CASE AND COMMENT

CONTRACTS—STATUTE REQUIRING CONTRACT FOR BENEFIT OF THIRD PERSON—RIGHT OF THIRD PERSON TO ENFORCE.—It is a fundamental principle of contract law that only the parties to a contract can acquire rights and duties thereunder, and that a third party for whose benefit a contract is made cannot enforce performance thereof, even if the contract purports to give him the right to sue upon it.[1] It is well known, however, that this principle is subject to a number of limitations or exceptions. In certain kinds of transactions in which there is no direct contractual privity between a promisor and a third party seeking to enforce performance of the promise, the courts have enabled the third party for whose benefit the transaction was entered into to secure enforcement of the promise.[2] This result has been effected by subsuming the particular transaction under some other established doctrine of law or equity.

In Halsbury: Laws of England[3], four types of exceptions to the general rule stated above are set out, which are in substance as follows:

I. Where a contract is made by an agent on behalf of an undisclosed principal, the latter is, as a general rule, entitled to sue thereon.[4]

II. Where a contract is intended to secure a benefit to a person who is not a party to it, so that he has a beneficial right as *cestui que trust* under the contract, the person for whose benefit the contract was made is allowed in equity to enforce it.[5]

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[1] *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; 121 E.R. 762; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd* [1915] A. C. 847; *Vandepitte* v. *Preferred Accident Ins. Co.* [1933] A.C. 70; 1 D.L.R. 289; [1932] 3 W.W.R. 573. See also Halsbury: Laws of England, 2nd ed. vol. 7, articles 106 and 199, and cases cited thereunder.

[2] See article: *Contracts for the Benefit of Third Persons* by Corbin, A.L. (1930), 46 Law Q. Rev. 12; and *Vandepitte* v. *Preferred Accident Ins. Co. supra.*

[3] 2nd ed. vol. 7, pp. 81-82.

[4] But if the contract is under seal, the principal can acquire no right thereunder unless he is a party to the deed. See Halsbury; Laws of England, 2nd ed. vol. 7, p. 68. While this is the common law rule, nevertheless in such a case the equitable concept of a trust of a chose in action has been employed to enable the principal to secure the promised benefit. See *Harmer* v. *Armstrong*, [1934] 1 Ch. 65; 103 L.J. Ch. 1, and comment thereon (1934), 12 C.B. Rev. 183.

[5] In such a case the promisee of the contract is deemed to be a trustee for the third party of a chose in action against the promisor, see *Tomlinson* v. *Gill* (1756), Ambler 330; 27 E.R. 221. In commenting on this case, Mr. A. L. Corbin says: "This, it may be, was the first application of the 'trust' concept for the advantage of a contract beneficiary. There was no trust

(Continued on page 666)

III. Where an agreement to pay money to a third person out of certain property amounts to a declaration of trust as distinguished from a mere covenant to pay money, it may be enforced by the third party although he is not a party to the contract.[6]

IV. Where a person has received money from another for the purpose of payment over to a third person, and has admitted to such third person that he holds the money on such terms, the third person can recover the money as had and received to his use.[7]

In view of the decision of the Manitoba Court of Appeal in the recent case of *Metropolitan Loan Co.* v. *Canada Security Assurance Co.* [8] it seems necessary to add a fifth exception to those enumerated above, as follows :

V. Where a contract is entered into pursuant to the requirements of a statute a third party for whose advantage the statute requires the contract to be made may sue in his own right to enforce the obligation thereof, which in relation to him is statutory and not contractual.[9]

The distinction between the right to enforce an obligation which is statutory and one which is purely contractual is well illustrated by the cases of *Tilson* v. *Warwick Gas Light Co.*[10] and *Melhado* v. *Porto Alegre Rail Co.*[11] In the former case, an Act of Parliament incorporating a gas light company enacted that all the costs of obtaining the Act should be paid and discharged out of the monies subscribed in preference to all other payments. It was held that the attorneys who obtained the Act could maintain an action of debt upon the statute for their costs. Bayley, J.

