rule applied to both realty and to personal grants and covenants, but only to an indenture *inter partes*;[68] it had no application to a deed poll.[69] Section 11 of the Transfer of Property Act 1844 abolished the rule, and applied to all covenants whether relating to realty or

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[58] (1967) 2 All E.R. 1197 *per* Lord Reid at 1201; *per* Lord Upjohn at 1217.
[59] (1967) 40 A.L.J.R. 471 at 487.
[60] (1966) 3 All E.R. 1 *per* Lord Denning at 8; Salmon, L.J. at 14.
[61] 15 & 16 Geo. 5 c.20.
[62] J. G. Starke has noted (21 *A.L.J.* 426) that sub.-s.(2) would still be subject to the limitations of sub.-s.(1) as the opening words clearly indicate a person who comes within the operation of sub.-s.(1).
[63] (1966) 3 All E.R. 1 at 9.
[64] 12 & 13 Geo. 5 c.16.
[65] 15 & 16 Geo. 5 c.5.
[66] 8 & 9 Vict. c.106.
[67] (1967) 2 All E.R. 1197 at 1216 *et seq.* See also the judgment of Simonds, J. (as he then was) in *White* v. *Bijou Mansions Ltd.* (1937) 1 Ch. 610 at 623-4.
[68] *Cooker* v. *Child* 2 Levinz 74.
[69] (1967) 2 All E.R. 1197 at 1222.

personal grants or covenants.[70] (It will be recalled that a deed poll is a deed made by one party only, whereas an indenture is a deed to which two or more persons are parties.)

This section was itself repealed and replaced by s. 5 of the Real Property Act 1845:

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

Section 5 supplanted the common law rule relating to indentures *inter partes* in relation to realty, and conferred a benefit "only on those persons to whom the deed purports to grant an estate or interest or those persons with whom there purports to be a covenant or agreement".[71] The old statute law was then consolidated by the Law of Property Act, and s. 5 was replaced by s. 56(1) of that Act.

Section 56(1) has been variously interpreted. In 1938, Luxmoore, J. expressed the opinion *obiter* that the section applied to every kind of property, both real and personal.[72] In *White* v. *Bijou Mansions Ltd.* Simonds, J. (as he then was) said s. 56(1) assisted one who "although not named as a party to the conveyance, is yet a person to whom that conveyance purports to grant something or with whom some agreement or covenant is purported to be made".[73] According to this view, although a person seeking to rely on the covenant was not expressly *named* as a covenantee, he was given a right of action if he could show that the covenant purports to be made *with* him.[74] Sir Wilfred Greene, M.R., hearing the appeal in *White's Case,* said a person is not entitled to rely on the section if it merely purports to confer a benefit on him; rather he must show he is a person "who falls within the scope and benefit of the covenant according to the true construction of the deed in question".[75]

Re Miller's Agreement[76] is consistent with this interpretation. In that case two continuing partners covenanted with a retiring partner to pay him £5000 per annum during his life and £1000 per annum after his death to his widow and daughters. Wynn-Parry, J. held that s. 56(1) did not confer any beneficial interest on the annuitants. He considered that the section did not create new rights, but merely protected rights already shown to exist.[77] It will be noted that in this case the agreement, although made for the benefit of the widow and daughters, did not purport to be made *with* them.

A wider interpretation of s. 56(1) based on a literal reading of the section has been proposed in *dicta* of Denning, L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*[78] and *Drive Yourself Hire Company* v. *Strutt*[79], and it is on these *dicta* that Lord Denning and Danckwerts, L.J. based their observations as to the effect of the section in *Beswick's Case.* This view amounts to a virtual abolition of the doctrine of privity of

[70] 7 & 8 Vict. c.76. "11. That it shall not be necessary in any case to have a Deed indented and that any Person not being a party to any deed may take an immediate benefit under it in the same manner as he might under a Deed Poll."

[71] *Per* Simonds, J., *White* v. *Bijou Mansions Ltd.* (1937) 1 Ch. 610 at 623-4.

