CASE NOTES

BESWICK v. BESWICK[1]

and

COULLS v. BAGOT'S EXECUTOR AND TRUSTEE CO. LTD.[2]

Contractual Rights of Third Parties

In *Dunlop* v. *Selfridge*[3] Lord Haldane said, 'Our law knows nothing of a *jus quaesitum tertio* arising by way of contract' and, after the more recent decisions of the High Court of Australia in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[4] and of the House of Lords in *Midland Silicones Ltd.* v. *Scruttons Ltd.*,[5] his lordship's dictum appeared to be unchallengeable. Nevertheless, in the current year both the High Court of Australia and the House of Lords have been called upon to give further consideration to the position of persons who, although not parties to a contract, were clearly intended to benefit from it.

In *Coulls* v. *Bagot's* a contract was entered into in the following terms—

> Agreement between Arthur Leopold Coulls and O'Neil Construction Proprietary Limited. In consideration of the sum of £5, I Arthur Leopold Coulls, Anstey's Hill, Highbury East, give to O'Neil Construction Proprietary Ltd. the sole right to quarry and remove stone from an area approximately 50 acres (fifty acres) situated around blue dolomite hill near homestead of original Newman's Nursery. The approximate 50 acres is detailed in attached map. I also agree to grant a permanent right of way along the original Council road of 'Water-gully' to Perseverance Road. O'Neil Construction Proprietary Ltd. agrees to pay at the rate of 3d. per ton for all stone quarried and sold, also a fixed minimum royalty of £12 per week for a period of ten (10) years with an option of another ten (10) years at above basis (£12 per week minimum). I also agree to extend this period for another ten (10) years at 4d. per ton royalty with a minimum royalty of £12 per week as above.
> I authorise the above Company to pay all money connected with this agreement to my wife Doris Sophia Coulls and myself, Arthur Leopold Coulls as joint tenants (or tenants in common?) (the one which goes to living partner).

The agreement was signed by A. L. Coulls, L. O'Neil (representing the company) and D. S. Coulls, the wife of A. L. Coulls.

During the lifetime of A. L. Coulls the Company's cheques for royalties were made out to A. L. Coulls and D. S. Coulls. They were paid into the husband's bank account and he then gave his wife

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1 [1966] Ch. 538 (C.A.); [1967] 2 All E.R. 1197 (H.L.)
2 (1967), 40 A.L.J.R. 471.
3 *Dunlop Pneumatic Tyre Company Limited* v. *Selfridge and Company Limited* [1915] A.C. 847, at p. 853.
4 (1956), 95 C.L.R. 43.
5 [1962] A.C. 446; [1962] 1 All E.R.1.

cheques for half the amounts. After the husband's death the Company paid the whole of the royalties to the widow and she treated them as her own moneys. Bagot's Executor and Trustee Co., the husband's executors, took out an originating summons requesting the Supreme Court of South Australia to determine the following questions arising out of the contract—

1. Is the Company entitled or bound to pay the royalties to the executor?
2. Is the Company entitled or bound to pay the royalties to the widow?
3. If the former, does it receive and hold them on behalf of the widow and the estate jointly or in common?
4. Is the widow the assignee of the royalties and is she entitled to demand that payment of them be made to her, and to hold them as her own?

The widow applied for provision to be made for her out of the estate under the powers contained in the South Australian Testators Family Maintenance Act. Mayo J. held that the final clause of the contract constituted the widow an assignee of the right to receive the royalties, so that, having answered question 4 affirmatively, the answer to question 2 was also affirmative. The answer to question 1 was negative so that question 3 did not arise. On the basis that, being entitled to the royalties, the widow was amply provided for, her claim under the Testators Family Maintenance Act was dismissed.[6]

On appeal to the High Court[7] the finding of an assignment was unanimously rejected and the majority[8] held that the final clause of the contract must be construed as a revocable mandate which was revoked on the husband's death. On this view the executor was entitled to demand payment of the royalties to it for the benefit of the husband's estate. In consequence the widow's application under the Testators Family Maintenance Act was referred back to the Supreme Court for a fresh hearing. The decision of the majority does nothing to disturb the views on privity of contract which have found general acceptance since *Tweddle* v. *Atkinson*[9] was decided in 1861.