(*Continued from page 665*)

fund to be administered either by the defendant or by the promisee. There was merely a contract between two persons by which one of them promised to pay a debt due to the plaintiff, a third party; and the promisee is called a trustee merely as a means of sustaining a bill in equity by the beneficiary against the promisor." 46 Law Q. Rev. 12 at p. 18.

[6] The equitable concept employed in such a case is the simple one of a declaration of trust of a *res* in favour of a *cestui que trust*. See the observations of Jessel, M.R. and James, L.J. in Re *Empress Engineering Co.* (1880), 16 Ch. D. 125.

[7] "In such a case the person who has received the money has constituted himself the agent of the third person, and no further consideration is necessary between them.": Halsbury: Laws of England, 2nd ed. Vol. 7, p. 82.

[8] 42 Man. L.R. 272, [1934] 3 D.L.R. 649; 2 W.W.R. 422.

[9] This statement of the principle is taken verbatim from the headnote in [1934] 3 D.L.R. 650.

[10] (1825), 4 B. & C. 962; 107 E.R. 1317.

[11] (1874), L.R. 9 C.P. 503.

said:[12] "Now where an Act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law enables those persons to maintain an action of debt."

In *Melhado* v. *Porto Alegre Rail Co.* the plaintiffs were promoters who had incurred preliminary expenses in establishing the company. The articles of association of the company, when formed, provided that the company should defray such expenses incurred in its establishment as the directors should consider might be deemed to be and treated as preliminary expenses, to an amount not exceeding £2,000. It was held that the plaintiffs had no right of action against the company for non-compliance with the articles of association.

Lord Coleridge, C.J. said:[13] "I do not think that there is in point of law any contract between the defendants and persons not parties to the articles of association, so as to give a right of action against the defendants for preliminary expenses."

In explanation of this case it should be pointed out that the *Companies Act* of 1862, under which this company was incorporated, makes the articles of association of a company incorporated thereunder binding on the company and the members thereof only *as if they had covenanted* with each other in the terms of the articles.[14] Therefore, in relation to a person who is not a member of the company, the articles are *res inter alios acta*[15] and he is in the position of an ordinary third party to a contract under the doctrine of *Tweddle* v. *Atkinson*[16] This is quite different from the situation in *Tilson* v. *Warwick Gas Light Co.*,[16A] where the Act of Parliament placed on the company a direct obligation to the plaintiffs.

In *Metropolitan Loan Co.* v. *Canada Security Assurance Co.*[17] the plaintiff employed two persons during business as bailiffs in

[12] 4 B. & C. at p. 967.

[13] L.R. 9 C.P. at pp. 505-6. See also Mellor and Brett, JJ. at pp. 506-507.

[14] S. 16 . . . . When registered, they [i.e. the articles] shall bind the Company and the Members thereof to the same Extent as if each Member had subscribed his Name and affixed his Seal thereto, and there were in such Articles contained a Covenant on the Part of himself, his Heirs, Executors, and Administrators, to conform to all the Regulations contained in such Articles, subject to the Provisions of this Act . . . .

[15] See remarks of Cairns L.C. in *Eley* v. *Positive & etc. Co.* (1876), L.R. 1 Ex. Div. 88 at p. 90.

[16] *Supra.*

[16A] *Supra.*

[17] *Supra.*

the City of Winnipeg under the name of Bonneau & Co. to collect certain monies. They collected part of the monies but failed to account for the same to the plaintiff. The plaintiff sued the defendant to recover the amount collected by virtue of a bond of indemnity executed by the defendant in the following terms :

