In the middle of the nineteenth century the common law judges reached a decisive conclusion upon the scope of a contract. No one, may be entitled to or bound by the terms of a contract to which he is not an original party. The principle is still the determining factor in the common law, but it must be received with reservations.

The principle was not accepted as universally true in the earlier common law. In the middle of the nineteenth century the actions of debt and account had been available to the third parties who wished to reap the benefit of an arrangement made by others on their behalf, and after the evolution of assumpsit, it remained unclear for a long whether a similar view would be taken or not. An exception of the privity of Contract, admitted in the first half of the eighteenth century when the rule was itself obscure, has since maintained its ground.

The doctrine of privity is strictly a creature of a Common Law. 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. 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.1

Another illustration is offered by the modern case of Smith and Snipes

1 P. 517, below, and Cheshire and Burn Modern Law of Real Property (15th edn.) pp. 614 ff. 
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hall Farm Ltd. v. River Douglas Catchment's Board. 2

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 overland 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. 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. It is still true

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.
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 support and sanction it.⁵

### 8.1 EXCEPTIONS UNDER ENGLISH LAW

The doctrine is however, neither rigid nor absolute. It is subject to certain non-statutory and statutory exceptions. These exceptions are discussed below:

#### 8.1.1 Non-statutory exceptions

1. **TRUST**

   This is the most common exception to the doctrine of privity of contract. It is an equitable exception. Where a trust is created by a contract in favour of a third party, he can sue in case of breach of the contract. In fact, no right can be conferred by way of contract, it can, however be conferred under a trust. But, it may be noted that the court is not to discover trust out of parties' intention. That is, the third party (or beneficiary) has to establish with the help of substantial evidence that a trust has been created in his favour.

   (i) **Rights based on equitable property not contract**

   Equity allows a third party to enforce a contract where it can be construed as creating a completely constituted trust of the contractual right, also known as a trust of the promise. However, as Lord haldane

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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.
stated in *Dunlop v. Selfridge (1915)*, the rights do not arise by way of contract but are based on the third party's equitable proprietary interest in the subject matter of the contract and the right of the equitable owner to enforce the trust in his favour. Property may be tangible or intangible and certain rights under a contract, 'chases in action', constitute an important example of intangible property.

Thus a promise under a contract, either at the time when the contract is made or thereafter, may constitute a trust of the right to which the promisee is entitled in favour of a third party which is enforceable in equity. The subject of the trust, the contractual right to money or property, is at law vested in the trustee, that is to say, in the promisee under the contract.

As with the enforcement of equitable rights in general, the person having the legal right in the thing demanded, in this case the contracting party who has thus become a trustee, must in general be a party to the action. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee. If, however, the trustee refuses to sue, the beneficiary can sue, joining the trustee as defendant. A trustee who sues on behalf of the third party may recover not merely nominal damages representing the trustee's own meagre

7 Williston (1902) 15 Harvard L.R. 767; Corbin (1930) 46 L.Q.R. 12; Glaville Williams (1944) 7 Mod. L.R. 123; Barton (1975) 91 L.Q.R. 236; Rickett (1979) 32 C.L.P. 1; Law Com. No. 242, ss. 2.8-2.9.
9 Vandepitte v. Preferred Accident Insurance Corporation of New York (1933) A.C. 70, at p.79.
interest in the performance of the contract, but the whole loss suffered by the beneficiary.\(^\text{10}\)

Although this equitable principle was first enunciated in the eighteenth century by Lord Harwicke,\(^\text{11}\) the important developments occurred in the nineteenth century. Thus in \textit{Lloyd's v. Harper}.\(^\text{12}\) H, whose son was about to be elected a member of Lloyd's, wrote to the committee guaranteeing his son's solvency. When the son became insolvent, Lloyd's claimed against the father on behalf of members who had suffered thereby, and also on behalf of some outsiders. It was held that the creditors were entitled to the benefit of the contract made, since the committee had entered into it as trustee for those who had suffered by the insolvency of the son.

The principle was applied by the House of Lords in \textit{Les Affreuteurs Rcusis Soriete Anonyme v. Leopold Walford (London) Ltd.}\(^\text{13}\)

In a charter-party made between the appellant, the owner of a steamship, and a firm of charters, the appellant promised to pay a commission of 3 percent on the gross amount of hire to the respondent, the broker who had negotiated the contract of charter-party. It failed to pay, and the respondent sued to obtain its commission.

The respondent was not a party to the contract. Although it would not normally be entitled to any rights under it, it was the practice for a charterer, if necessary, to sue the ship-owner for the amount of a broker's

\(^{10}\) Lloyd's Harper (1880) 16 Ch. D. 290.
\(^{12}\) (1880) 16 Ch.D. 290. See also Fletcher v. Fletcher (1844) 4 Hare 67.
\(^{13}\) (1919) A.C. 801.
commission as trustee for the broker. Here the action had been brought by
the brokers themselves, but by consent it was treated as brought by the
charterers as trustees for them. The House of Lords recognized the
practice and gave judgment in the broker’s favour.

(ii) Intention to create trust

To establish a trust of the promise it is necessary to establish that
the promisee intended to enter the contract as trustee but, in the absence
of express words,\textsuperscript{14} there is no satisfactory test to determine whether the
requisite intention exists. The consequence is uncertainty\textsuperscript{15}.

The different judicial approaches to the question at different stages
to the doctrine have led to a complicated body of case law which is not
possible to reconcile. \textit{Lloyds v. Harper and Walford’s} case may suggest
that it is possible to infer an intention to create a trust solely from the
intention to benefit the third party and, as such, the device of a trust could
be fictionally employed as a way round the privity rule\textsuperscript{16} However, the
approach of the Courts in more recent times has been stricter. It is said
that the approach of the Courts in more recent times has been stricter. It
is said that the intention to constitute the trust must be affirmatively
proved by substantial evidence,\textsuperscript{17} in part because the presence of a trust
renders the contract immutable where the parties might otherwise be free
to vary it\textsuperscript{18}. Thus it will be more difficult to establish a trust where the

\begin{footnotesize}
\begin{enumerate}
\item Fetcher v. Hetcher (1844) 4 Hare 67.
\item Glanville Williams (1944) 7 Mod. L.R. 123.
\item Corbin (1930) 46 L.Q.R. 12, at p. 17; Lord Wright (1939) 55 L.Q.R. 189, at p. 208 (a ‘cumbersome fiction’).
\item Vandepitte v. Preferred Accident Insurance Corp. of New York (1933) A.C., 70, at p. 80.
\item Re Schebsman (1944) Ch. 83, at p. 104; Green v. Russell (1959) 2 Q.B. 226, at p. 241
\end{enumerate}
\end{footnotesize}
intention to benefit the third party is not irrevocable,\(^9\) where the contract consists of a complex package of benefits and burdens,\(^{10}\) or where the third party may not need the benefit.\(^{11}\)

An example of the differences of approach is provided by the contrast between **Re Flavell\(^{22}\)** and **Re Schebsman,\(^{23}\)** *In Re Flavell;*

Partnership articles provided that, in the event of the death of one of the partners, an annuity out of the firm's net profits each year was to be paid to his widow or children as he should appoint and, in default of appointment, to his widow. It was held that the executors of the deceased partner were trustees for the widow under this contract, and that she was entitled to be paid the promised sums. But in **Re Schebsman;**

In 1940 S’s employment was terminated, and, in consideration of his retirement, the company agreed to pay him the sum of £5,500 by installments. If he died before the completion of the payments to him they were to be paid to his widow and daughter, S later became bankrupt, and then died. His trustee in bankruptcy claimed to intercept the sums being paid to his widow, on the ground that S himself could have intercepted them, and so they were available for his creditors.

The Court refused to hold that the contract created a trust in favour of the widow and daughter; they had therefore no enforceable right to the

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\(^9\) **Re Sinclair’s Life Policy** (1938) Ch. 799. Note. Note, however, that it is possible to have a revocable trust: Wilson v. Darling Island Stevedoring and Lighterage Co. (1956) 95 C.L.R. 43, at p. 67 (Fullagar J.).


\(^{11}\) Vandepitte v. Preferred Accident Insurance Corp. of New York i bid., at p. 80 (contracting party liable for infant third party’s torts); Swain v. The Law Society (1983) 1 A.C., 598, at pp. 612, 621 (third party beneficiary accorded direct action against promisor by statute), post. p. 444.

\(^{22}\) (1883) 25 Ch. D. 89.

\(^{23}\) (1944) Ch. 83.
money. But the company was free to perform its obligation if it so wished, and, if it did so, neither S nor his trustee in bankruptcy could intercept the money and put it in his own pocket. Accordingly, the claim failed. **Du Parcq L.J. said:**

> It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jordian talked probably, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used in 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 courts to discover a trust is offered by the case of **Green v. Russel**. 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

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24 (1944) Ch. 83, at p. 104.
25 (1959) 2 QB 226, (1959) 2 All ER 525, Furmston 23 MLR 373 at 337-385.
obligation on Mr. Green in respect of the policy. The insurance company paid the £1,000 to Mrs. Russell, as her husband's administrator, and she paid it over to the plaintiff.

The Plaintiff, as the son's administrator, sued the defendant, as the husband's administrator, 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 my contract of assurance or insurance'.

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 LJ, 'does not in itself give rise to a trusteeship'.