[72] *Re Ecclesiastical Commissioners for England's Conveyance* (1936) Ch. 430 at 438.

[73] *White* v. *Bijou Mansions Ltd.* (1937) Ch. 610 at 625 *per* Simonds, J. This has received approval in *Re Foster* (1938) 159 L.T. 279; *Re Sinclair's Life Policy* (1938) Ch. 799; *Stromdale & Ball Ltd.* v. *Burden* (1952) Ch. 223; *Re Miller's Agreement* (1947) Ch. 615, (1947) 2 All E.R. 78.

[74] *Stromdale & Ball Ltd.* v. *Burden, supra,* and see Anson *op. cit.* at 380.

[75] *White* v. *Bijou Mansions Ltd.* (1938) Ch. 351 at 365.

[76] (1947) 2 All E.R. 78.

[77] *Id.* at 82; (1947) Ch. 615 at 622.

[78] (1949) 2 K.B. 500 at 517.

[79] (1953) 2 All E.R. 1475 at 1482-3.

contract. Danckwerts, L.J. considered that the words of the section operated to introduce a *jus quaesitum tertio* into English law, hence the plaintiff in the action then before the court could sue in her personal capacity.[80]

It has been argued in other cases that the section gives a third party a right to sue on a contract. Crossman, J. was not prepared to hold that the section created such an "enormous change".[81]

Macfarlan, J. considered the New South Wales section in the *Concrete Constructions Case*,[82] and noted that the views expressed on the section by Denning, L.J. in *Smith* v. *River Douglas Catchment Board*[83] met with the disapproval of Fullagar, J. in *Wilson's Case*,[84] a judgment approved by Dixon, C.J. and later by Viscount Simonds in *Scruttons' Case*.[85] His Honour noted that, while the effect of the section was not discussed in *Scruttons' Case*, if s. 56(1) did allow a third party to sue on a contract made for his benefit, surely their Lordships would have mentioned this when stating the privity rules.[86] His Honour concluded:

> Although there are plainly doubts as to what is the affirmative meaning of the section, it is . . . clear that it does not, in any respect that is material to this case affect or alter what has been called the rule in *Tweddle* v. *Atkinson*.[87]

The judgments of Lord Denning and Danckwerts, L.J. in *Beswick* v. *Beswick* were considered by Macfarlan, J. who thought their opinions were "at variance with those which . . . authority binding on me compels me to hold".[88]

In *Beswick* v. *Beswick* the House of Lords appear to have rejected the suggestion that s. 56(1) operated to abolish the principles relating to privity of contract, although the opinions of their Lordships were *obiter dicta*. What, then, was its effect?

Regard must be had to the definition of "property" in s. 205 Law of Property Act:

> (1) In this Act unless the context otherwise requires the following expressions have the meanings hereby assigned to them respectively, that is to say . . . (xx) "Property" includes any thing in action and any interest in real or personal property.[89]

Lords Reid, Hodson and Guest noted that the law of Property Act was a Consolidation Act, and that it must be presumed that Parliament did not intend to alter the pre-existing law. If the definition of "property" is applied to the section, it would clearly encompass both realty and personalty, and this would lead to a result far beyond the pre-existing statute law as contained in s. 5 of the Real Property Act 1845, which, as noted above, only applied to realty. The definition was, however, prefaced by the phrase "unless the context otherwise requires". Hence, to give the section a meaning which would not

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[80] (1966) 3 All E.R. 1 at 13.

[81] *Re Foster*, 159 L.T. 279 at 282; cited with approval by Wynn-Parry, J. in *Re Miller's Agreement*. In *Coulls' Case*, only Windeyer, J. referred to the South Australian equivalent of s. 56(1), and he did not find it necessary to decide upon its effect. His Honour considered that there was no authority binding upon the High Court as to the meaning of the section, and was content to observe that he found difficulty "in seeing in it a complete reversal of the rule that only those who are parties to a bargain can enforce it at law" (at 488).

[82] *Supra* n. 36.

[83] *Supra* n. 78.

[84] *Supra* n. 25.

