PRIVITY OF CONTRACT

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EARLY HISTORY

Introduction

The following two chapters briefly consider the history of the doctrine of privity.[1] They are short for the following reasons. First, because this text is mainly concerned with the privity problems that confront the modern English practitioner who practices law in a jurisdiction that has a general legislative exception to the **1.01**

[1] There is an excellent historical account in Vernon V Palmer, *The Paths to Privity* (Austin and Winfield, San Francisco, CA, 1992) (hereafter Palmer). This is based on Professor Palmer's doctoral thesis at Oxford, supervised by Barry Nicholas and Brian Simpson and examined by Patrick Atiyah and John Baker. Unfortunately Brian Simpson's classic *A History of the Common Law of Contract* (OUP, Oxford, 1975) (hereafter Simpson) only goes as far as the seventeenth century. In the earliest forms of the privity rule, such as classical Roman law, there are very substantial difficulties with agency and assignment. The historical developments are discussed in Chapter 3. See also, Vernon V Palmer, 'The History of Privity—The Formative Period (1500–1680)' (1989) 33 Am J Legal History 3; Kevin M Teeven, *A History of the Anglo American Common Law of Contract* (Green Wood Press, New York, 1990); David J Ibbetson and Eltjo JH Schrage, 'Ius Quaesitum Tertio: A Comparative and Historical Introduction to the Concept of Third Party Contracts', in Eltjo JH Schrage (ed), *Ius Quaesitum Tertio* (Duncker & Humbolt, Berlin, 2008) at 1–34 (hereafter Schrage); Sir John Baker, 'Privity of Contract in Common Law Before 1680', in Schrage at 35–60; NG Jones, 'Aspects of Privity in England: Equity to 1680', in Schrage at 135–74; David J Ibbetson and Warren Swain, 'Third Party Beneficiaries in English Law: From *Dutton v Poole* to *Tweddle v Atkinson*', in Schrage at 191–214; David Ibbetson, 'English Law Before 1900', in Jan Hallebeek and Harry Dondorp (eds), *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (Martinus Nijhoff Publishers, Leiden, 2008), Ch 5. For an outline of the law in Scotland, see TB Smith, 'Jus Quaesitum Tertio: Remedies of the "Tertius" in Scottish Law' [1956] Juridical Review 3. The present chapter does not discuss developments in equity starting with *Tomlinson v Gill* (1756) Amb 330, 27 ER 221, since this is also discussed in Chapter 3. Palmer (130–8) considers that this case has been widely misunderstood.

privity rule, and second, because the history of privity is now an area that has been well traversed by eminent legal historians. Chapter 2 deals with the modern history and is slightly longer as aspects of the modern history of the rule are more relevant to the modern practitioner.

1.02 In the common law it is often difficult to see where history ends and the modern law begins, so most modern books on contract contain a discussion of *Lampleigh v Braithwait*[2] decided in 1615. This is not the case with privity of contract. History ends and the modern law begins with *Tweddle v Atkinson*.[3] This is odd since, as we shall see, *Tweddle v Atkinson* was neither the logical conclusion of a historical development nor a clear articulation of the modern law.

Roman Law

1.03 In his account of the modern law in *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd*,[4] Lord Haldane said that there were two principles—privity of contract and a rule that consideration must move from the promisee. As we shall see,[5] some have thought that in the modern law these are two different ways of saying the same thing.[6] Nevertheless, it is clear that one rule can exist without the other. In Roman law, without any help from the doctrine of consideration there existed a stern statement of privity. In the words of Paul in digest 44.7.11:

> *Neque stipulari neque emere vendere contrahere; ut alter suo nomine recte agat, possumus.*

1.04 It seems clear, however, that as so often with cases of privity, this rule was not without qualifications. The digest text of Ulpian says[7]

> If I stipulate for another, while I have an interest, let us see whether a stipulation is concluded. And Marcellus states that the stipulation is valid in the following specific case. Someone, who started to take care of the administration of a pupil's tutilage, left it entirely to his fellow tutor and stipulated that the pupil's patrimony will be intact. Marcellus says it can be defended that this stipulation is valid, because the stipulator has an interest that is done what he stipulated, since if this would not be done, he will be obligated towards the pupil.