See of the 1908 Act has now been repeated 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
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 portion of the premium which he had paid.'

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 trust has been much stronger indicia.\textsuperscript{27} A variety of
reasons have combined to produce this result: a feeling that the trust was
a 'cumbrous fiction'\textsuperscript{28}: 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.

Similar contrasts can be found in the approach of the Courts to
contracts of insurance. Thus while in some cases such contracts have
been held to create a trust in favour of third parties.\textsuperscript{29} in others they have
not\textsuperscript{30}. In this context too it would appear that English Courts no longer
favour the device of a trust of a contractual right. It has been stated in
Australian decisions that this may be too cautious and that there is

\textsuperscript{27} 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.

\textsuperscript{28} See per Lord Wright 55 LQR 189 at 208.

\textsuperscript{29} Royal Exchange Assurance v. Hope (1928) Ch. 179; Re Webb, (1941) Ch. 225; Re Foster's Policy (1966) 1 W.L.R. 222. See also

\textsuperscript{30} Re Englebach's Estate (1924) 2 Ch. 348; Clay's Policy of Assurance (1937) 2 All E.R. 548; Re Sinclair's Life Policy (1938) Ch. 799;
'considerable scope for the development of trusts' particularly in the context of insurance policies for the benefit of third persons. One recent English case also indicates less hostility. However, the dominant approach is exemplified by the decision of the Judicial Committee of the Privy Council in Vandepitte v. Preferred Accident Insurance Corporation of New York on appeal from British Columbia:

B insured his car with the respondent. The contract of insurance was stated to cover not only B himself, but all persons driving the car with his consent. B's daughter, while driving it with his consent, knocked down and injured the appellant. She was successfully sued in negligence but the judgment was unsatisfied. But according to the British Columbia Insurance Act, an injured person could in such circumstances, avail himself of any rights possessed by the driver of the vehicle against the insurance company. Therefore brought an action against the respondent under this Act.

In order to succeed, he held to establish that the daughter had some rights against the company under the policy and he could only do this by showing that a trust had been created for her benefit. The Judicial Committee were not satisfied that this was B's intention.

Firstly as British Columbia law provided that a father was liable for the torts of his minor children living with the family, B would 'naturally

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33 (1933) A.C. 70, Cf. Williams v. Baltic Insurance Association of London Ltd. (1924) 2 K.B. 282; Road Traffic Act
expect’ any claim to be against him. Secondly a trust was not appropriate for a contract, such as insurance which imposes serious duties and obligations on any person claiming to be insured, which necessarily involve consent and privity of contract.

The strict and possibly overcautious approach to the requirement of intention means that, despite its continued use\(^ \text{34} \), the trust of a contractual right does not now constitute a major qualification to the doctrine of privity of contract.

(iii) Differences of the rights Act, 1999

It will clearly be more difficult for a third party to establish a trust of a contractual promise for the third party’s benefit than to establish a right to enforce the promise under the 1999 Act. But the rights under the 1999 Act will be more limited. First, rights under the statute can, subject to section 2, be altered or extinguished whereas the third party’s rights under a trust of a promise are in principle irrevocable. Secondly, the third party’s rights under the statute, but not under a trust, are subject to defences applicable between the parties to the contract.\(^ \text{35} \) Thirdly, since the third party’s rights based on a trust of the promise are founded on an equitable proprietary interest, they will be more effective than those under the 1999 Act where the promise is insolvent\(^ \text{36} \).

There are also procedural differences since, as noted above, it is

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1988, s. 148(7).
35 1999 Act, s. see ante, p. 436.
36 Property held on trust by a bankrupt individual or an insolvent company is not available for distribution to creditors: Insolvency Act 1986, ss. 283, 107; Insolvency Rules 1986 S.I. 1986 No. 1925, See e.g., Re Kayford
necessary in an action based on a trust of the promise for the trustee to be joined in the action whereas, under the 1999 Act it is a matter for the Court's discretion\textsuperscript{37}.

2. COVENANTS CONCERNING LAND

The law allows certain covenants (whether positive or restrictive) to run with land so as to benefit (or burden) people other than the original contracting parties. The relevant covenant may relate to freehold land or leasehold land. The law relating to the running of covenants is an illustration where, for commercial and ethical reasons, the privity of contract doctrine has been departed from through the development of a separate body of "non-contractual" principles (here the principles being categorised as belonging to the law of real property). The law on covenants relating to leasehold land has recently been reformed by the \textbf{Landlord and Tenant (Covenants) Act 1995}\textsuperscript{38}.

The benefit and burden of covenants in a lease granted prior to 1996 would pass on an assignment of the lease or reversion, provided that the covenant "touched and concerned" the land\textsuperscript{39}. As a result of the Landlord and Tenant (Covenants) Act 1995, in relation to leases granted after 1995, the benefit and burden of all covenants in a lease passes on an assignment of the lease or reversion unless the covenant is expressed to be personal\textsuperscript{40}.

It is now for the parties to decide whether a covenant is to be

\textsuperscript{37} Civil Procedure Rules, r. 19.1 (2).
\textsuperscript{39} Spencer's Case (1583) 5 Co. Rep. 16a; 77 ER 72 (lease); Law of Property Act 1925, as 141-142 (reversions).
regarded as personal. It is no longer for the court to try to decide it objectively according to whether it is thought to "touch and concern" the land. Where, prior to 1996, L granted a lease to T and T then sublet to S, the burden of the covenants in the head-lease did not bind S, the sub-lessee, because there was no privity of estate\(^{41}\) between L and S. This was subject to an exception. If the covenant was a restrictive covenant, it would bind S as an equitable property right, provided that, where the title was unregistered, he had notice of the covenant (as he would in practice)\(^{42}\) or, where the title was registered, in any event\(^{43}\). In leases granted after 1995, this rule is codified. A restrictive covenant in the head-lease binds any sub-lessee automatically\(^{44}\). Where, prior to 1996, L granted a lease to T and T then subject to S, S could enforce the benefit of any landlord covenants which touched and concerned the land against L, despite the absence of privity of contract. This is because the benefit of such covenants was annexed under section 78 of the Law of Property Act 1925 and could be enforced by a person with a derivative interest\(^{45}\).

In a lease granted after 1995, this is no longer possible\(^{46}\). S cannot enforce any covenant in the head-lease against . For leases granted prior to 1996, the original tenant and landlord remained liable for a breach of covenant in the lease despite assignment. For leases granted after 1995 the

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40 Landlord and Tenant (Covenants) Act 1995, s 3(6).
41 Which simply means the relationship of landlord and tenant.
42 See Law of Property Act 1925, s 44; While v. Bijou Mansions Ltd. (1937) Ch. 610.
43 Land Registration Act 1925, s. 23(1) (a).
44 Landlord and Tenant (covenants) Act 1995, s 3(5).
45 Smith v. River Douglas Catchment Board (1949) 2 KB 500 (lessee able to enforce annexed freehold covenant on the wording of s 78). As is clear that s.78 applies to leases as well as to freeholds: Cairns Motor Services Ltd. v. Texaco Ltd. (1994) 1 WLR 1249, S must be able to enforce the covenant against L.
46 Law of Property Act 1925, s. 78 does not apply to such leases (Landlord and Tenant (covenants) Act 1995,
original tenant\textsuperscript{47} will generally be released from covenants in the lease once the lease has been assigned\textsuperscript{48}. This aspect of the reforms is concerned to cut back a normal feature of privity of contract rather than being concerned with the exception to privity of contract constituted by covenants running with land.

As regards covenants relating to freehold land (which are unaffected by the 1995 Act) any such covenants entered into after 1926 which touch and concern the land will in most cases be automatically annexed to the land of the covenantor under section 78 of the Law of Property Act 1925\textsuperscript{49}. According to the wording of that section, where the covenant in question is positive it may then be enforced by the covenantor, his successors in title and those who derive title under him or them (such as mortgagees and lessees). Squatters (who are not successors in title) or licensees (who have no title) cannot enforce such an annexed covenant. Where the covenant is restrictive, any owner or occupier for the time being can enforce the annexed covenant even though he or she may be a squatter or licensee. There will be few covenants made after 1926 which are not annexed in this way\textsuperscript{50}.

3. TORT OF NEGLIGENCE

The tort of negligence can be viewed as an exception to the third

\textsuperscript{47} Somewhat different provisions apply in respect of an assignment of the reversion by the landlord. The landlord must apply to the tenant to be released from the landlord covenants. If the tenant refuses to do so, the court may release the landlord if it considers it reasonable to do so. See Landlord and Tenant (covenants) Act 1995, ss. 6-8.

\textsuperscript{48} Landlord and Tenant (Covenants) Act 1995, ss and 5; although under's 16 a tenant may enter into an "authorised guarantee agreement" to guarantee compliance with the covenants by the assignee.

\textsuperscript{49} Federated Homes Ltd. v. Mill Lodge Properties Ltd. (1980) 1 WLR 594.

\textsuperscript{50} It is probably only those which are expressed to be capable of passing solely by express assignment:
party rule where the negligence in question constitutes the breach of a contract to which the plaintiff is not a party. For example, the classic case of negligence, *Donoghue v. Stevenson*[^51], established that where A supplies goods to B under a contract with B, A may owe a duty to C in respect of personal injury or damage to property caused by defects in those goods. But the right not to be injured or to have one's property damaged by another's negligence exists independently of any contractual undertaking by A. It is only in a very wide sense, therefore, that standard examples of the tort of negligence constitute exceptions to the third party rule.