[85] *Supra* n. 27.

[86] (1966) 85 W.N. (Pt. 1) (N.S.W.) 104 at 118. It is also significant to note that no intention to alter the law of privity on the part of the legislators appears during the passage of the Bills through the House of Lords: see (1966) 29 *Mod. L.R.* 657 at 661-2 (G. H. Treitel).

[87] *Id.* at 118.

[88] *Id.* at 119.

[89] *Cf.* Conveyancing Act (N.S.W.) s.7.

alter the pre-existing law, their Lordships held that the statutory definition of "property" did not apply to s. 56(1). Accordingly, s. 56(1) was not available to the widow. Lord Reid was influenced by the fact that the language of the section "is not at all what one would have expected if the intention had been to bring in all that the application of the definition would bring in", and s. 56(1) appeared in a section of the Act entitled "conveyances and other instruments", but if the scope of the section were extended by the definition of "property", the section would have been inappropriately placed. While neither Lords Reid nor Hodson stated their precise view as to the meaning of the section, Lord Guest considered that "property" was limited to real property.[90]

Lord Pearce found that the meaning given to the section in *White* v. *Bijou Mansions* and *Re Miller's Agreement* was unsatisfactory, but it was a possible meaning. His Lordship said that he inclined to the view expressed by Lord Upjohn.[91]

Lord Upjohn traced the origin of the section, and noted the presumption that it should not alter the law, appearing as it did in a consolidating act. However, quite apart from the statutory definition of "property", the word has a wide import, and his Lordship found it difficult to limit the section's import to real property.

> Without expressing any concluded view I think it may be that the true answer is that Parliament (as sometimes happens in consolidation statutes) inadvertently did alter the law in section 56 by abrogating the old common law rule in respect of contracts affecting personal property as well as real property. But it cannot have done more. Parliament, *per incuriam* it may be, went back to the position under the Act of 1844 but I am convinced it never intended to alter the fundamental rule laid down in *Tweddle* v. *Atkinson*.
>
> The real difficulty is as to the true scope and ambit of the section. My present views, though obiter and tentative, are these. Section 56, like its predecessors, was only intended to sweep away the old common law rule that in an indenture *inter partes* the covenantee must be named as a party to the indenture to take the benefit of an immediate grant or the benefit of a covenant; it intended no more. So that for the section to have any application it must be to relieve from the consequences of the common law, and in my opinion three conditions must be satisfied. If all of them are not satisfied then the section has no application and the parties are left to their remedies at common law.[92]

The three conditions which Lord Upjohn considered must be complied with are as follows:

(i) the defendant must have purported to covenant with or make a grant to the third party;
(ii) the section is limited to documents under seal;
(iii) it refers only to documents strictly *inter partes*.

The agreement in *Beswick* v. *Beswick* satisfied none of these conditions, and the section was of no use to the plaintiff.

It is submitted that, having regard to the history of the section, the view expressed by Lord Upjohn is the more accurate interpretation.

It is strongly arguable that in New South Wales, the section would apply to both realty and personalty. The section originally appeared in New South Wales as s. 48 Conveyancing Act 1919, which applied only to deeds and to immediate interests in land and to the benefit of conditions and covenants

[90] Lord Reid: (1967) 2 All E.R. 1197 at 1202-1205; Lord Hodson at 1205-1207; Lord Guest at 1209-1211.
[91] *Id.* at 1215-1216.
[92] *Id.* at 1223-4.

relating to land only. Section 48 was repealed by the Conveyancing (Amendment) Act 1930 (*s. 11(d)*), and s. 9 of the latter Act inserted the present s. 36C. It is submitted that for reasons similar to those advanced by Lord Upjohn with regard to s. 56(1) Law of Property Act, the effect of s. 36C was to abolish the old common law rule as regards personalty as well as realty. The present New South Wales section appears in a part of the Act dealing with "General Rules Affecting Property", whereas the English equivalent is grouped under "Conveyances and other Instruments".