[2] (1615) Hob 105, 80 ER 255.
[3] (1861) 1 B&S 393, 121 ER 762.
[4] [1915] AC 847.
[5] See 2.38.
[6] MP Furmston, 'Return to Dunlop v Selfridge?' (1960) 23 Mod LR 373 at 382–4.
[7] D. 45.1.38.20.

Medieval Common Law

1.05 In the medieval period, and indeed later, the key to the common law lay in the choice of the right form of action.[8] Fact situations which we would now regard as contractual were pursued by the actions of covenant or debt. There are certainly cases which we would now regard as privity cases. In *Alice's* case[9] a fact situation arose which was to be repeated in leading cases for 400 years. The plaintiff alleged that he had been promised by Alice's father that if he married Alice, her father would pay him 100 marks and that he had married Alice and the father had not paid the 100 marks. Such promises were often made under seal when they were certainly enforceable.

1.06 The case was considered in an inconclusive way by a five-judge court; Moyle and Danvers JJ were for the plaintiff, Ashton and Danby JJ for the defendant, and Prisot CJ appears undecided. The action was in debt, which required a quid pro quo (an actual benefit and not merely a promise). The difficulty was that although the marriage had been carried out this was regarded as conferring a benefit on Alice and not on her father.[10]

The Rise of Assumpsit

1.07 During the sixteenth century debt and covenant came to be replaced by assumpsit. It is clear that the development of the English law of contract was intimately connected with this development.[11] It is also clear that assumpsit and consideration were closely connected and that the analysis of consideration in the sixteenth and seventeenth centuries was significantly different from how it turned out to be in the later part of the nineteenth century.[12]

1.08 There are cases from this period with fact situations which we would now see as presenting privity problems but as Simpson says,[13] lawyers in this period talked about promises and not contracts. Similarly, although consideration is discussed, there is not yet a rule that consideration must move from the promisee (described by Simpson as a haunting and melancholy phrase).

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[8] See Simpson 153–160.

[9] 37 HenVI, Mich f8, pl 18. For this and other cases, see CHS Fifoot, *History and Sources of the Common Law, Tort and Contract* (Sweet & Maxwell, London, 1949) pp 249–51 (hereafter Fifoot).

[10] There is a substantial discussion of these problems in St Germain's Doctor and Student in 1530 and see Fifoot 326–9.

[11] Simpson 475–85, Fifoot 353–5.

[12] See n 21.

[13] Simpson 476.

1.09 The two leading cases were decided within a few years of each other and are not easy to reconcile at first or even at second sight. In *Bourne v Mason*,[14] Parry was indebted to both Bourne and Mason. Chaunter was indebted to Parry. In consideration that Parry would let Mason sue Chanter, Mason promised to pay Bourne part of the sum owed to him by Parry. The Court held that the plaintiff could not sue. The defect in the plaintiff's case was one of consideration.

1.10 In *Dutton v Poole*[15] the defendant, Nevil Poole, promised his father that he would pay his sister, Grizil, £1000. His father, Sir Edward Poole, had been planning to cut down timber trees and to sell the timber so as to provide portions for his children. Nevil did not make the payment and Grizil (by now Lady Dutton) and her husband sued. The action succeeded and the judgment was affirmed in the Court of Exchequer Chamber. In this case the deal was entirely for the benefit of Grizil, and her father had carried out his side, which was for the benefit of Nevil (who was the eldest son and heir apparent). Grizil had not been present when the promise was made. It was clearly an important part of the reasoning that father would naturally wish to provide for marriageable daughters so that Grizil was not a stranger.

1.11 In most of the cases which involve marriages about to take place the parties will be the father of the bride and the father of the groom. *Dutton v Poole* is factually unusual in that the deal is all on one side of the marriage. The size of the deal was substantial and in most cases of this size the parties would surely have gone to lawyers and made a contract under seal. Presumably Sir Edward thought he could trust his son. The son did not argue that there was no contract but instead that his father was the appropriate plaintiff. The decision that the daughter could sue was put in terms of her being within the consideration.

1.12 Little seems to have happened in the eighteenth century. *Crow v Rogers*[16] is an echo of *Bourne v Mason*. In *Martyn v Hind*[17] Lord Mansfield thought *Dutton v Poole* obviously correct.