> "Whereas the City of Winnipeg under and by virtue of the powers contained in the Winnipeg Charter 1918, has passed by-laws for licensing, regulating and governing auctioneers, bailiffs, detective agents and collecting agents, and providing that before any such license shall be granted to an auctioneer, bailiff, detective agent or collecting agent, such auctioneer, bailiff, detective agent or collecting agent shall furnish to the City a bond of indemnity for the purpose of indemnifying the City or any other person or corporation who may suffer loss owing to the default of such licensee.[18]
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> And whereas Augustus A. Bonneau and John A. Puls, trading as 'Bonneau & Co.' have applied to the said City for a license as a Bailiff for the license year ending on May 31st, A. D. 1933, such person or corporation being hereinafter for convenience referred to as the licensee, and the term license where hereinafter used being understood to include the license above referred to and any subsequent license issued to the licensee for the same business :
>
> Now therefore Canada Security Assurance Co. as surety, in consideration of an agreed premium paid by the licensee, hereby binds itself subject to the limitations hereinafter contained, to pay to the said City and/or any and every other person or corporation (the City and/or any such person or corporation being herein referred to as the assured), any pecuniary loss, not exceeding One Thousand Dollars, sustained by the assured owing to the default of the licensee during the period commencing with the date hereof and continuing until the termination of this bond."

It was contended for the defendant that as the bond was to the City of Winnipeg an action by the plaintiff thereon did not lie; and that, alternatively, for such an action to be maintainable the city should be a party to the action. The action was dismissed by Stacpoole, Co. Ct. J., on the ground that a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party thereto, even if the

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[18] The Winnipeg Charter, 1918 (Man.) chapter 120, section 700, subsection 170 empowers the city to pass by-laws for licensing, regulating and governing certain described agents "and all other persons carrying on business as agents of any kind whatsoever." The following clause was added to sub-section 170 by 1927, (Man.) chapter 115, section 25, and 1930, (Man.) chapter 91, section 16 (a) and (b). And for providing that before any such license shall be granted to a bailiff, detective agent or collecting agent, such bailiff, detective agent or collecting agent shall furnish to the city a bond of indemnity to the amount of at least $1,000.00, satisfactory to the City Solicitor, for the purpose of indemnifying the city or any other person or corporation who may suffer loss owing to the default of such licensee . . .

contract is made for his benefit, and purports to give him the right to sue upon it.[19]

The Manitoba Court of Appeal reversed this decision, and held that the action as framed was maintainable. After reviewing the law as to trusts of choses in action, and pointing out that under that doctrine the action should have been brought by the city as trustee, Trueman, J. A. bases his decision on the ground that on looking at the legislation applying to the transaction it was clear that the bond of indemnity authorized to be required was "for the purpose of indemnifying the city or any other person or corporation who may suffer loss owing to the default of such licensee"; that the by-law gave effect to this provision, which was also carried into the terms of the bond; and that therefore the plaintiff had a statutory right against the defendant which it was entitled to enforce by its own action.[20] The only other written opinion, by Robson, J.A., based the decision on the same ground, holding that there could be no possible doubt that the stipulation for the bond was imposed for the benefit of such persons as the plaintiff, and that the statutory provision, invoked as authorized by the law as pointed out by Duff, J. in *Orpen* v. *Roberts*[21], could be made use of to supply the want of direct contractual privity[22].

It is to be noted that the Court avoided the doctrine of *Tweddle* v. *Atkinson*[23] by subsuming the transaction under the principle of the enforceability of a statutory obligation by the person for whose benefit it is created. This is a principle of the common law. In his instructive comment[24] upon the decision of the English Court of Appeal in *Harmer* v. *Armstrong*[25] Mr. Willis remarks that the case suggests that Equity has not wholly spent its powers of law reform and that it draws attention to the great possibilities offered by an intelligent use of the concept of a trust of a chose in action. The recent decision of the Manitoba Court of Appeal may be said to show that the common law technique has also retained its power to provide for special contingencies, and that the common law, as well as Equity, is possessed of principles that may be invoked to arrive at just and enlightened decisions.

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[19] See [1934] 3 D.L.R. at p. 652.
[20] See [1934] 3 D.L.R. at p. 654.
[21] [1925] S.C.R. 364; 1 D.L.R. 1101.
[22] See [1934] 3 D.L.R. at p. 656.
[23] *Supra.*
[24] (1934), 12 C.B. Rev. 183.
[25] *Supra.*

RESTITUTION OF CONJUGAL RIGHTS—SEPARATION AGREEMENT AS A BAR TO THE DECREE.—The subject of our enquiry in this note is, how far, if at all, will a separation agreement operate as a bar to proceedings for restitution of conjugal rights? This was involved in the recent case of *Walton* v. *Walton* (1934) 3 W.W.R. 588, decided by the Court of Appeal for Manitoba.