(c) *Remedies*

(i) *Damages*

The facts in *Beswick* v. *Beswick* may be reduced to this format:

> Under a contract between A and B, A promises that he will transfer all the assets of his business to B in consideration of a promise by B, that B will pay C . . . £5 a week for the rest of C's life. A duly transfers all the assets to B, B pays one instalment to C and then refuses to make any further payments under the contract.[93]

What damages can be recovered by A in an action against B for breach of contract?

At common law, subject to the rules relating to remoteness of damage, the amount recoverable in an action for damages for breach of contract is the actual loss suffered. In the case of third party contracts, this has been generally taken to mean that if, in the *Beswick* v. *Beswick* situation, A sues B for breach of contract, A can only recover his actual loss, not that of C. The point may be illustrated by reference to a decided case. In *West* v. *Houghton*[94], C was a tenant of B under a lease which did not give him any right of action against B for damage to crops on the estate. A took a lease of sporting rights from B, and covenanted to keep down rabbits so that no appreciable damage would be done to the crops. Coleridge, C.J., in an action brought by B for A's failure to observe the covenant, awarded nominal damages only, for B was not under any liability to C, and hence had not personally suffered any damage.[95]

The authorities on this point are not perfectly clear as was noted by Else-Mitchell, J. in *Cathels* v. *Commissioner of Stamp Duties*,[96] who thought it odd if only nominal damages could be recovered. In the Court of Appeal in *Beswick*, Danckwerts, L.J. seems to have assumed that only nominal damages can be recovered in an action brought by A against B, and used this as an argument for granting specific performance.[97] Salmon, L.J. asserted that A could only recover nominal damages.[98] The learned Master of the Rolls, however, held that A could recover not merely nominal damages, but the money which B promised to pay to C,[99] and cited in support of this the common law and the well-known statement of Lush, L.J. in *Lloyd's* v. *Harper*.[100] With respect, in that decision Lush, L.J. was referring to the situation in which A entered the contract as trustee for C, in which case it is clear that A could

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[93] (1966) 3 All E.R. 1 *per* Salmon L.J. at 13.

[94] (1879) 4 C.P.D. 197; see also *Viles* v. *Viles* (1939) S.A.S.R. 164.

[95] In *West* v. *Houghton* it was admitted as a fact that appreciable damage had been done to the crops of the occupier by the rabbits on the estate.

[96] (1962) S.R. (N.S.W.) 455 at 472. Holmes, L.J. in the Irish case of *Drimmie* v. *Davies* (1898 1 Ir. Rep. 176 at 190) asserted that only nominal damages could be recovered.

[97] (1966) 3 All E.R. 1 at 11.

[98] *Id.* at 14.

[99] *Id.* at 7.

[100] ". . . 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:" (1880) 16 Ch. D. 290 at 321.

recover substantial damages.[101] Lord Denning made it definite that no trust of a contractual right was involved in the present case;[102] hence it is difficult to see how he could rely on *Lloyd's* v. *Harper*.

Before *Beswick* v. *Beswick* was heard by the House of Lords, the High Court delivered its judgment in *Coulls' Case*. Windeyer, J.[103] considered the same set of facts and distinguished two questions in the case where A sues B for damages: (i) what damages can A recover? (ii) for whom does A hold them, himself or C? As to the first question, his Honour concluded that there was no reason for limiting A's remedy to purely nominal damages. There may be circumstances in which B's failure to pay would cause A more than mere nominal loss.

> If C were A's creditor, and the $500 was to be paid to discharge A's debt, then B's failure to pay it would cause A more than nominal damage. Or, suppose C was a person whom A felt he had a duty to reward or recompense, or was someone who, with the aid of $500, was to engage in some activity which A wished to promote or from which he might benefit.[104]

Damages could be nominal or substantial when assessed according to the ordinary rules relating to the measure of damages.