Of more direct interest are cases of pure economic loss recovery in the tort of negligence where the basis of the third party's claim appears to be the failure by A properly to perform a contract made with B[^52]. In other words, cases where the basis of the third party's tort claim appears not to be independent of the rights conferred by the contract. For example, in *Ross V. Counters*[^53], an improperly executed will deprived a prospective beneficiary of an intended benefit, and the prospective beneficiary was able to recover in tort against the negligent solicitor. It can be argued that the remedy in tort effectively served to enforce a contract benefiting a third party at the suit of the third party.

The third party was awarded the expectation loss of the benefits that he would have received under the will. This decision was confirmed by the

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[^51]: (1932) AC 562.
House of Lords in **White v. Jones**\(^54\), where solicitors were held to be negligent and liable to a prospective beneficiary for the loss of the intended legacy (an expectation loss), when they failed to draw up a will before the testator died. The decision was based on an extension of the principle of assumption of responsibility in **Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd**\(^55\). Lord Goff\(^56\) was of the opinion that in allowing such liability to be imposed, there had been "no unacceptable circumvention of established principles of the law of contract"\(^57\). But, whether acceptable or not, it does seem to us that the decision is best analysed as allowing a third party to enforce a contract by pursuing an action in tort\(^58\). A further example is **Junior Books Ltd. v. Veitchi Ltd**\(^59\). Here the owners of a factory were allowed to recover expectation loss from a subcontractor, in that they were allowed to recover the cost of either replacing a negligently constructed factory floor. The owners' claim can again be viewed as being one by a third party beneficiary of a contract (here between the subcontractor and the head-contractor) to enforce the benefit which was contracted for.

\(^53\) (1980) Ch. 297.
\(^54\) (1995) 2 SV 207.
\(^56\) Who gave the most detailed of the majority speeches.
\(^57\) (1995) 2 AC 207, 268. Lord Goff saw the decision as giving effect to the considerations of "practical justice".
\(^58\) Lord Mustill (dissenting) was clearly of the opinion that the beneficiaries were effectively seeking to enforce contract to which they were not a party: "... the intended beneficiaries did not engage the solicitor undertake to pay his fees or tell him what to do. Having promised them nothing he has broken no promise. They nevertheless fasten upon the circumstance that the solicitor broke his promise to someone else."; (1995) 2 AC 207, 278.
\(^59\) (1983) 1 AC 520. It should be noted that since it was decided, Junior Books has come to be seen as unreliable authority and has consistently been confined to its facts: "The consensus of judicial opinion with which I concur, seems to be that the decision... cannot be regarded as laying down any principle of general application in the law of tort or delict", D & F Estates Ltd. v. Church Commissioners (1989) Ac 177, 202, per Lord Bridge. Cf Murphy v. Brentwood DC (1991) 1 AC 398 While v. Jones (1995) 2 AC 207.
4. AGENCY

Many contracts are made through intermediaries and will be subject to the law of agency. Agency is the relationship which exists between two persons, one of whom (the principal) expressly or impliedly consents that the other should act on his behalf, and the other of whom (the agent) similarly consents so to act or so acts. One consequence of this relationship is that the principal acquires rights (and liabilities) under contracts made by the agent on his behalf with third parties. Although one can normally say, without undue fiction, that the principal is the real party to the contract concluded by his agent, agency can also be viewed as an exception to the privity doctrine in that the principal, albeit a third party to the contract concluded by his agent is able to sue (and be sued) on it. The doctrine of the undisclosed principle is particularly controversial. If an agent within his authority contracts in his own name and purportedly on his own behalf, the undisclosed principal may in certain circumstances intervene to sue and be sued on the contract. The other party who has no knowledge of the principal’s existence may thus find that he has made a contract with a person of whom he has never heard, and with whom he never intended to contract.

An agency agreement is one by which the agent is authorised to

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60 Bowstead and Reynolds on Agency (16th ed, 1996) para 1-001.
establish privity of contract between his employer, called the principal, and a third party\textsuperscript{63}. It produces effects of two quite different kinds.

**Firstly** 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. To this extent, therefore, the fundamental rule that a person cannot be affected, either beneficially or adversely, by a contract to which he is not a party, is considerably diminished in its area of operation. The significance of this doctrine is apparent if it is compared with the rule of Roman law upon the subject\textsuperscript{64}.

The question sometimes arises whether a man has acted as an agent or as an independent contractor in his own interest\textsuperscript{65}. The latter is a person who is his own master in the sense that he is employed to bring about a

\textsuperscript{63} "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 225.
given result in his own manner 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 it is obvious that 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 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. But the question whether the dealer is to be regarded in general as the agent of 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 denied that any general rule could be laid down, and repeated the denial in Mercantile

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64 Nicholas Introduction to Roman Law pp. 201-204.
65 Freidman 84 LQR 224.
66 Hire-Purchase Act 1964, ss. 10 and 11; Hire-Purchase Act 1965, ss.12 (2) and (3) and see now Consumer Credit Act 1974; ss. 56(1), (2) and (3), 69 (6), 102(1), 175.
67 (1962) 3 All ER 386, (1962) 1 WLR 1184.
Credit Co. Ltd. v. Hamblin\textsuperscript{68}.

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 on behalf of one or the other or it may be both of these two parties. On the other hand, Lord Denning and Lord 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\textsuperscript{69}.

In Branwhite v. Worcester Works Finance\textsuperscript{70} 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 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 Financines Ltd v. Stimson and set the question against the mercantile back ground of hire-purchase transactions.

\textsuperscript{68} (1965) 2 QB 242 at 269, (1964) 3 All ER 592 at 600-601.
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 interest involved. So far from thinking first of a purchase from the dealer and then separately, or 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, of 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.

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 Wilber force is, in the latter's words more consistent with 'mercantile reality' and is to be preferred71.

Alternatively, it may be clear that A is an agent but obscure for

69 (1962) 3 All ER 386, (1962) 1 WLR 1184.
70 (1965) 2 QB 242 at 269, (1964) 3 All ER 592 at 600-601.
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*\(^{72}\) 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\(^{73}\), reversed legislation in Jamaica and restrictively distinguished in England.

**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.

**Firstly** 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

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71 Cf Hughes 27 MLR 395.
72 (1929) 2 KB 356, This conclusion is often reinforced by clauses in the proposal form.
may disclose the fact of the agency but withhold the name or 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 evident then the question is determined by certain general principles.

5. ASSIGNMENT

Except when personal considerations are at its foundation, the benefit of a contract may be assigned (that is transferred) to a third party. The assignment is effected through a contract between the promisee under the main contract (that is, the assignor) and the third party (that is, the assignee). In addition to assignment by an act of the parties, there exists assignment. Assignment may, therefore, deprive promisors of their chosen
contracting party, although safeguards are imposed to protect promisors. While an equitable assignment is usually fully effective even without notice, notice is desirable and there are circumstances in which failure to give notice may leave the equitable assignee unable to exercise rights enjoyed by the assignor. In addition, an assignee takes "subject to equities", that is, subject to any defences which the promise has and any defects in the assignor's title. The effect of assignment is that the promisor is faced with an action brought on the contract by a person whom he did not regard as a party and whom he may not have intended to benefit. The practical importance of assignment is considerable; the whole industry of debt collection and credit improving depends upon it.

In Third Parties Act, 1999, assignment constitute a particularly significant exception. For if, immediately after a contract for a third party's benefit is made the promisee assigns his rights under it to that third, the third party can enforce the contract and the promisee loses all right to enforce, vary or cancel the contract. There is a thin divide between (i) making a contract for the benefit of third party and (ii) making a contract for the benefit of a third party and, immediately thereafter assigning that benefit to the third party (especially where the third party does not provide consideration). If an immediate assignment is valid, there can hardly be fundamental objections to allowing the third party to sue without an assignment. It also allows that in considering the details of reform it is instructive to consider the rules assignment dealing with, for example, the defences and counterclaims available to the promisor (the principle is that an assignee takes "subject to equities"), and joinder of the original promisee
(joinder of the assignor is sometimes necessary)\textsuperscript{74}.

6. **COLLATERAL CONTRACTS**

A contract between two parties may be accompanied by a collateral contract between one of them and a third party\textsuperscript{75}. A collateral contract may in effect allow a third party to enforce the main contract. For instance, where C buys goods from B, there may be a collateral contract between C and the manufacturer in the form of a guarantee. Collateral contracts have been used as a means of rendering exclusion clauses enforceable by a third party; and are extensively used in the construction industry as a way of extending to subsequent owners or tenants the benefits of a builder’s or architect’s or engineer’s contractual obligations. Strictly speaking, of course, a collateral contract is not an exception to the third party rule in that the ‘third party’ is party to the collateral contract albeit not a party to the main contract.

7. **BENEFIT OF EXCLUSION CLAUSES**

The extent to which third parties to contract can take benefit of clauses in those contracts excluding or limiting liability for loss or damage have been a challenge to the privity doctrine. Earlier English cases accepted a principle of ‘vicarious immunity’, according to which a servant or agent performing a contract was entitled to that immunity from liability

\textsuperscript{74} See Chitty on Contracts (27th ed, 1994), paras 19-002, 19-022-19-023.
which his employer would have had\textsuperscript{76}, but this principle was later discarded by the House of Lords in Scruttons Ltd. v. Midland Silicones Ltd\textsuperscript{77}, in which the stevedores engaged by the carrier negligently damaged a drum containing chemicals, and in suit by the cargo-owners in tort, relied on a limitation clause contained in the bill of lading between the carrier and the cargo-owners, but did not succeed.