The Nineteenth Century

1.13 The nineteenth century began much like the eighteenth century ended. In *Price v Easton* (1833)[18] William, who was an employee of the defendant, owed the plaintiff £13. The defendant promised William that he would pay the debt to the plaintiff

[14] (1670) 1 Vent 6, 2 Keb 457, 527, 86 ER 5, 84 ER 287, 330.

[15] (1678) 2 Lev 210, 83 ER 523; Jones T 102, 84 ER 1168; 1 Freeman 471, 89 ER 471; 3 Keble 786, 814, 830, 836, 84 ER 1011, 1028, 1038, 1041; 1 Ventris 318, 332, 86 ER 205, 215; T Raym 302, 83 ER 156.

[16] (1724) 1 Strange 592, 93 ER 719.

[17] (1776) 2 Cowp 437, 98 ER 1174.

[18] (1833) 4 B&Ad 433, 110 ER 518.

if William would leave his earnings in the defendant's hands. It was held that the plaintiff could not sue. The case seems to have been treated as being like *Bourne v Mason* and *Crow v Rogers.* The reasoning talks mainly about consideration.

1.14 This brings us to *Tweddle v Atkinson*,[19] a confusing and confused case. For a leading case it is much more like Balaclava than Waterloo. By this time the view that it is not possible to burden a third party under a contract had long been settled. However, the law as to whether or not a third party can enforce a contract made for his or her benefit was subject to conflicting decisions. Nevertheless, it is generally accepted that the point at which the modern privity rule—which prevents a third party enforcing a contract made for his or her benefit—was formally adopted was in *Tweddle v Atkinson*.[20]

1.15 The case concerned the enforcement of a written contract (entered into six years before the case) which replaced an earlier oral contract under which the fathers of a couple soon to be married promised each other to pay certain sums to the bride and groom. The written agreement was entered into after the marriage had taken place. Under this agreement each party promised to pay a sum to the plaintiff husband on or before 21 August 1855. The agreement was expressed to be enforceable by the plaintiff and was executed by the two fathers. In due course the plaintiff sued the estate of his now late father-in-law for failure to pay.[21] The action failed. There are

[19] (1861) 1 B&S 393, 121 ER 762, 30 LJQB 265, 5 Law Times 468. See also *Playford v The United Kingdom Electric Telegraph Co Ltd* (1869) LR 4 CP 706.

[20] (1861) 1 B&S 393, 121 ER 762. Cf *Lawrence v Fox* (1859) 20 NY 268. It has been noted that this revival of the privity rule (which in that case law—following *Dutton v Poole* (1678) 2 Lev 210, 83 ER 523; Jones T 102, 84 ER 1168; 1 Freeman 471, 89 ER 471; 3 Keble 786, 814, 830, 836, 84 ER 1011, 1028, 1038, 1041; 1 Vent 318, 332, 86 ER 205, 215; T Raym 302, 83 ER 156—was not relied upon as much as it had been once the rule requiring consideration to move from the promisee was created) was under way before the decision in *Tweddle v Atkinson* although no clear distinction between the privity and consideration rules was made at that time; see David Ibbetson, 'English Law Before 1999' in Jan Hallebeek and Harry Dondorp (eds), *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (Martinus Nijhoff Publishers, Leiden, 2008) Ch 5 at 111 (noting that the reliance of the privity rule was under way by the time of *Price v Eastern* (1833) 4 B&Ad 433, 110 ER 518, but that that was an example of where the two rules 'were seen as different ways of formulating one and the same rule'). Mason has noted that the consideration rule had some prominence when the plaintiff had to sue in assumpsit as it provided a reason for enforcing the promise, see Sir Anthony Mason, 'Privity—A Rule in Search of Decent Burial?' in Peter Kincaid (ed), *Privity: Private Justice or Public Regulation* (Ashgate Dartmouth, Sydney, 2001), Ch 5 at 89 (Sir Anthony goes onto suggest that the privity rule emerged and took centre stage when a law of contract developed out of assumpsit with the model of contract being that of a bargain between two or more parties; the privity rule thus rests 'on a legal conception rather than any functional or policy consideration' at 90). See also David J Ibbetson and Eltjo JH Schrage, 'Ius Quaesitum Tertio: A Comparative and Historical Introduction to the Concept of Third Party Contracts', in Schrage at 27; David J Ibbetson and Warren Swain, 'Third Party Beneficiaries in English Law: From *Dutton v Poole* to *Tweddle v Atkinson*', in Schrage at 207–8.