For whom are the damages held once they are recovered by A? Lord Denning, M.R. expressed the view that A holds the proceeds for the benefit of C., and cited the case of *Re Schebsman*.[105] Although the Court of Appeal refused to hold that there was a trust of a promise in this case, Danckwerts, L.J. nevertheless held that the damages recovered "become subject to a trust for the true beneficiary".[106] Windeyer, J. disagreed with this reasoning, observing that in the case of a purely contractual right with no trust attached, A sued at law for damages he himself suffered, not as representative of C. A could have agreed with B to vary the contract without any reference to C, so why should a "proceeding brought by A to enforce his legal right give C a right against A when previously he had none?"[107]

Could there have been some confusion in the Court of Appeal regarding the Court's earlier decision in *Re Schebsman*? In that case, a debtor entered into an agreement with his employer that the company would pay to him certain sums during his life, and after his death to his wife and daughter. In March, 1942, Schebsman was made bankrupt, and he died in 1943. His trustee in bankruptcy applied for a declaration that he could intercept the money payable to the wife and daughter under the agreement. It was held that although no trust had been created in favour of the wife and daughter, neither Schebsman nor his trustee in bankruptcy was entitled to intervene unilaterally to divert payment from the third party.[108] Applied to the *Beswick* v. *Beswick* situation, *Re Schebsman* would simply mean that A could not by himself have required B to pay the annuity to someone other than C.[109] The case does not support the proposition that A holds any damages recovered on trust for C.

In the House of Lords, Lord Reid said that A cannot recover the contract money, and assumed that if A sued for damages, only nominal damages could be recovered because, in this case, no loss was caused by the breach to the estate of the husband.[110] His Lordship did not state any principle of general

[101] *Coulls' Case*: (1967) 40 A.L.J.R. 471 at 486 *per* Windeyer, J.
[102] (1966) 3 All E.R. 1 at 8.
[103] (1967) 40 A.L.J.R. 471 at 486.
[104] *Ibid.*
[105] (1944) Ch. 83.
[106] (1966) 3 All E.R. 1 at 11.
[107] (1967) 40 A.L.J.R. 471 at 487.
[108] *Per* du Parcq, L.J. (1944) Ch. 83, 103-104.
[109] See also *Cathels* v. *Commissioner of Stamp Duties* (1962) S.R. (N.S.W.) 455.
[110] (1967) 2 All E.R. 1197 at 1202.

application. Lord Hodson was content merely to state that "only nominal damages can be recovered".[111] Lord Pearce stated that damages need not be nominal, and cited with approval the observations of Windeyer, J. in *Coulls' Case*. In the case before his Lordship, substantial damages would be awarded, since if only nominal damages could be recovered, this would be "wholly repugnant to justice and commonsense".[112] Lord Upjohn also agreed with Windeyer, J., and noted that if one contracting party sues for damages for breach of contract by reason of the failure to pay the third party he must prove his loss; "that may be great or nominal according to the circumstances". However, on the facts of *Beswick's Case*, his Lordship assumed damages would be nominal.[113] Lord Guest did not give an opinion on this aspect of the appeal.

While the principles governing the measure of damages in these circumstances are by no means free from doubt, it is to be hoped that courts in England and Australia will open further the door unlocked by the above opinions to the assessment of damages according to the normal rules relating to breach of contract.

(ii) *Specific Performance*

For 250 years the courts have been saying that specific performance will not be granted where damages would be an adequate remedy.[114] Thus Salmon, L.J., finding that the administratrix of the deceased's estate in *Beswick* could only recover nominal damages, held that this was clearly inadequate and awarded specific performance.[115] Lord Denning, M.R., in the same case, allowed the widow to enforce the defendant's promise in her capacity as the personal representative of her late husband, even though he would have awarded substantial damages to her in that capacity.