However, it was held that liability could be limited if provided by contract in certain cases, namely, where the bill of lading clearly provided, that the carrier was contracting on his own behalf and also contracting as agent of the stevedore, or had authority from the stevedore to act, or if the stevedore later ratified, or if there was consideration moving from the stevedore. The Supreme Court of Canada has accepted the doctrine of vicarious immunity. The plaintiffs had a contract of bailment with a warehouseman which contained a clause limiting the liability of the warehouseman on any one package 'to $40, unless the holder had declared in writing a valuation in excess of $40 and paid the additional charge specified to cover warehouse liability'. The goods got damaged because of negligent handling by the employees of the warehouseman. The plaintiff sued the employees for the tort of negligence.

Although, there was no express mention of employees in the

\textsuperscript{76} Elder Dempster & Co. v. Paterson Zochonis & Co. (1924) All ER Rep. 135 (HL); per Scrutton LJ in the Court of Appeal (1923) 1 KB 421 at 441; Mersey Shipping & Transport Co. Ltd. v. Rea Ltd (1925) 21 Lloyd's Rep. 375; Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd. (1954) 2 All ER 581.
\textsuperscript{77} Scruttons Ltd. v. Midland Silicones Ltd. (1962) AC 446, (1962) 2 WLR 186, (1962) 1 All ER 1 (HL), affirming Midland Silicones Ltd. v. Scruttons (1960) 2 All ER 737 (CA); Wilson v. Darling Island Stevedoring & Co. Ltd. (1956-57) 95 CLR 43 (stevedores, not party to bill of lading, could not be sued in contract, but not relieved of tortious duty in negligence).
limitation clause, it was held that the employees could take the benefit of the contractual limitation because the employees were acting in the course of employment and had performed the very services provided for in the contract between their employer (warehouseman) and the plaintiff; particularly so when the plaintiff knew that employees would be involved in performing the obligation of the warehouseman\textsuperscript{78}. On the other hand, the benefit of the clause excluding liability in a contract for preparing drawings between a building contractor and an engineering firm was not available to engineers employed by the firm who had prepared the drawings, as it was not shown that the exemption clause was established for the benefit of the engineers, and the facts did not give rise to an inference that the exemption was intended to include the engineers\textsuperscript{79}.

In **New Zealand Shipping v. A.M. Satterthwaite (The Eurymedon)**\textsuperscript{80}, the Privy Council considering 'Himalaya clause'\textsuperscript{81}, had to consider whether an exclusion clause contained in a bill of lading could be relied upon by a third party stevedore employed by a carrier in a suit by consignees for negligently damaging the goods while unloading them. The Privy council gave to the stevedores the benefit of the exemptions and limitations contained in the bill or lading by regarding that the shipper had made an offer of a unilateral contract to the stevedores to unload the goods

\textsuperscript{79} Edgeworth Construction Ltd. v. ND Lea & Associates (1993) 3 SCR 206 (Supreme Court of Canada) (but the suit against engineers was dismissed on another ground).
\textsuperscript{80} New Zealand Shipping Co. Ltd. v. AM Satterthwaite & Co. Ltd. (The Eurymedon) (1975) AC 154, (1974) 1 All ER 1015 (PC).
\textsuperscript{81} The name is derived from the name of the ship involved in Adler v. Dickson (1955) QB 158, (1954) 2 All ER 397, and refers to an exclusion or exemption clause relieving the shipowner or carrier, his servant, agents and independent contractors from liability for negligence; see for Himalaya clauses 43, Halsbury's Laws of England, fourth edn, para 462.
on terms incorporating the exclusion clause, which offer the stevedores had accepted by commencing the work; and held that the carrier had contracted to the exclusion clause as an agent for its servants, agents and independent contractors, and therefore, was 'designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracted the exemption or immunity in favour of whoever the performer turned out to be'\textsuperscript{82}. The approach in this case was viewed as artificial. The principle of The Eurmedon\textsuperscript{83} was restricted to contracts carriers and stevedores. In Southern Water Authority v. Carey\textsuperscript{84}, the main contract between the employer and the head-contractor for construction of sewage works excluded liability on the part of all sub-contractors, agents and independent contractors. In a suit for negligence filed by the employer against the engineering sub-contractor, the latter relied on the above clause, and was entitled to the benefit of the exemption clause on the ground that it negative, the duty of care which would otherwise have existed upon the head-contractors. In Norwich City Council v. Harvey\textsuperscript{85}, the sub-contractor had contracted on the same terms as the main contract between a building owner and the head-contractor, and the main contract provided that the owner was to bear the risk of damage by fire. The

\textsuperscript{82} New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon) (1975) AC 154 at 167, (1974) 1 All ER 1015 (PC); KH Enterprise & Pioneer Container (The Pioneer Container) (1994) 2 All ER 250 (sub-bailee from carrier could invoke exclusive jurisdiction clause contained in the contract between the owner of the goods and the carrier allowing the carrier to contract 'on any terms', as the had contracted with the carrier 'on the same terms'); cf The Mahkutai (1996) 3 WLR 1, (1996) 3 All ER 502 (PC) (exclusive jurisdiction clause did not fall within the terms of the Himalaya clause, and the ship owners not being party to the bill of lading, were not entitled to invoke the exclusive, jurisdiction clause).

\textsuperscript{83} New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon) (1975) AC 154, (1974) 1 All ER 1015 (PC).

\textsuperscript{84} Southern Water Authority v. Carey (1985) 2 All ER 1077.

building was damaged by fire as a result of negligence of the roofing sub-contractor. The owner sued him in tort, and although there was no contractual relationship between the owner and the sub-contractor, it was held that the latter owed no duty of care, because both the contractors had contracted on the basis that the owner had assumed to bear the risk of damage by fire. The above cases indicate a departure from the privity doctrine, dictated by the need to support established commercial practice, and to avoid the redistribution of the risks perceived and contemplated by the contracting parties at the time of making the contract.

8. PROMISEE'S REMEDIES ASSISTING THE THIRD PARTY

Although not strictly an exception to the third rule since it is the promisee suing - in certain circumstances the promisee may be able to assist the third party by recovering substantial damages representing its own loss or, more controversially, loss sustained by the third party; or by being granted specific enforcement of the obligation owed to the third party. There are some remedies which have been discussed as follows

(i) Damages

Subject to a few exceptions (such as The Albazero\textsuperscript{86} exception discussed below), the promisee is entitled to damages representing its own loss and not that of the third party\textsuperscript{87}. For example, in Forster v. Silvermere Golf and Equestrian Centre Ltd. the plaintiff owned property which she and

\begin{footnotesize}
\begin{itemize}
\item 86 (1977) AC 774. See para 2.40 below.
\item 87 The traditional view is also that the promisee will normally be unable to bring an action in debt to enforce payment to him or her of sums due to the third party under the contract, since those sums were by definition not due to the promisee: see Chitty on Contracts (27th ed, 1994) para 18-030 and Coulls v. Bagot's Executor and Trustee Co. Ltd. (1967) 119 CLR 460, 502. Quaere whether the promisee can bring an action for sums due to the third party if the purpose of the claim is for the sums to be paid direct to the third party rather than to the promisee: see A Burrows, Remedies for Torts and Breach of contract (2nd ed, 1994) p. 317.
\end{itemize}
\end{footnotesize}
her two children occupied. She transferred the property to the defendant, who undertook to construct a house for the plaintiff and her children who could live there rent-free for life. When the defendant broke this undertaking, the plaintiff recovered damages for her own loss. However, she could not claim damages for the loss of rights of occupation after her death which her children would have enjoyed. In *Jackson v. Horizon Holidays Ltd*\(^{88}\). Lord Denning MR had reasoned generally that a contracting party could recover the third party's loss but this approach was firmly rejected by the House of Lords in *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd*\(^{89}\). A, a buyer of land, had promised B, a seller of land, to pay part of the purchase price to C. Although the majority of the House of Lords (Lords Wilberforce, Keith and Scarman; Lords Salmon and Russell dissenting) held that there had been no breach by A justifying termination by B, all their Lordships indicated that, had B had an action for breach, it could have recovered only its own loss and not C's loss.

As a promisee will commonly suffer no loss, in a contract made for a third party's benefit, it follows that a promisee can often recover nominal damages only. But this will certainly not always be so\(^{90}\). In some circumstances, for example where the promisee required the promisor to pay the third party in order to pay off a debt owed by the promisee to the third party, the promisor's failure to benefit the third party will constitute a

\(^{88}\) (1975) 1 WLR 1468.
\(^{89}\) (1980) 1 WLR 277.
substantial pecuniary loss to the promisee\textsuperscript{91}. And in Woodar v. Wimpey one justification for the generous measure of damages given to a father for a ruined family holiday in \textbf{Jackson v. Horizon Holidays Ltd.} was that the father was being fully compensated for his own mental distress\textsuperscript{92}.