[21] As has been noted by others it is not clear from the report whether the father of the plaintiff paid, although Wightman J did ask counsel what the ramifications of the case would be if such payment had been made, this suggests that payment was not made, see (1861) 1 B&S 393 at 397, 121 ER 762 at 763. If payment had not been made and the obligations of the two fathers were concurrent conditional obligations, then the failure of the plaintiff's father to tender payment would be a reason

several reports of the case and they are not identical. All of the reports are brief and cannot be deemed to be complete. Typically, the account of the argument is fuller. Moreover, as will be seen the discussion is overwhelmingly in terms of consideration. The words 'privity of contract' do not appear.

1.16 It was submitted for the defendant, citing *Price v Easton*,[22] that as the plaintiff was neither a party to the agreement nor provided any consideration, he could not enforce it: the action must be brought by the person from whom the consideration moved. Counsel for the plaintiff (Mellish) accepted the rule as submitted by counsel for the defendant but argued, citing *Dutton v Poole*,[23] that an exception existed for contracts made by parents for the provision of their children.[24] In this respect it was surely relevant that the agreement was made after the marriage so that the marriage itself could not be a consideration as it could often be where the agreement was made before the marriage.

1.17 Wightman J held that the trend of the modern law was that a stranger to the consideration could not enforce the contract.[25] In doing so he rejected older authority that had supported the proposition 'that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration'.[26]

1.18 Crompton J was of the view that the confusion in the old cases arose simply because the law was not settled and the actions were more in the nature of tort than contract. Under the modern law consideration must move from the party seeking to enforce the contract.[27] Crompton J immediately followed this by saying that it 'would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for

for refusing the plaintiff's action against the estate of this father in law, see A Phang Boon Leong (ed), *The Law of Contract in Singapore* (Academy Publishing, Singapore, 2012), para 14.004 n 11. See also *Beswick v Beswick* [1966] Ch 538 at 553–4 per Lord Denning MR.

[22] (1833) 4 B&Ad 433, 110 ER 518. This was one of a number of conflicting decisions made at this time, see *Coulls v Bagot's Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 114 per Mason CJ and Wilson J.

[23] (1678) 2 Lev 210, 83 ER 523; Jones T 102, 84 ER 1168; 1 Freeman 471, 89 ER 471; 3 Keble 786, 814, 830, 836, 84 ER 1011, 1028, 1038, 1041; 1 Ventris 318, 332, 86 ER 205, 215; T Raym 302, 83 ER 156.

[24] There are cases that reflect this submission but in time such situations were more likely to be dealt with by way of a trust on a promise, see David Ibbetson, 'English Law Before 1900', in J Hallebeek and H Dondorp (eds), *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (Martinus Nijhoff Publishers, Leiden, 2008), Ch 5 at 104–5, 108; David J Ibbetson and Eltjo JH Schrage, 'Ius Quaesitum Tertio: A Comparative and Historical Introduction to the Concept of Third Party Contracts', in Schrage at 28–9; Sir J Baker, 'Privity of Contract in the Common Law Before 1680', in Schrage at 37–8; N G Jones, 'Aspects of Privity in England: Equity to 1680', in Schrage at 150–8.

[25] (1861) 1 B&S 393 at 398, 121 ER 762 at 764.

[26] (1861) 1 B&S 393 at 397, 121 ER 762 at 763.

[27] (1861) 1 B&S 393 at 398, 121 ER 762 at 764.

the purpose of being sued'.[28] This latter sentence reads like a statement of the privity rule, but in following on from a statement of the consideration rule, it is not clear whether he was suggesting that both requirements must be met, or whether they are different ways of expressing the same principle, or whether only a person providing consideration can be a party. If his reference to 'party' was meant in a technical sense the judge could have been suggesting that enforcement is only possible if one is a party and has provided consideration. In another report of the case Crompton J is reported as saying that 'the consideration must move from the parties to the contract'.[29]