Does it follow that substantial damages must always be an adequate remedy? No; the law has long recognised that even substantial damages will not always be an adequate compensation (as in the case of a purchaser of a particular piece of land). In the course of his dissenting judgment, Windeyer, J. said:

> Nominal or substantial, the question seems to be the same, for when specific relief is given in lieu of damages it is because the remedy, damages, cannot satisfy the demands of justice. . . . Complete and perfect justice to a promisee may well require that a promisor perform his promise to pay money or transfer property to a third party.[116]

Evidently his Honour in *Coulls' Case* considered that mere damages, even though they be substantial, would not satisfy the demands of justice in that case. The Court of Appeal in *Beswick* v. *Beswick* adopted a similar attitude. It will be recalled that both *Coulls' Case* and *Beswick* v. *Beswick* concerned contracts which involved periodic payments. The remedy of damages is considered inadequate in these circumstances, either because it would require a series of actions[117] or because damages would have "to be calculated merely on conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted at a conjectural price". [118]

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[111] *Id.* at 1207.
[112] *Id.* at 1212.
[113] *Id.* at 1221.
[114] *Cud* v. *Rutter* (1719) 1 P. Wms. 570; *Rogers* v. *Challis* 54 E.R. 68 at 70 *per* Romilly, M.R.; (1859) 27 Beav. 175.
[115] (1966) 3 All E.R. 1 at 15. *Cf.* Danckwerts, L.J. at 11.
[116] (1967) 40 A.L.J.R. 471 at 487. *Cf. Fry on Specific Performance*, (6 ed.) at 28-9; *Flint* v. *Brandon* (1803) 32 E.R. 314 at 315; *Aristoc Industries Pty. Ltd.* v. *Wenham (Builders) Pty. Ltd.* (1965) N.S.W.R. 581 at 588-9 *per* Jacobs, J.
[117] *Per* Danckwerts, L.J. in *Beswick* v. *Beswick* (1966) 3 All E.R. 1 at 11.
[118] *Adderley* v. *Dixon* (1824) 1 Sim. & St. 607, 611. See G. H. Treitel at (1966) 29 *Mod. L.R.* 663.

The House of Lords discussed the availability of specific performance in *Beswick* v. *Beswick*. Counsel for the defendant contended that equity would not enforce a contract to make a money payment. This argument was rejected by the Court of Appeal,[119] and was not argued before their Lordships. It has long been settled that the courts may decree specific performance of an agreement for valuable consideration to grant an annuity, and the House of Lords approved the old authorities.[120] Specific performance is particularly appropriate in the case of a contract to grant an annuity, for, as Lord Upjohn noted, "It is to do true justice to enforce the true contract that the parties have made and to prevent the trouble and expense of a multiplicity of actions".[121] Damages would not be an adequate remedy, especially if they were merely nominal, as some of their Lordships suggested. Lord Upjohn cited the words of Lord Plunket, L.C. in *Swift* v. *Swift*,[122] when the latter said that to compel a plaintiff to accept a certain sum ascertained by conjecture of a jury as to the value of the annuity would be most unreasonable and unjust.

It has been observed that the question whether damages are an adequate remedy (and hence whether specific performance is available) has come to depend on the category of the contract in question. Commenting on this development, Windeyer, J. considered that there is "no reason today for limiting by particular categories rather than by general principle, the cases in which orders for specific performance will be made".[123] These words were approved by Lord Pearce in *Beswick* v. *Beswick*.

It might be noted that if one contracting party had obtained an order compelling the other specifically to perform his promise to pay the third party, the third party could then enforce obedience to that order under the Supreme Court Rules (S.A.) Order 42 Rule 25. This was not mentioned in *Coulls' Case*, but in *Beswick* v. *Beswick*, Lords Pearce and Upjohn in the House of Lords, and Danckwerts and Salmon, L.JJ. in the Court of Appeal, considered that the English equivalent of that rule applied to the case before them.[124]

CONCLUSIONS

The two decisions here under review should prove to be a rich and inviting territory for exploration in later cases. Now that the dust of this particular conflict has settled, one principle that seems to have withstood all attacks is that the third party does not have any right to sue at common law under a contract made for his benefit.

It is unfortunate that the House of Lords did not agree upon a single statement as to the effect of s. 56(1) Law of Property Act, but the material contained in the judgments of their Lordships will provide an excellent opportunity for other courts to direct their attentions to this section as indicated in *Beswick* v. *Beswick*.