In two important recent cases, the House of Lords and The Court of Appeal respectively have confirmed and extended an exception to the rule that the promisee recovers its own loss only. In \textbf{Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd}\textsuperscript{93} the question arose as to the damages which could be recovered by a company (the 'employer') which had contracted for work on its property (the removal of asbestos) but had then, before breach of the works contract, sold the property to a third party (to whom the employer had made an invalid assignment of its contractual rights). The House of Lords held that the employer could recover substantial damages – the cost of curing the defects in the work –despite the fact that it no longer had a proprietary interest in the property by the time of the breach and despite the fact that the cost of the repairs had been borne by the assignee and not by the employer.

The reasoning of the majority of their Lordship (Lord Keith, Bridge and Ackner agreeing with Lord Browne-Wilkinson) was that the employer could recover the third party's (the assignee's) loss on an application of the exceptional principle applicable to a changed ownership of property.


\textsuperscript{92} Lord Wilberforce, Russell and Keith all relied on this justification. Lord Wilberforce's alternative explanation, (1980) 1 WLR 277, 283, was that a few types of contract – for example, persons contracting for family holidays, ordering meals in restaurants for a party, hiring a taxi for a group-call for special treatment.

\textsuperscript{93} (1994) 1 AC 85. For notes on this case see, eg. I Duncan Wallace, "Assignment of Rights to Sue: Half a Loaf" (1994) 110 LQR 42; A Tellenborn "Loss, Damage and the Meaning of Assignment" (1994) CLJ 53; A Berg, "Assignment, Prohibitions and the Right to Recover Damages for Another's Loss" (1994) LBL 129.
established by *Dunlop v. Lambert*[^1] and *The Albazero*[^2].

The only modification required for the application of this principle to Linden Gardens was that the property in question was land and buildings and not goods. It should be noted, however, that Lord Browne – Wilkinson in Linden Gardens confined the exception to cases where the third party had no direct right of action.

Lord Griffiths decided Linden Gardens on a much wider basis. He took the controversial view[^3] that the employer had itself suffered a loss (measured by the cost of repairs) by reason of the breach of contract in that it did not receive the bargain for which it had contract: whether the employer did not, have a proprietary interest in the subject matter of the contract at the date of breach was irrelevant.

In *Darlington BC v. Wiltshier Northern Ltd*[^6]. Darlington BC wished to build a recreational centre on its land, but needed to avoid contravening restrictions on local authority borrowing. Thus an arrangement was reached whereby Morgan Grenfell (Local Authority Services) Ltd. ("Morgan Grenfell") contracted with Wiltshier Northern Ltd. ("Wiltshier") for the latter to build the recreational centre on Darlington BC’s land. Darlington BC then entered into a covenant agreement with Morgan Grenfell which provided, inter alia, that Morgan Grenfell would pay Wiltshier all sums falling due under the building contract, that the council

[^1]: (1839) 6 Cl & F 600; 7 ER 824. In this case, goods had been jettisoned from the defendants' ship in a storm, and the appellant consignor sought to recover damages under the contract notwithstanding the fact that title had passed to the consignee before the goods were lost. The consignor was permitted to recover substantial damages for the carrier's failure to deliver, even though the consignor had parted with property in the goods before the breach occurred.
[^2]: (1977) AC 774.
[^3]: (1977) AC 774.
would reimburse these monies, and that Morgan Grenfell were not liable to the council for building defects. It also provided that, on request, Morgan Grenfell would assign any rights against Wiltshier to Darlington BC. The rights were duly assigned pursuant to the covenant agreement. The council alleged that Wiltshier’s construction work was defective. The Court of Appeal had to decide whether Darlington BC, as the assignee of Morgan Grenfell’s rights under the construction contract, could recover substantial damages for the cost of repairs that it had incurred. This in turn depended on whether Morgan Grenfell could have claimed substantial damages. The Court of Appeal, by extending the principle in Linden Gardens\(^98\) held that Morgan Grenfell, and hence Darlington BC, were entitled to substantial damages. The Principle of Linden Gardens required extension because, in contrast to the facts of Linden Gardens and Lord Diplock’s formulation of the principle in The Albazero, the original contracting party (Morgan Grenfell) had never had a proprietary interest in the property. It was not therefore a case of the owner at the time of contract transferring ownership before breach. Nevertheless Steyn LJ was able to describe the extension required as a "very conservative and limited" one\(^99\). In effect the principle becomes that wherever there is the breach of a contract for work on property causing loss to a third party who is an owner of that property, and it was known or contemplated by the parties that a third party was, or would become, owner of the property and that owner has no direct right to

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96 Although it should be noted that the order Law Lords expressed some tentative support  
97 (1995) 1 WLR 68.  
98 (1994) 1 AC 85.  
sue for breach of contract, the original contracting party, who has the right to sue, can recover substantial damages as representing the owner's loss.

It should be noted that Steyn LJ (but not Dillon LJ or Waite LJ) expressed support for Lord Griffiths' wider view in Linden Gardens, albeit that he did not agree with Lord Griffiths that there was any need to show an intention to carry out the repairs by someone. On this qualification, however, Steyn LJ's view appears to have been subsequently rejected (albeit without direct reference) by the approach of the House of Lord in Ruxley Electronics and Construction Ltd. v. Forsyth\(^{100}\) in which a plaintiff's intention to effect repairs was considered a crucial ingredient in deciding whether it was reasonable to claim the cost of repairs when higher than the difference in value. The effect of these cases has been to enhance a promisee's prospects of recovering substantial damages in a contract made for a third party's benefit. The decisions themselves are confined to confirming and developing The Albazero exception; but in addition dicta in the cases controversially suggest that substantial damages may be an appropriate measure of the promisee's own loss in a wider range of situations than has traditionally been thought to be the case.

(ii) Specific performance and a stay of action

In Beswick v. Beswick\(^{101}\) an uncle transferred his business to his nephew who, in return, promised that, after his uncle's death, he would pay £5 a week to his widow. The uncle died and his widow brought an action for specific performance of the nephew's promise. The House of

\(^{100}\) (1996) 1 AC 344.
\(^{101}\) (1968) AC 58.
Lords, applying the third party rule, held that while the widow could not maintain a successful action in her personal capacity, she could as administrator succeed in suing for the estate's loss, though not her own personal third party loss. Most importantly, the Lords held that as administrator she should be granted specific performance of the nephew's promise rather than being confined to damages. This was on the basis that the administrator's damages would be nominal\textsuperscript{102} and that nominal damages would here be inadequate given that the purpose of the bargain was to benefit the widow. This reasoning opens the door to specific performance being an appropriate remedy for promisees in many contracts for a third party's benefit, where the third party would otherwise produce an unjust result. It should be noted, however that there are well-known additional restrictions on specific performance (that is, over and beyond damages having to be inadequate) such as that specific performance will not be ordered of a contract for personal service or where the contract to be enforced is not supported by valuable consideration.

\textbf{8.1.2 STATUTORY EXCEPTIONS}

A number of statutory and common law exceptions of the third party exist. Which have been discussed below

\textbf{1. CONTRACTS OF INSURANCE}

Contracts of insurance made for the benefit of third parties cannot in principle be enforced by them, unless a trust is created in their favour. The general principle is, however, subject to a number of important

\textsuperscript{102} Lord Pearce alone considered that the damages would be substantial. And see generally para 2.38 above.
statutory exceptions, including the 1999 Act. The potential application of the 1999 Act to insurance contract has been noted. This section considers other statutory exceptions.

(i) Road Traffic Act, 1988

Under the Road Traffic Act 1988, section 148(7), the person issuing a policy of insurance against death or bodily injury to third parties in accordance with the requirements of the Act is made liable to indemnify not only the persons taking out the policy, but 'the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover'. This means that the driver of a motor vehicle is entitled to the benefit of an insurance policy made with an insurance company by the owner of the vehicle and which purports to cover the driver\(^{103}\). The Act also permits an injured third party to proceed directly against the insurance company on obtaining judgment against the assured\(^{104}\). It provides a better remedy for a third party than the 1999 Act since it precludes the insurer relying on various defences which would have been available in a claim by the assured. Victims of road accident are also protected by two agreements entered into in 1972 between the Secretary of State for the Environment hand the Motor Insurers' Bureau. These are designed to compensate injured by untraced ('hit and run') drivers and by uninsured drivers. Where the victim claims against the Bureau in respect of injuries sustained, as it is the policy of the Bureau not to raise the defence that the victim is not a party to the agreement between it and the

\(^{103}\) Tattersall v. Drysdale (1935) 2 K.B. 174.
Secretary of State\textsuperscript{105}, the victim may proceed and even obtain judgment\textsuperscript{106}.