In these days, when the courts are so often engaged in dissolving marriages and freeing the parties thereto from the bonds of matrimony, it is well to bear in mind that the court which dissolves marriages has generally the converse right of compelling married persons to live and cohabit together as man and wife, by means of the old Ecclesiastical decree of restitution of conjugal rights—a decree, by the way, which can generally be enforced by contempt proceedings. How far there may be moral justification for compelling by force two persons to live together when there is disaffection on at least one side, is not a matter for us to decide. Nevertheless, we are reminded of the dictum of Sir James Hannen, in *Marshall* v. *Marshall*[1] that "so far are suits for restitution of conjugal rights from being in truth and in fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand." We might also add that in the majority of cases, suits for restitution of conjugal rights brought by wives in England have not really been for restitution, nor even to secure an allowance, but, in the event of the husband's non-compliance with the decree and with the further offence of adultery on his part, to obtain a divorce. The (Imp.) Act of 1884, 47 & 48 Vic. c. 68, treats such non-compliance as statutory, desertion thereby enabling a woman to couple this other matrimonial offence to that of adultery, and therefore to show grounds for the dissolution of her marriage. This devious course, however, has been greatly obviated by the passing of the 1923 (Imp.) Act, 13 and 14 Geo. 5, c. 19, by which a married woman is enabled to obtain a divorce on the sole ground of her husband's adultery committed since the celebration of the marriage and since the passing of the 1923 Act.

We must bear in mind that previous to the Reformation marriage was regarded as a sacrament; cohabitation of man and wife was enforced by the spiritual courts, acting *pro salute*

[1] (1879) L.R.5 P.D.19, at p. 23.

animae, and voluntary separations were regarded as contrary to law. After the Reformation, however, the sacramental nature of marriage ceased to be regarded for civil purposes. In 1533 the statute 25 Hy. 8, c. 19 had made provision for the appointment of Commissioners to examine and revise the ecclesiastical law. No ecclesiastical laws were to be put into execution by authority of the convocation of the clergy contrary to the King's prerogative or the customs, laws or statutes of the realm. Such ecclesiastical laws as were already made and were not repugnant to the laws, statutes and customs of the realm or to the King's prerogative were still to be used and executed as they were before the passing of the 1533 Act till such time as they were examined and revised by the Commissioners. In this manner, therefore, the ecclesiastical law became subject to the law of the realm. The statute of 1533 was repealed by 1 & 2 Ph. & M.c.8, but was revived by 1 Eliz. c. 1, s. 6; and later in Elizabeth's reign the Commissioners published their report, with a new code which, unfortunately, never became law. Now, the common law did not prohibit the cessation of consortium by consent; and from early times separation deeds were recognized and enforced at common law: so also, in equity, after the Reformation. Despite the foregoing, however, the Ecclesiastical Courts seem never to have permitted a voluntary separation to be pleaded in bar to proceedings in the spiritual courts. Under sec. 22 of the Divorce and Matrimonial Causes Act, 1857, the new Court, in all suits and proceedings, other than proceedings to dissolve marriage, is to proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts theretofore acted and gave relief, subject to the provisions of the Act and the rules and orders thereunder. The attitude of the Ecclesiastical Courts is expressed by Sir William Scott in *Mortimer* v. *Mortimer*[2] as follows : —

> "The objection taken against these articles is, that deeds of separation are not pleadable in the Ecclesiastical Court; and most certainly they are not, if pleaded as a bar to its further proceedings; for this Court considers a private separation as an illegal contract, implying a renunciation of stipulated duties—a dereliction of those mutual offices, which the parties are not at liberty to desert—an assumption of a false character, in both parties, contrary to the real *status personae*, and to the obligations which both of them have contracted in the sight of God and man, to live together 'till death them do part,' and on which the solemnities both of civil society, and of religion, have

[2] (1820) 2 Hagg.310, at p. 318.

> stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes, which the law itself has not pronounced to be sufficient, and sufficiently proved. These Courts, therefore, to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uniformly rejected such covenants, as insignificant in a plea of bar; and leave it to other Courts to enforce them, so far as they may deem proper, upon a more favourable view (if they entertain it) of their consistency with the principles of the matrimonial contract. As a plea in bar, therefore, this Court would be bound to reject it."

Anyone wishing to bar proceedings in the spiritual courts on the ground of a voluntary separation, therefore, was obliged to proceed indirectly by means of an injunction granted by a court of equity; and in passing we might notice Lord Westbury's statement in *Hunt* v. *Hunt*, infra, that—

> " in granting an injunction the Chancery neither forms nor expresses any judicial opinion upon the conduct of the husband and wife towards each other, nor does it determine anything as to the propriety of their living apart, or the duty of returning to cohabitation."

In *Wilson* v. *Wilson*,[3] the court recognized and decreed the performance of an executory agreement to execute a separation deed, containing a covenant (introduced by the Master when settling the form of the deed) not to institute proceedings for restitution of conjugal rights. Such a covenant is now regarded as one of the " usual " covenants in a separation deed.[4] Fourteen years later, the case of *Hunt* v. *Hunt*[5], was decided. In that case, the husband had covenanted with his wife's trustees in a separation deed that he would not by any legal proceedings or otherwise howsoever compel or endeavour to compel the wife to cohabit or live with him. Less than one year after the execution of the separation deed the husband had commenced his suit for restitution of conjugal rights, the parties having lived separate and apart ever since the execution of the deed; and in her answer the wife alleged, as part of her defence, the covenant by the husband referred to above. An order was made striking out this part of the answer, and the husband gave notice of having lodged his record for trial. The wife and her trustees thereupon filed a bill, praying that the husband, his solicitors and agents, might be restrained from prosecuting the suit already commenced in the Divorce Court, and from commencing or prosecuting any other suit or legal proceeding to compel or endeavour to compel the plaintiff to cohabit and live with him. The case

[3] (1848) 1 H. L. Cas. 538.

[4] 16 Hals. 444.

[5] 31 L.J.Ch.161.

was argued before Romilly, M.R. on " the mere dry legal point " whether a court of equity will interfere by injunction to prevent the defendant from suing for a restitution of conjugal rights in breach of his covenant; and on that point alone the learned Master of the Rolls decided that it would not. An appeal was taken to Lord Westbury, L.C., who in a masterly judgment reviewed the subject as treated by the Common Law Courts, the Ecclesiastical Courts, and the Chancery, and granted the relief asked for by or on behalf of the wife. If, by the way, any enumeration of excellent reasons for upholding separation agreements were ever required, one could not do better than refer to those set forth by the plaintiff's counsel in *Hunt* v. *Hunt*.[6] When the writer first read these, he was almost forced to the conclusion that separation agreements are one of the bulwarks of society.

Under the Judicature Acts, a contract which would have given a right to an injunction to restrain a suit may be set up as a defence in a suit, and must be examined on the same principles as it would formerly have been examined in a Court of equity. In *Marshall* v. *Marshall*, supra, Sir James Hannen followed *Hunt* v. *Hunt*, supra, and regarded the husband's plea of a separation agreement containing a covenant by the wife not to sue for restitution of conjugal rights to be such an equitable plea of defence as the Divorce Court since the Judicature Acts was bound to consider, and held that the wife was bound by the deed, and dismissed a suit by her for restitution of conjugal rights. So also Jessel, M.R., in *Besant* v. *Wood*;[7] *Clark* v. *Clark*[8]. See also *Aldridge* v. *Aldridge*[9]. Note that no particular form of separation agreement is necessary; only evidence of a contract is required[10].