1.19 A couple of points arise from these two judgments. First, one might take the view that the case is mostly authority for the consideration rule rather than the privity rule.[30] Indeed, that this is so is reflected in other reports of the case.[31] Moreover, it would appear that the existence of the privity rule was conceded by counsel and it has been said that it 'seems entirely unsatisfactory that the general third party right of action should be lost on an unnecessary concession'.[32] However, in the Weekly Reporter it is recorded that the submission of counsel was only that there was no privity between the plaintiff and the defendant.[33] In that report Crompton J is recorded as having decided the case on the basis that the plaintiff provided no consideration and Blackburn J on the basis that natural love and affection were not good consideration. In another report Crompton J is recorded as concluding that 'it would be monstrous to hold that a man was party to the contract for one purpose and not for another, so he might be able to sue, without being liable to be sued'.[34] In this report this statement is not premised

[28] (1861) 1 B&S 393 at 398, 121 ER 762 at 764. It has been noted by commentators that this reasoning seems misplaced where the intention of the parties was to benefit the third party and not place any burdens on the third party, see Robert Flannigan, 'Privity—the End of an Era (Error)' (1987) 103 LQR 564 at 570–571. See also Deryck Beyleveld and Roger Brownsword, 'Privity, Transitivity and Rationality' (1991) 54 MLR 48 at 61 ('If the objection is that the third-party is immune from reciprocal suit by the promisor, the short—and conclusive—answer is that the promisor's interests are fully protected by having a claim against the promisee'). See further Edwin Peel, *Treitel, The Law of Contract* (13th edn, Sweet & Maxwell, London, 2011), para 14–015 (noting that in the case of unilateral contracts the law allows a promisee to sue on the contract when he or she could not be sued) and see John N Adams and Roger Brownsword, 'Privity and the Concept of a Network Contract' (1990) 10 Legal Studies 12 at 23.

[29] (1862) 8 The Jurist P1 332 at 333. In another report he is quoted as saying that 'the consideration must move from the party entitled to sue upon the contract', see (1861) LT 468 at 469.

[30] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) at 413–14; Robert Flannigan, 'Privity—the End of an Era (Error)' (1987) 103 LQR 564 at 569–71; FE Dowrick, 'A *Jus Quaesitum Tertio* By Way of Contract in English Law' (1956) 19 MLR 374 at 383–4.

[31] See (1861) LT 468 (where it is reported that counsel only submitted that the plaintiff was a stranger to the consideration and that the marriage took place prior to the written contract being entered into).

[32] Robert Flannigan, 'Privity—the End of an Era (Error)' (1987) 103 LQR 564 at 568.

[33] (1861) 9 WR 781.

[34] (1861) 30 LJ (NS) QB 265 at 267.

by a statement of the consideration rule. Wightman J appears to raise the privity point by stating that it 'seems to have been at one time entertained, that if the party to be benefited stands in a near relation to the party to whom the promise was made; and if that were the case now, then the plaintiff in this case would have a right to recover'.[35] However, he rejected that as now being the law and held that the plaintiff provided no consideration. Nevertheless, in what appears to be a more complete transcription of this passage in the Law Journal Report, Wightman J appears to rest his decision both on privity and consideration. He is recorded as stating:[36]

> [I]t has always been held that no stranger can take advantage of a contract made with another person. If an action would lie against the father-in-law, it would seem to lie also against the father. There is no modern case to shew that mere nearness of relationship would give a right to sue. It is admitted that if the plaintiff was a mere stranger he could not maintain the action; and I think that as the marriage took place before the contract was made, no consideration ran from him, and, that being no party to the contract, he cannot recover.

1.20 Second, to the modern lawyer, it would seem as if Wightman J was rejecting the concept of joint promisees. If one party contracts as principal and agent to bring about a single contract with both principal and agent as parties on one side of the transaction, then they may be joint promisees and it is only then necessary for one of them to provide the consideration.[37]

1.21 Third, it is clear that Crompton J was also considering the privity rule as he was only considering enforcement by a person who is a party to a contract, hence his emphasis on the notion that to be a party one must be both benefitted and burdened. He was not envisaging an argument that a third person who is not a party to the contract could take the benefit of the contract.