(ii) **The Third parties (Right against insurers) Act, 1930**

Although, in general, a third party who has a claim against a defendant who has taken out insurance against liability to third parties will not be able to claim against the insurer under the 1999 Act, as seen above in certain circumstances such will be possible. Additionally, under the Third parties (Right against Insurers) Act 1930 a third party who has a claim against a defendant, against liability to third parties will be able to claim against the insurer where the defendant has become, inter alia, insolvent either before or after incurring the liability to the third party. The 1930 Act has several limitations primarily that the third party has to establish its claim in proceedings against the defendant before obtaining any rights against the insurer\textsuperscript{107}. The law Commission\textsuperscript{108} has therefore recommended the replacement of the 1930 Act with legislation under which a third party will be entitled to resolve all issues relating to a claim in a single set of proceedings against the insurer and to improved rights to information about the insurance policy. Where the defendant is insolvent the 1930 Act, despite its several limitations, is likely to provide a better remedy than the 1999 Act which does not give the third party priority over the claims of the defendant’s liquidator. Moreover, the limitations in

\begin{itemize}
  \item \textsuperscript{104} Road Traffic Act 1988, ss. 151-3, See also the Third parties (Rights against Insurances) Act 1930, post, p. 444.
  \item \textsuperscript{105} Hardy v. Motor Insurers' Bureau (1964) 2 Q.B. 745, at 757; Gurtner v. Circuit (1968) 2 Q.B., at 587, at p. 599.
  \item \textsuperscript{107} Law Com. No. 272 (2001)
\end{itemize}
section 2 and 3 of the 1999 Act will not apply to a claim under the 1930 Act. Third party rights may also be created by administrative rules made by a regulatory body operating in the public law sphere. Thus a contract to provide indemnity insurance for solicitors made between the Law Society and insurers as part of a compulsory insurance scheme can be directly enforced by solicitors.¹⁰⁹

(iii) The Married Women’s Property Act, 1882

The Married Women’s Property Act 1882, section 11, allows a husband to effect an insurance on his life for the benefit of his wife and children. A wife, too, may effect an insurance on her own life for the benefit of her husband and children. Such an insurance creates a trust in favour of the objects of the policy, and does not form part of the assured’s estate. The Law Revision Committee proposed that this be extended to all life, endowment, and education policies which name a beneficiary¹¹⁰ but the Law Commission considered that this would only be sensible as part of a general review of insurance¹¹¹. Nevertheless, those named as beneficiaries under such policies may have a right to enforce them by virtue of the 1999 Act, albeit subject to the limits set out in it, in particular those in sections 2 and 3, which exclude those sections where the 1882 Act applies.

(iv) Limited interests

Persons with limited interests in property may also be given the right to sue even though they are not parties to the contract of insurance. In contracts of marine insurance, when several persons have an interest in

the merchandise conveyed, any such person 'may insure on behalf and for
the benefit of other persons interested as well as for his own benefit.'
Similarly, in the case of sales of land, if A contracts to sell to B and
property on the land is damaged or destroyed before the completion of the
sale, any insurance moneys received by A must be held by A in trust for
B. And a tenant can claim under the landlord's fire insurance policy, and
vice versa.

(v) Fire prevention (Metropolis) Act, 1774

Under section 83 of the Fire Prevention (Metropolis) Act 1774, where
an insured house or building is destroyed by fire, the insurer may be
required "upon the request of any person or persons interested" to lay out
the insurance money for the restoration of the building. This means that
a tenant can claim under its landlord's insurance, and a landlord under its
tenant's insurance.

2. COMMERCIAL PRACTICE

Certain exceptions have been introduced into the doctrine of Privity
of Contract as concessions to commercial Practice, some of those are
statutory provisions, others arise out of the agreed practice of merchants
as recognised by the courts.

(i) Negotiable Instruments and bill of lading

It provides important illustrations of statutory exceptions, and

110 Sixth Interim Report 1937, Cmnd. 5449, s 49.
112 Marine Insurance Act 1906, s. 14(2).
113 Law of Property Act 1925, s. 47(1).
114 Fires Prevention (Metropolis) Act 1774, s.83.
additionally excluded from the operation of the 1999 Act. These are dealt with in the section devoted to them.

(a) Bills of Exchange

In general, negotiable instruments (such as bills of exchange, cheques and promissory notes), are transferable by delivery and give to the transferee for value, who acts in good faith, ownership of, or a security interest in, the instrument free from equities. Under the Bills of Exchange Act 1882\textsuperscript{117}, the holder of a bill of exchange may sue on the bill in his own name. If a bill of exchange is dishonored, the drawer, acceptor and endorses are liable to compensate the holder in due course.

(b) Bills of Lading

Where goods are to be carried by sea, the shipper will typically enter into a contract of carriage with a carrier, which is evidenced by a bill of lading. The goods are then usually consigned to the buyer, to whom the bill will be endorsed. At common law the buyer was not able to sue the carrier on the contract of carriage because there was no privity between them\textsuperscript{118}. It was to remedy this defect that the Bills of Lading Act 1855 was passed. Under that Act, however, a buyer only had a right of action under the bill of lading contract if the property in the goods passed by reason of, and at the same time as, endorsement of the bill to him or if the endorsement of the bill played an essential causal role in the chain of

\textsuperscript{117} Section 38 (1)
\textsuperscript{118} Thompson v. Dominy (1845) 14 M & W 403; 153 ER 532.
events by which the property passed to him\textsuperscript{119}. The Act was replaced by the Carriage of Goods by Sea Act 1992\textsuperscript{120} which separates the rights to sue the carrier from the passing of property in the goods under the sale contract. This is achieved, under section 2, by a statutory assignment of the right to sue the carrier. The right is assigned to a holder of a bill of lading or to a person to whom delivery of goods is to be made under a sea waybill or ship's delivery order. By section 3, where those with a title to sue under the statute take or demand delivery of the goods or make a claim against the carrier under the contract but without affecting the liabilities of the original shipper. Where a pledgee takes delivery of the goods and pays any carriage charges such as freight or demurrage, there may come into existence an implied contract between the pledgee and the carrier on the terms of the bill of lading. Such a contract, known as a Brandt v. Liverpool contract\textsuperscript{121}, is a further circumvention of the third party rule.

\textbf{(ii) Letters of Credit}

The irrevocable letter of credit has often been said to be an example of an exception to privity of contract\textsuperscript{122}. The Purpose of such letters of credit is to finance contracts for the sale of goods between buyers and sellers in

\textsuperscript{119} Sewell v. Burdick (1884) App. Cas. 74 (where an action against the bank by the carrier for unpaid freight, the bank being pledgees of the bill of lading, failed as the bank had no property in the bill and the goods); The San Nicholas (1976) 1 Lloyd's Rep. 8; The Sevonia Team (1983) 2 Lloyd's Rep. 640; The Delfini (1990) 1 Lloyd's Rep. 252.
\textsuperscript{122} See The Uniform Customs and Practice for Documentary Credits (1993); lack, Documentary Letters of Credit (1993).
different countries, particularly where the delay between dispatch from the place of manufacture and arrival at the destination is a considerable one. It enables short-term credit facilities to be made available, guarantees payment to the seller, and safeguards the parties against currency fluctuations.

There are three stages in the transaction

Firstly, a term is inserted in the contract of sale made between the buyer and the seller whereby the buyer undertakes to furnish an irrevocable letter of credit in favour of the seller. Secondly, the buyer approaches its own banker (usually described as the issuing banker) and instructs it to issue an irrevocable letter of credit, giving the banker details of the transaction. This constitutes a contract between the buyer and the banker.

Thirdly, the banker advises the seller that an irrevocable letter of credit has been opened in its favour, that is to say, the banker gives an irrevocable undertaking to pay the seller, or to accept bills of exchange drawn on it, provided the seller tenders the required shipping documents in compliance with the terms of the letter of credit. The seller can then ship the goods in the secure knowledge that it will be paid for them. The shipping documents represent the goods themselves, and they are usually retained by the banker as security against its right to be reimbursed by the buyer.

123 For the effect of a failure to furnish the letter of credit, see ante, p. 136, post, p. 524.
124 An irrevocable letter of credit may also be 'continued' by a banker operating in the seller's country (known as the correspondent banker) who, by contingent the credit, adds to the promise of the issuing banker its own undertaking to ensure payment.
The irrevocable letter of credit does not fit easily into the common law. If the transaction is regarded simply as a contract between the buyer and its banker, the seller is a third party to this contract and technically would be unable to sue, should the banker revoke the letter of credit or for some reason fail to make payment. Nevertheless, it has been established that the banker is legally under an absolute obligation to pay, irrespective of any dispute there may be between the buyer and seller. It has therefore been argued that the irrevocable letter of credit forms an 'exception' to the doctrine of privity of contract; but it seems better to regard the promise of payment given by the banker to the seller as an autonomous undertaking, independent of any other contract. Thus the irrevocable letter of credit is not an exception to privity of contract but to the doctrine of consideration. It is either an irrevocable offer by the banker to the seller (which is accepted by the seller tendering the shipping documents) or a unilateral contract between the banker and the seller to pay on tender of the shipping documents.

3. LAW OF PROPERTY ACT, 1925

Whereas at common law, no person could sue on a deed inter partes unless a party to that deed, section 56(1) of the Law of Property Act 1925

125 In the Sixth Interim Report of the Law Revision Committee, 1937 (Cmd. 5449), s. 45, it was pointed out that the liquidator of a bank might be compelled to rely on the defence of privity.
127 Ellinger (1962) 4 Malaya L.R., 307. The problem in either case is how, and at what time, consideration for the undertaking is furnished by the seller, so as to render it binding. In Urquhart's case (supra), at p. 321, Rowlatt j. thought that the banker's undertaking took effect once the seller acted on it, e.g. by commencing performance of their contract with the buyer. Cf. Dexters' Ltd. v. Schenker & Co. (1932) 14 L.I. L.R. 586, at p. 588 (when letter of credit received). The latter is correct.
status. 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 in the case of contracts in writing
affecting property. This view has now been rejected by the House of Lords
in the case of Beswick v. Beswick.