However, the dissenting judgments of Barwick C. J. and Windeyer J. are of considerable importance. Differing from the majority as to the construction of the contract, they each held that the wife being a joint-promisee with her husband was a party to the contract and that, because he had provided consideration, although she had not, she was entitled to have the royalties paid to her for her own benefit.

6 [1965] S.A.S.R. 317, *sub. nom. In The Estate of Coulls, Deceased.*
7 (1967), 40 A.L.J.R. 471.
8 McTiernan, Taylor and Owen JJ.
9 1 B. & S. 393; 30 L. J. (Q.B.) 265; 4 L. T. 468; 25 J. P. 517; 8 JUR. (N.S.) 332; 9 W. R. 781.

McTiernan J. did not consider this proposition but Taylor and Owen JJ. expressly agreed with it,[10] differing from the Chief Justice and Windeyer J. only on the question of construction.

In *Dunlop* v. *Selfridge*[11] Lord Haldane had declared that two principles are fundamental. First that only a person who is a party to a contract can sue on it and, secondly, that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. It has been suggested that these two principles, in the context of simple contracts, are merely two ways of saying the same thing[12] and indeed, *Tweddle* v. *Atkinson*, which is usually accepted as establishing the doctrine of privity of contract, was substantially decided on the second principle, that consideration must move from the promisee.[13] However, both Barwick C. J. and Windeyer J. appear to have favoured Lord Haldane's view that the principles are separate[14] and, indeed the separate consideration of the two principles seems to be necessary to the conclusion that a joint-promisee, who has given no consideration, can enforce the contract provided that his co-promisee has given consideration. In any event the views of the majority constitute an amplification, if not an extension, of the principle that consideration must move from the promisee and it may be restated as 'consideration must move from the promisee or in the case of joint-promisees from any one of them.'[15]

In regard to the mode of enforcement the Chief Justice, Owen, Taylor and Windeyer JJ. agreed that during the lifetime of the promisees all of them would have to be parties, either as plaintiffs or defendants, to an action to enforce the contract.[16] In the event of the death of one of the joint-promisees, Barwick C. J. alone was of opinion that the deceased promisee's personal representatives would have to be joined.[17] The others considered that the right of action would vest in the survivor. With respect *Attwood* v. *Rattenbury*,[18] cited by the learned Chief Justice appears to support the view of the majority rather than his own.

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10 40 A.L.J.R. 471, at p. 480.

11 [1915] A.C. 847, at p. 853.

12 The view appears to have been originated by Professor Williams in *Salmond and Williams*, at p. 100; cp. *Salmond and Winfield*, at pp. 77-8. It was elaborated by M. P. Furmston, 'Return to *Dunlop* v. *Selfridge*,' 23 *M.L.R.* 373, at pp. 382-385 and has been accepted by some writers *e.g. Cheshire and Fifoot*, 6th ed., at p. 65 (Aust. ed., at p. 157), *Smith and Thomas*, 2nd ed., at p. 207 and *Treitel*, at pp. 399-400.

13 It is only in the judgment of Wightman, J. as reported in 30 L. J. (Q.B.), at p. 267, that Lord Haldane's first principle is mentioned.

14 40 A.L.J.R., at p. 477 and at pp. 483-4, respectively.

15 It would appear, therefore, that in the first example given in *Cheshire and Fifoot*, 6th ed. at p. 65 (Aust. ed. at p. 157), A could enforce the agreement.

16 40 A.L.J.R. at p. 477, p. 480, and p. 483, respectively.

17 *Ibid.* at pp. 477-8.

18 (1822) 6 Moore C. P. 579 at p. 584; 23 R. R. 633, at p. 636.