1.22 The third judge was Blackburn J, who noted the admission by the plaintiff—that generally consideration must move 'from the party to whom it is made'[38]—and limited himself to addressing the submission of the plaintiff which argued for an exception, 'that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from him'.[39] Blackburn J rejected this submission on the ground that the law now does not accept natural love and affection as sufficient consideration. Interestingly

[35] (1861) 9 WR 781 at 782.
[36] (1861) 30 LJ (NS) QB 265 at 267.
[37] [2.42] ff.
[38] (1861) 1 B&S 393 at 399, 121 ER 762 at 764.
[39] (1861) 1 B&S 393 at 399, 121 ER 762 at 764 per Blackburn J interpreting the submission. See also (1861) LT 468 at 469; (1861) 9 WR 781 at 782; (1861) 30 LJ (NS) QB 265 at 267; (1862) 8 The Jurist P1 332 at 333.

he said that *Dutton v Poole* as a decision of Exchequer Chamber cannot be overruled but then said that there is 'a distinct ground on which the case cannot be supported.'[40]

1.23 It is perhaps surprising that the court did not distinguish *Dutton v Poole* as it could easily have done. In *Dutton* the contract had been wholly performed by the father and the son had had the whole benefit of the performance. On the face of it if sued by his mother as executor, the son would have had no defense (although it appears there were procedural difficulties). In *Tweddle* the father-in-law if sued by the father might plausibly have said that the contract had not been performed on either side. It surely cannot have been the case that one father was bound and the other was not.

1.24 Objectively viewed *Tweddle* looks like a rather marginal and not very important case.[41] Why then has it been treated as a turning point? The answer given by Palmer is that this is the result of the writing of Sir Frederick Pollock and Sir William Anson.[42] It is true that the first edition of *Pollock on Contract* appeared in 1876 and that of Anson in 1884, and that both gave accounts of the subject which ring much more of 1915 than of 1861. In this respect they appear to have been inspired by their view of what the civilian position was.[43]

1.25 This may of course be so, but it is perhaps permissible to add a word of caution. Both Pollock and Anson were of course figures of the Establishment.[44] Each was the third baronet and Pollock had several relations who were judges, yet English judges did not at this period get the law much from books—authors could not be cited in court until they were safely dead. None of the judges who sat in *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd*[45] had a law degree (neither did Pollock or Anson).

The Civil Law

1.26 For their account of the civil law, Pollock and Anson appear to have relied heavily on such writers as Savigny and Pothier but by the time they wrote, the civil law was

[40] Of the three judges who heard the case two were very senior—Wightman J (1785–1863) and Crompton J (1792–1865)—while the third judge, Blackburn J (born in 1813, and undoubtedly a great judge), had been appointed in 1859.

[41] See PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP, Oxford, 1979) at 413–14.

[42] Palmer at 187.

[43] There is certainly much reference to the writing of Pothier (1699–1772) and of Savigny (1779–1861), although things had moved on significantly by the time that Pollock and Anson wrote. For a discussion of the influence of Savigny on Pollock, see *Fifoot, Judge and Jurist in the Reign of Victoria* (Sweet & Maxwell, London, 1959), Chapter 1.

[44] Even if the concept of the establishment had not yet been invented.

[45] [1915] AC 847.

in a period of major change.[46] The Code Napoleon (1805) appears in articles 1119 and 1165 to state a privity-type rule with only two exceptions in article 1121. By the late nineteenth century commercial pressure, particularly in relation to third-party beneficiaries of life insurance policies, had led the Cour de cassation effectively to reverse the rule. The drafters of the BGB in 1900 took the view that the privity rule should be abandoned—section 328. Other civil law codes have followed either the French or the German model.

American Law

1.27 In the middle of the nineteenth century it would have been assumed that contract law in the states of the Union was substantially the same as in England. However, just prior to the decision on *Tweddle v Atkinson* the law in the United States was set on a different course by the decision of the Court of Appeal of New York in *Lawrence v Fox*.[47] This case involved a creditor beneficiary. The basic facts were that an individual named Holly loaned and advanced a sum of $300 to the defendant

[46] Gilbert WF Dold, *Stipulations for a Third Party: A Comparative Study with Special Reference to Continental Law* (Steven and Sons, London, 1948); MA Meiner, 'Ius Quaesitum Tertio: Comparison and Synthesis' (1967) 16 ICLQ 446.