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 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

128 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 1483. Cf Re Faster (1938) 159 L.T. 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) 179;
Furmston 23 MLR 375 at 380-385; Ellinger 26 MLR 396.
129 [1968]AC 58, [1967] 2 All ER 1197. For the judgments in the Court of Appeal, see [1966] Cl. 538, [1966] 3 All ER
1.
which she claimed £175 as arrears of the annuity and asked for specific performance of the contract. She sued (a) as administrator of Peter’s estate, (b) in her personal capacity.

The Court of Appeal held unanimously that she was entitled, as administrator, 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\(^\text{130}\). The defendant appealed to the House of Lords. The House held that, as administrator, the widow could obtain an order for specific performance which would enforce the provision in the contract for the benefit of herself; 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 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

\(^{130}\) 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.
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.\(^ {131}\)

At first sight the decision in Beswick v. Beswick (1968) Ac58 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 the third party beneficiary but by the original promisee. This possibility is further illuminated by the decision in Snelling v. John G Snelling Ltd.\(^ {132}\)

Although Denning LJ, in Drive Yourself Hire Co (London) Ltd. v. Strutt\(^ {133}\), took the view that this abolished the rule in Tweddle v. Atkinson\(^ {134}\), it is clear from Beswick v. Beswick\(^ {135}\) that section 56(1) does not apply to a mere promise by A to B that money will be paid to C. The exact scope of section 56(1) remains unclear. It may be confined (i) to real property; (ii) to covenants running with the land; (iii) to cases in which the

\(^{131}\) 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.


\(^{133}\) (1954) 1 QB 250, 274.

\(^{134}\) (1861)1B & S 393; 121 ER 762. See para 2.5 above

\(^{135}\) (1968) AC 58.
instrument is not solely for the benefit of the third party but purports to contain a grant to or covenant with it; (vi) to deeds strictly inter parties.\textsuperscript{136}

It does appear, however, that a person cannot take the benefit of a covenant under section 56(1) unless he or she or his or her predecessor in title was in existence and identifiable when the covenant was made.\textsuperscript{137}

4. **COMPANIES ACT, 1985**

Under section 14 of the Companies Act 1985, the registered memorandum and articles of association of a company bind the company and its members to the same extent as if they respectively had been signed and sealed by each member.\textsuperscript{138}

5. **PACKAGE TRAVEL, PACKAGE HOLIDAYS AND PACKAGE TOURS REGULATION 1992**\textsuperscript{139}

Where a contract for the provision of a package\textsuperscript{140} holiday is made between an organiser or retailer and a consumer\textsuperscript{141}, the organiser or retailer is liable to the consumer for the proper performance of the obligations under the contract, whether those services are to be performed by the organiser or retailer or not.\textsuperscript{142} The Regulations therefore, inter alia, circumvent the third party rule by giving the beneficiaries of package tour

\textsuperscript{136} Chitty on Contracts (27th ed, 1994) Para 18-057.
\textsuperscript{138} The Law Commission is currently section 14 in our work on Shareholders' Remedies.
\textsuperscript{140} Defined in Regulation 2(1) to mean "the pre-arranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:- (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package". The definition does not exclude tailor-made packages, and is not avoided by the submission accounts (Reg 2(1) & (ii)).
\textsuperscript{141} Which means the person who takes who takes or agrees to take the package, any person on whose behalf that person agrees to purchase the package or any person to whom that person or any of the beneficiaries transfer the package (Reg 2(2)).
contracts direct rights against the organiser and/or retailer with whom the contract was made\textsuperscript{143}. The Regulations also require that contracts for the provision of package holidays should comply with certain formalities and provide certain information\textsuperscript{144}, provide for withdrawal from the contract where it is significantly altered or cancelled\textsuperscript{145}, and make arrangements for bonding and insurance cover.

\section*{8.2 Exceptions Under Indian Law}

There are certain statutory exceptions to this principle which are discussed below:

\subsection*{8.2.1 Contracts of Insurance}

Contracts of Insurance made for the benefit of third parties cannot in principle be enforced by them, unless a trust is created in their favour. The general is, however subject to a number of important statutory exceptions which are considered as follows.

1. MOTOR VEHICLE ACT, 1988

\begin{itemize}
\end{itemize}
pillion rider of motor vehicle unless requisite amount of premium is paid for covering his/her risk-Legal obligations arising under Section 147 of the Act cannot be extended to an injury or death of owner of pillion rider- Pillion rider in a two wheeler not to be treated as a third party when accident took place owing to rash and negligent riding of scooter and not on part of driver of another vehicle.


The principles of law deducted by this Court as regards gratuitous passenger should not apply in a case of this nature; In any event this Court should exercise its jurisdiction under Article 142 of the Constitution of India direction the appellant to pay the claimed amount to the claimants and recover the same from the owner of the scooter. Before embarking on the rival contentions, we may notice the insurance policy. The contract of insurance was entered into on or about third party liability. The relevant clauses of the said contract of insurance are as under:

Subject to the limit of liability as laid down in the Motor Vehicles Act the Company will indemnify the insured in the event of accident caused by or arising out of the use of motor vehicle any where in India against all sums including claimant’s costs and expenses which the insured shall become legally liable to pay in respect of death or bodily injury to any person and/or damage to any property of third party.

145 Regulation 12 and 13.
(iii) United India Insurance Co. Ltd. v. Serjerao & Others, 2007(13) SCALE 80 : 2008 (1) T.A.C. 6, it was held as under:

When a statutory liability has been imposed upon the owner, in our opinion, the same cannot extend the liability of an insurer to indemnify the owner, although in terms of the insurance policy or under the Act, it would not be liable therefore.

(iv) Sapna v. United India Insurance Co. Ltd. and Another (3575 of 2008 (Arising out of S.L.P. (C) No. 21080 of 2006), decided on 14th May 2008). Motor Vehicles Act, 1988, Section 168-Quantum of Compensation-Permanent disability suffered by a 12 years girl. Fair and adequate compensation-Victim Girl suffered compound fracture of left knee and dislocation of Patellae/bone of left knee. Became crippled and completely disabled to walk. Tribunal awarded Rs. 82,569/- which was enhanced to Rs. 2,00,000/- by High Court-Contention that not only her education has to come an end but also her future matrimonial prospects are also adversely affected-Courts may deviate from structured formula. National income of Rs. 15,000 p.a. taken and multiplier of 15 applied. A sum of Rs. 2,25,000/- would be payable. Absence of any clear cut estimate for future treatment expenses. Apex Court allowed Rs. 75,000/-, under said head.

(v) The High Court of Karnataka has, recently in an appeal by the same appellant and based on the same arguments in the same context of facts and type of policy, in Bajaj Allianz General Insurance Co. Ltd. v. B.M. Niranjan and Anr., 2008 A.C.J. 554, held as under:

(a) A reading of the aforesaid terms and conditions discloses that
that the Insurance Company issued a policy known as a package policy for two-wheeler and collected a premium to cover the risk of not only own damage but also third party. The coverage also included the death or bodily injury to any person including occupants carried in the insured vehicle (proved such occupants are not carried for hire or reward). The terms and conditions of the policy and the schedule of payment cannot but be said to cover claims of the insured pillon rider of the motor cycle.”

(b) The above opinions expressed in several judgments would clearly show, (i) that the phrase “Limits of Liability for Third Party” refers to pecuniary limits of the liability of the insurer and does not refer to liability of insurer towards third party qua third party, and (ii) that even if a pillion rider or a gratuitous passenger were not covered by the expression ‘third party’ or ‘any person’, liability of the insurer could arise under special conditions of the policy to cover any risk by way of contractual liability. Even otherwise, the condition contained in Section 11 of two-wheeler package policy to indemnify the insured against all liabilities in respect of death of or bodily injury to occupants carried in the insured vehicle cannot be read as having been cancelled or excluded on account of the occupant not being treated as a “third party”.

(c) In other words, the Schedule to the Policy cannot be read, interpreted or applied so as to put to naught the essential conditions described in detail in the prescribed form of the policy. Therefore, the argument that while undertaking the liability to indemnify the insured in respect of the liability arising out of death of or bodily injury to occupants is subject to limits of liability to third party under the Act and a gratuitous
passenger was not a third party ahs to be rejected as disingenuous and circuitous. That condition of the policy and the mention of Motor Vehicles Act, 1988 against the column “Limits of Liability” in the Schedule to the Policy has to be read in the context of the provisions of Section 147 of the Act, more particularly sub-section (2) 147. That sub-section requires cover of liability upto the amount of liability incurred and the only pecuniary limit is in respect of damage to any property of a third party. Therefore, by necessary implication, the insurer undertakes to indemnify the insured to the extent of liability incurred by him in respect of death of or bodily injury to the occupations carried in the insured vehicle. The scope for limiting the liability is only in respect of the liability arising in respect of damage to property.

(vi) Bhav Singh v. Savirani and Others 2008(3) T.A.C. 134 (M.P.)

Motor Vehicles Act, 1988, Section 147(1) proviso (i)-Motor insurance- Goods vehicle-passenger risk-Liability of Insurance Company-Deceased labourer working for owner of tractor-trolly and while travelling in tractor-trolly met with a accident and died-Third party-Meaning of: Whether an employee is a third party inasmuch as he is not a prty to the third insurance policy-Held- Insurance Company is liable to cover any liability in respect of death or bodily injury to an employee of owner of vehicle who falls in categories of (a), (b) and (c) of Clause (i) of proviso to Section 147(1) of the Act-However, Insurance Company is liable only for the liability under the W.C. Act (2005 A.C.) 1401 (M.P.) overruled).