A separation deed will not, however, act as a bar to a decree of restitution of conjugal rights if the party in whose favour it is pleaded has not substantially observed his or her covenants in the deed. *Besant* v. *Wood*[11]; *Tress* v. *Tress*,[12] *Kennedy* v. *Kennedy*[13] .See also *McCreanney* v. *McCreanney*[14] *Walker* v. *Walker*[15]. And it now seems well settled that if the

[6] Supra, at pp. 163/4.
[7] (1879) L.R.12 Ch.D.605.
[8] (1885) L.R.10 P.D.188.
[9] (1888) 13 P.D. 210.
[10] Supra, at p. 195.
[11] Supra.
[12] (1887) 12 P.D.128.
[13] (1907) P. 49 (explaining *Hardie* v. *Hardie* (1901) 70 L.J. (P.D., 29).
[14] (1928) 138 L.T.671.
[15] (1934) 2 W.W.R.554.

respondent does not appear in the proceedings and raise the defence of the separation deed, the Court is entitled to assume that there are circumstances which prevent the party from availing himself or herself of a covenant not to sue for restitution of conjugal rights, and the Court is not bound to take notice of such a covenant. *Tress* v. *Tress*, supra; *Phillips* v. *Phillips*[16]; *Williams* v. *Williams*[17]. Furthermore, the right to refuse cohabitation by reason of the existence of a separation deed is a purely personal right to the party sued, the assertion of which does not apparently serve any public interest. A new state of facts not contemplated when the deed was executed may relieve the parties from the obligations of the deed. Sir Henry Duke, P., in *Williams* v. *Williams*[18].

In recent years, for reasons which are not too clear, a reaching back towards the ecclesiastical practice in regard to separation agreements, when dealing with petitions for restitution of conjugal rights, is evidenced. For example, in *Palmer* v. *Palmer*[19] the English Court of Appeal decided that the law must be considered as it was before the Divorce and Matrimonial Causes Act, 1857, and followed the practice of the Ecclesiastical Court, holding that a separation deed which contained a covenant by the wife not to compel the husband to cohabit with her or endeavour to enforce any conjugal rights, was not a bar to the wife's suit for restitution. We observe that in this case the husband did not appear or set up the deed, which was disclosed by the wife, who said that she had been coerced into signing the deed. See also *Harnett* v. *Harnett*[20] *Palmer* v. *Palmer* and *Harnett* v. *Harnett* were followed by the Manitoba Court of Appeal in *Walton* v. *Walton*,[21] in which the existence of an agreement to separate did not, under the circumstances of that case, debar the court from pronouncing a decree of restitution of conjugal rights in favour of the wife, the Court considering that the evidence disclosed the fact that the petitioner sincerely desired the return of her husband. It should be mentioned that the husband did not give any evidence in the last mentioned case. It is difficult to say whether or not the "new freedom" furnished to women by the (Imp.)

[16] (1917) P.90.

[17] (1921) P.131. *Contra: Kennedy* v. *Kennedy, supra.*

[18] At pp. 134/5, citing *Morrall* v. *Morrall* (1881) 6 P.D. 98, and *Gandy* v. *Gandy* (1882) 7 P.D. 108.

[19] (1923) P.180.

[20] (1924) P.126.

[21] (1934) 3 W.W.R. 588.

Act of 1923, *supra*, has in any way affected the English courts in respect to their attitude towards the granting of decrees for restitution of conjugal rights.

In closing, two other matters call for notice. 1. Where misconduct on the part of one or both of the spouses has been condoned by the provisions or operation of a separation deed, which contains a provision that such misconduct shall not be raised in any subsequent matrimonial proceedings taken by either party against the other, a subsequent matrimonial offence will not revive the offence condoned by the separation agreement, which can, therefore, be pleaded in bar. *Rowley* v. *Rowley*[22] *Rose* v. *Rose*[23]. 2. The Court will not now grant a decree of restitution of conjugal rights unless satisfied of the petitioner's sincere desire for the resumption of cohabitation. *Williams* v. *Williams*,[24] *Mann* v. *Mann*;[25] *Palmer* v. *Palmer*;[26] *Walton* v. *Walton*[27].

F. READ.

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[22] (1866) L.R.1 H.L. Sc. 63.
[23] (1882) L.R. 7 P.D.225, affd. 8 P.D.98; L. v. L. (1931) P.63.
[24] *Supra.*
[25] (1922) P.238.
[26] *Supra.*
[27] *Supra.*