[47] 20 NY 268 (1859). See also *Burr v Beers* (1862) 24 NY 178; *Choate, Hall and Stewart v SCA Services Inc* (1979) 392 NE (2d) 1045; *Vandenburg Bulb Co Inc v Shinners* (1994) WL 593905 (Mass App Div). Cf *Vrooman v Turner* (1877) 69 NY 280 at 283–5 ('The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promissor, of which *Lawrence v Fox* is a prominent example. To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promissee to secure some benefit to the third party, and second, some privity between the two, the promissee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally … It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promissee to him, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor … [I]n in every case in which an action [based on *Lawrence v Fox*] has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.') See further SP de Cruz, 'Privity in America: A Study in Judicial and Statutory Innovation' (1985) 14 Anglo-Am L Rev 265; LP Simpson, 'Promises without Consideration and Third Party Beneficiary Contracts in American and English law' (1966) 15 ICLQ 835; Louise Wilson, 'Contract and Benefits for Third Parties' (1987) 11 Syd L Rev 230 at 243–58.

in return for a promise from the defendant to pay an equivalent sum to the plaintiff the next day and thus discharge a debt owed by Holly to the plaintiff. When the defendant did not pay, the plaintiff commenced an action which was successful on the basis that where 'a promise [is] made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach'.[48] Although recognising that such relief is often given where the money was held on trust for the third party, it was said that this principle was not limited to such cases and was instead a general principle of law.[49] This decision, despite early reservations,[50] ultimately proved to be very influential[51] and it set in motion a movement in the United States which culminated in sections 302 and 304 of the Restatement Contracts (2d) which

[48] 20 NY 268 (1859) at 274 per H Gray J, Johnson Ch J, Denio, Seldon, Allen and Strong JJ concurred. However, note that at 275 of the report it is stated that Johnson Ch J and Denio J 'were of the opinion that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge though not with without his being privy thereto'. Justices Grover and Comstock dissented. He referred to *Dutton v Poole, Crow v Rogers* and *Price v Easton* but did not prevail. The majority opinion did not refer to any of the English cases.

[49] The extraordinary history behind the proceedings and ultimate judgment in *Lawrence v Fox* is traced in Anthony Jon Waters, 'The Property in the Promise: A Study of the Third Party Beneficiary Rule' (1985) 98 Harv LR 1109. Waters' research discovered numerous interesting features of this case, including: (a) that the plaintiff probably did not sue Holly (probably correctly spelt as 'Hawely') for the debt because it was a gambling debt; (b) that the action commenced as an action for money had and received which would have failed if Holly had handed over the money to the defendant as a loan; such an action was seen as proprietary in nature as restitution would be granted to the 'true owner' of the fund; (c) it is at the appeal level that the bill was varied to recognize that it was in fact a loan and so the action became a contract action as the plaintiff now had to enforce a promise made by the defendant to Holly which would normally fail for lack of privity; (d) nevertheless the court granted the plaintiff a remedy and in doing so placed much reliance on notions of property, thus bringing property notions within the field of contract law, (Waters notes at 1139, recognising a 'property in the promise'); (e) that this moulding was made possible because the case arose at that moment in time when the forms of action were abolished; (f) that the case, combined with the influence of Professor Corbin over six articles (and numerous letters) to recognize the rights of third party beneficiaries, resulted in the law in the Unites States as it is today. The Corbin papers are: Arthur L Corbin, 'Contracts for the Benefit of Third Persons in Connecticut' (1922) 31 Yale LJ 489; Arthur L Corbin, 'The Law of Third Party Beneficiaries in Pennsylvania' (1928) 77 U Pa L Rev 1; Arthur L Corbin, 'Third Parties as Beneficiaries of Contractors' Surety Bonds' (1928) 38 Yale LJ 1; Arthur L Corbin, 'Contracts for the Benefit of Third Persons' (1930) 46 LQR 12; Arthur L Corbin, 'Contracts for the Benefit of Third Persons in the Federal Courts' (1930) 39 Yale LJ 601. See also Arthur L Corbin, 'Contracts for the Benefit of Third Persons' (1930) 46 LQR 12.