(vii) Branch Manager, National Insurance Company Ltd., Mettur Dam v. Venkatan and another 2008(3) T.A.C. 277 (Mad.) workmen's
Compensation Act, 1923, Sections 3, 4 and 22-Compensation-Accident arising in the course of employment-violation of policy in as much as offending vehicle is a goods vehicle and driver of Tempo had driving license to drive goods/heavy goods vehicle- Finding of Tribunal that vehicle involved in accident was light motor vehicle since gross weight of vehicle is 5,300 kgs. Which is less than 6000 Kgs- Tribunal upheld-Insurance Company held liable to pay compensation.

(viii) Madurantakam v. Anjalakshmi Ammal, Madurantakam and others 2008(3) T.A.C., 317 (Mad.) Motor Vehicles Act, 1988 Section 146, 147, 173 and 175, Motor Insurance. Third party risk-Renewal of policy-liability of Insurance Company-In absence of third party insurance coverage, only owner of vehicle is liable to pay damages to the victim or dependent of victims in case of a fatal accident-Only in case of negligence as baker and customer of Bank-No case established against Bank-Bank held entitled to claim the amount deposited by it from the owner of the vehicle.

(ix) Ramesh Kumar Singh and others v. Kristo Sao and others (2008) 3 T.A.C. 356 (Chhat.). It was held, Insurance Co. is liable to pay compensation in respect of third party risk.

(x) Jayavarapu Rajamma and Others v. Jayavarpu Laxminarayana and others 2008 (3) T.A.C. 483 (A.P.) Motor Vehicle Act, 1988 Section 147, 166 and 173- Motor insurance. Third party claim-Liability of Insurance Company-Death of owner of car travelling with his family members-Claim preferred by kith and Kin of insured claiming themselves to be third parties-Tribunal held that accident accrued due to
negligence of driver of car and father or other family members of insured
will not fit within ambit of third party-held. Claims by the kith and kin of
insured for injuries or their legal representatives in case of death in
accident have to be treated as third party claims, and are sustainable if
policy in question covers such third claims Determination of
maintainability of claims of compensation on facts and circumstance of
each case depends upon terms and conditions of insurance policy involved
therin-Guidelines explained and issued.

(xi)  AIR 2009 Guj.- National Insurance Co. Ltd. Jashuben
Liability of Insurer-Act policy-It would cover pillion rider as third party-
Insurer liable to pay compensation in respect of death or bodily injury or
pillion rider.

(xii) ICICI Lombard General Insurance Co. Ltd. v. Vinod Bhai

Motor Vehicles Act, 1988 Sec. 147 Liability of Insurer Act- policy
covering risk of third parties also it would include risk caused by death or
injury to pillion riders. (May Volume)

(xiii) Bajaj Allianz General Insurance Co. Ltd. v. Dipak Kumar
Narayan Bhai Nai AIR 2009 (Guj.). Sec. 147 Third party risk-liability of
insurance co.- if driver or owner commits breach of terms and conditions of
insurance policy insurer is not exonerated from its liability to pay
compensation to third party.

The liability for third party risk is a statutory cannot be denied by
Insurance co. ever in case of breach of terms and conditions committed by
drivers as well as owner. The remedy is available to Insurance Co., as per their terms and conditions incorporated in insurance policy that in case if breach is committed by driver and owner, then they are entitled to recover the amount, for which, indemnity by Insurance Co. for risk of owner to third party. Therefore, a beneficial Act has been inacted by legislation to give a protection to third party in a road accident. Insurance Co. would have to pay compensation or indemnity owner case of vehicular accident occurred on road.

(xiv) New India Assurance Co. Ltd. Navrangpura v. Ramesh Bhai Gopal Ji Lakhani and others AIR 2009 (Guj.). Motor Vehicles Act 1988. Sec. 149 (2) (2) (i). Third party risk-liability of insurer driver was not holding valid driving lenience to drive vehicle in question on date of accident-breach of condition of insurance-policy- insurer can not be held liable to pay compensation- But in case of third party-Insurance co. would be liable to pay compensation to claim out and would have right to recover same from insured because a breach committed by insured gives right to insurer to recover amount of compensation from owner.

(xv) National Insurance Co. at Godhra v. Shabbir Mohmmad Kunj ada and other AIR 2009 (Guj.) Motor Vehicle Act, 1988 Sec. 149 third party risk-liability of insurance co.-occupants of private vehicles are third parties in the eye of law- Death or bodily injury to such persons would entitle them to claim compensation from insurers even without any additional premium by owners of private vehicles. Gobind Ram v. Umed Singh & others AIR 2009 (P&H). Motor vehicles Act (1988) Sec. 149 -third party risk-liability of insurer –failure of registered owner to notify
insurer of fact of transfer of ownership insured vehicle does not absolute insures of its liability, especially toward third party. It is not transfer of vehicle but the accident which furnishes cause of action for filling of an application before tribunal.

2. THE LAW OF AGENCY

An agency is the well known exception to the doctrine of privity of contract. An agent by entering into a contract with a third person, makes the principal liable to such third person. Although there is no specific provision in the Indian Contract Act, which defines the term 'agency' but agency is implicit under section 182 of the Act, which provides as follows: An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons. The person, for whom such act is done, or who is so represented, is called the 'principal'. On the basis of this section an 'agency' may be defined as a contract by which an agent is employed by a principal to act on behalf of the principal or to represent the principal in dealings with the outside world, 'the relation of agency arises when one person (the agent) has authority to act on behalf of another (the principal). The relationship has its origin in contract. "Representation" is an essential element of agency. It is also necessary that the representation must have reached a stage where legal position of the principal can be altered i.e. the principal can be held liable for agent's act. Here a question may arise as to who is competent to become a principal and who is competent to act as an agent. According to section 183 of the Indian

Contract Act a person who is major and who is of sound mind may employ an agent. On the other hand, according to section 184 of the Contract Act where an agent is minor, the principal will be bound for his act to the third person, but the minor is not responsible to the principal. It is to be noted that all the essentials of a contract except consideration\(^\text{147}\) are necessary for creating an agency and merely because a person gives advice to another in matters of business, he does not become an agent of another person\(^\text{148}\). In **Mohan Lal Jain v. Ex. Ruler of Jaipur**\(^\text{149}\), the Supreme Court held that signing letters on behalf of military secretary of an ex-ruler of a former Princely State could not make the person, who signed the letters, agent.

### 3. INDIAN TRUST ACT, 1882

Trust is the most common statutory exception to the doctrine Sec. 56 of the Indian Trust Act 1882 provides that beneficiary is entitled to have the intention of the owner of the trust specifically executed to the extent of beneficiary’s interest. But, the execution cannot be compelled in absence of positive duty of trustee. That is, if there is mere discretionary power the trustee cannot be compelled to do the act. The beneficiary is, obviously, a stranger to the contract creating a trust.

### 4. INDIAN PARTNERSHIP ACT, 1932

Indian Partnership Act, 1932 deals with another exception to the doctrine of privity of contract. It is well settled that a minor is incompetent to make a contract and so, he cannot become a partner to a firm. But, section 30(1) of the Partnership Act says that with the consent of all

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\(^\text{147}\) Section 185, The Indian Contract Act, 1872.
partners a minor may be admitted to the benefits of partnership. Further, section 30(2) of the partnership Act provides that such share of property and of profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

It is, thus, clear from the above provisions that my mutual consent of all the partners, benefits of partnership can be transferred to a minor, who is a stranger to such agreement made between the partners. Consequently, the minor is entitled to receive the agreed benefits from the firm. However, it is note worthy that for his share, the minor cannot sue the partners unless he is servering his connection with the firm. It may, therefore, be submitted that the exceptions incorporated in various Acts such as the Indian Contract Act, 1872 the Indian Partnership Act 1932, and the Indian Companies Act 1956, have rightly narrowed down the scope of the doctrine of privity of contract, because in modern society a stranger's rights are likely to be affected by contracts in different dimensions. Therefore, such limitations on the doctrine of privity of contract are for the benefit of the stranger.

**CONCLUSION**

**The Development of Non-comprehensive Exceptions**

A number of statutory and common law exceptions to the third party rule exist. These have been discussed above. Where an exception to the third party rule has been either recognised by case-law or created by

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statute, the rule may now not cause difficulty. Self-evidently, this is not the case where the situation is a novel one in which devices to overcome the third party rule have not yet been tested. We believe that the existence of exceptions to the third party rule have not yet been tested. We believe that the existence of exceptions to the third party rule is a strong justification for reform. This is for two reason

**Firstly** the existence of so many legislative and common law exceptions to the rule demonstrates its basic injustice. **Secondly** the fact that these exceptions continue to evolve and to be the subject of extensive litigation demonstrates that the existing exceptions have not resolved all the problems. The existence of the privity of Contracts, together with the exceptions, has given rise to a complex body of law and to the use of elaborate and often artificial structures in order to give third parties enforceable rights. These should reform in exceptions which enables the artificiality and some of the complexity to be avoided. The technical hurdles which must be overcome if one is to circumvent the rule in individual cases also lead to uncertainty, since it will often be possible for a defendant to raise arguments that a technical requirement has not been fulfilled. Such uncertainty is commercially inconvenient.