The law relating to remedies for breach of contract will also benefit from these two decisions. Although no complete agreement was reached as to whether damages in the third party contract situations would be nominal or substantial, at least it is open to other judges to grant substantial damages, which in many cases may prove to be the just result. When the question of specific performance arises in future, the judgment of Windeyer, J. in *Coulls'*

[119] The court cited as authority *Keenan* v. *Handley* (1864) 12 W.R. 930; *Peel* v. *Peel* (1869) 17 W.R. 586; *Hohler* v. *Aston* (1920) 2 Ch. 420; (reviewed by Lord Denning at (1966) 3 All E.R. 8).

[120] *Pritchard* v. *Ovey* (1820) 1 Jac. & W. 396; *Swift* v. *Swift* (1841) 3 I.R. Eq. 267; *Keenan* v. *Handley*, *supra* n. 119.

[121] (1967) 2 All E.R. 1197 at 1218.

[122] (1841) 3 I.R. Eq. 267 at 275-6.

[123] (1967) 40 A.L.J.R. 471 at 487.

[124] R.S.C. O.45, r.9; (formerly O.42 r.26).

Case will help to clarify the issues involved. It is also definitely established that specific performance of a promise to pay a third party may be obtained at the suit of the promisee of least in some circumstances, and that a contract to pay money may be specifically enforced.

W. J. TEARLE, Case Editor—Third Year Student.

STARE DECISIS, JUDICIAL POLICY AND PUNITIVE DAMAGES

UREN v. *JOHN FAIRFAX & SONS PTY. LIMITED*[1] *AUSTRALIAN CONSOLIDATED PRESS LIMITED* v. *UREN*[2]

In *Australian Consolidated Press Limited* v. *Uren*[2] three important questions came before the Privy Council. These concerned the extent of the prerogative of justice, and in particular the jurisdiction of the Privy Council to entertain an appeal not against the formal order of the court below, but against the reasons upon which the order was based; the authority in Australia of English decisions, and in particular decisions of the House of Lords; and the place of punitive or exemplary damages in the law of tort.

Uren, a Member of the House of Representatives, brought actions against John Fairfax & Sons Pty. Limited and Australian Consolidated Press Limited, claiming that he had been defamed by articles in the *Sun-Herald* and the *Sunday Telegraph* which suggested that he was a "dupe" of "the Russian Spy, Ivan Skripov", who had "inspired (Uren and others) to ask searching questions in Parliament unsuspectingly, on secret defence establishments in Australia".[3] In the *Australian Consolidated Press Case* there were further counts concerning other allegedly defamatory publications in the *Daily Telegraph* and *The Bulletin*.

In each case the jury awarded the plaintiff very substantial damages. In the *Fairfax Case* the judge directed the jury that it was open to them to award punitive damages in addition to damages intended as compensation, and that in this connection they should consider in particular whether the defamatory material was published with a reckless disregard of the plaintiff's rights and with a view to increasing sales, circulation and profits.[4] In the *Australian Consolidated Press Case* also the jury were directed that they could if they saw fit award punitive damages, and that it would be proper for them to do so if they found that the defendant had acted maliciously or in "contumelious disregard for the rights of the plaintiff".[5]

Each case directly raised the question whether a court in New South Wales should follow observations of members of the High Court, in a series of cases,[6] on the place of punitive damages in tort, or the recent decision of the House of Lords in *Rookes* v. *Barnard*.[4] If the former, it was arguable that the directions in both cases were, on the evidence, correct. If the latter, both directions were clearly wrong, for in *Rookes* v. *Barnard*[7] Lord Devlin,

[1] (1966) 40 A.L.J.R. 124.
[2] (1966) 40 A.L.J.R. 142 (High Court); (1967) 41 A.L.J.R. 66 (Privy Council).
[3] Quoted by McTiernan, J. in the *Fairfax Case supra* at 125.
[4] Quoted by Herron, C.J. in the Full Court: (1965) N.S.W.R. 202 at 210.
[5] Quoted by Walsh, J. in the Full Court: (1965) N.S.W.R. 371 at 392.
[6] Cited and discussed *infra* 13.
[7] (1964) A.C. 1129.