[50] See Peter Karsten, 'The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case' (1991) 9 Law and History Review 327 at 331; Melven Aron Eisenberg, 'Third-Party Beneficiaries' (1992) 92 Columbia L Rev 1358 at 1368. The point has been made that *Lawrence v Fox* may not be the landmark that it is often held out to be; rather it represents a link in a chain of cases allowing third-party beneficiaries to enforce promises made in their favour and may 'represent an eloquent plea for the *retention* of a rule that was being abandoned increasingly as bad law'; see Peter Karsten, 'The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth and Nineteenth Centuries: Third-Party Beneficiary Contracts as a Test Case' (1991) 9 Law and History Review 327 at 331, and Melven Aron Eisenberg, 'Third-Party Beneficiaries' (1992) 92 Columbia L Rev 1358 at 1363. See further MH Hoeflich and E Perelmuter, 'The Anatomy of a Leading Case: *Lawrence v Fox* in the Courts, the Casebooks, and the Commentaries' (1988) 21 U Mich J L Reform 721.

[51] See eg *Turk v Ridge* (1869) 41 NY 201.

recognise a duty owed to an 'intended beneficiary' of a promise and an ability of such a beneficiary to enforce that duty.[52]

1.28 An equivalent case for donee beneficiaries is *Seaver v Ransom.*[53] Here, a husband, who was a lawyer and a judge, drafted his wife's will under her instructions. They had no children and she was very ill at the time. When she read the will as drafted she said that it was not what she wanted and that she wished to leave her house to her niece. Her husband offered to redraft it but she said she was afraid she might die before signing it. Her husband then promised to leave a sum of $6,000 in his will for the benefit of the niece; this equated to the value of the house. His wife then executed the will. The husband failed to amend his will and in due course the niece commenced an action against his estate and was, by a majority decision, successful. Pound J delivering judgment for the majority said:[54]

> If [the wife] had left her husband the house on condition that he pay the plaintiff $6,000 and he had accepted the devise, he would have become personally liable to pay the legacy, and plaintiff could have recovered in an action at law against him, whatever the value of the house … That would be because the testatrix had in substance bequeathed the promise to plaintiff and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible but not obvious. The tendency of American law is to sustain the gift in all such cases and to permit the donee-beneficiary to recover on the contract … The equities are with the plaintiff and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement.[55]

[52] The concept of an 'intended beneficiary' has been the subject of some debate as to what intention is necessary and whose intention is relevant; see Comment, 'Contracts for the Benefit of Third Parties in the Construction Industry' (1971) 40 Fordham L Rev 315; Nancy Bryce Helm, 'Third Party Beneficiaries: Test for Materialmen's Suit on Contractor's Surety Bond' in Notes (1956) 41 Cornell LQ 481; Comment (1958) 27 Fordham L Rev 262; Robert S Adelson, 'Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent' (1985) 94 Yale LJ 875. The Restatement (First) of Contracts maintained a distinction between donee, creditor, and incidental beneficiaries allowing the first two the right to sue. These distinctions were not replicated in the Restatement (Second) of Contracts on the basis that they were based on 'obsolete doctrinal difficulties', see Restatement (Second) of Contracts §302 introductory note. See David M Summers, 'Third Party Beneficiaries and the Restatement (Second) Of Contracts' (1982) 67 Cornell L Rev 880; Harry G Prince, 'Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts' (1984) 25 Boston C L Rev 919; SP de Cruz, 'Privity in America: A Study in Judicial and Statutory Innovation' (1985) 14 Anglo-Am L Rev 265; Kay S Bruce, '*Martinez v Socoma* Companies: Problems in Determining Contract Beneficiaries' Rights' (1975) 27 Hastings LJ 137.

[53] (1918) 224 NY 233. Indeed this case can be viewed as marking the re-emergence of the *Lawrence v Fox* line of reasoning, see Melven Aron Eisenberg, 'Third-Party Beneficiaries' (1992) 92 Columbia L Rev 1358 at 1371ff equating its timing with the rise of modern contract law and a movement away from the classical school, see also at 1389–91.

[54] (1918) 224 NY 233 at 241–2.

[55] It has been noted by others that many donee beneficiary cases could be explained by reference to the basic principles governing gifts, see Howard O Hunter, *Modern Law of Contracts* (revised edn, West Group, St Paul, 1999) §20:7. See further Comment (1958) 27 Fordham L Rev 262 at 265.