Coulls v. *Bagot's* emerges as a very strong if not a binding authority in Australia for the proposition that a joint-promisee, who has given no consideration, can enforce a contract, provided that his co-promisee has given consideration. It opens up wide possibilities especially in the field of oral contracts for the purchase of consumer goods. Does it for example render a retailer in a *Donoghue* v. *Stevenson*[19] situation liable for breach of contract to the consumer when some other person has paid for the goods to be consumed? Clearly the answer will depend upon whether or not the court will regard the consumer as a joint promisee and therefore a party to the contract. If the consumer took an active part in the selection of the goods and the retailer is aware of the fact that they are intended for her use or consumption, it is arguable that the consumer is a joint-promisee even in regard to the implied conditions as to fitness and quality of the Sale of Goods Acts. In such cases the importance of the contractual remedy is not only that the retailer may be more readily accessible to an action than the manufacturer, as for example where the latter is not within the jurisdiction, but that the retailer's liability will be absolute in the sense that absence of fault on his part is no defence. If this view is acceptable, *Coulls* v. *Bagot's* has made a not insignificant contribution to the common law.

In *Beswick* v. *Beswick*[20] by a written contract, not under seal, Beswick (the uncle) agreed to sell his business of a coal round to Beswick (his nephew) in consideration of the nephew's promise to employ the uncle as a consultant for the rest of his life at a wage of £6-10-0 a week and after the uncle's death to pay his widow £5-0-0 for her life. There were no business premises and the assets of the uncle's business consisted of certain chattels and the goodwill. The business was transferred to the nephew and he employed his uncle in accordance with the contract. After the uncle's death the nephew made one payment of £5-0-0 to the widow but refused to make any further payments. The widow sued to obtain payment in accordance with the contract both in her personal capacity and as sole administratrix of the uncle's estate and before the Court of Appeal her case was argued on four grounds—

1. That the deceased uncle was a trustee for the plaintiff of the nephew's contractual promise.
2. That as administratrix the plaintiff was entitled to recover and to hold what she recovered in her personal capacity.
3. That the plaintiff, as administratrix, was entitled to an order for specific performance of the contract.
4. That under s. 56(1) of the English Law of Property Act, 1925, the plaintiff, in her personal capacity, was entitled to recover on the contract.

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19 [1932] A.C. 562.
20 [1966] Ch. 538 (C.A.); [1962] 2 All E.R. 1197 (H.L.).

The contention that the deceased had contracted as a trustee for his wife was unanimously rejected. Both Lord Denning M. R. and Salmon L. J. appear to have based their rejection on the fact that during the uncle's lifetime he and his nephew by agreement might have rescinded or varied the agreement.[21]

Only Lord Denning was prepared to hold that the plaintiff, suing as administratrix, could recover substantial damages at common law. The other members of the Court appeared to think that only nominal damages would be recoverable.[22] However, the court was unanimous in holding that the plaintiff, as administratrix, was entitled to an order for specific performance.

In regard to s. 56(1) both Lord Denning M. R. and Danckwerts L. J. considered it to be a statutory abrogation of the doctrine of privity of contract and therefore it enabled the widow to enforce the contract for her own benefit. Salmon L. J. decided that in view of his decision as to specific performance it was not necessary for him to consider the operation of the section.

On appeal to the House of Lords the widow, as respondent, was content to rely upon only two of the grounds argued before the Court of Appeal, specific performance and s. 56(1) of the Law of Property Act. Their Lordships were unanimous in upholding the order for specific performance and in rejecting the claim under s. 56(1).

In considering specific performance the only questions were whether that remedy is available for the recovery of a sum of money and whether the remedy was precluded by the element of personal service by the uncle. In deciding that the remedy is available for the recovery of a sum of money their Lordships adopted the reasoning, as had Barwick C. J. and Windeyer J. in *Coulls' Case*,[23] of Lord Denning and confirmed the authority of the cases cited by him.[24] In Australia the unanimous decision of the High Court in *Turner* v. *Bladin*[25] was already authority for the proposition that an order for specific performance may be decreed in respect of a contract to pay money by instalments where all of the instalments have not yet accrued due. In the Court of Appeal the majority had justified an order for specific performance on the ground that because only nominal damages could be awarded the common law remedy was inadequate.[26] However, in the House of Lords both Lord Pearce and Lord Upjohn[27] expressly agreed with the view expressed by Windeyer J. in *Coulls's Case*[28] that damages might well be substantial.

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21 [1966] Ch. 538, at p. 555 and pp. 564-5, respectively.
22 *Ibid.*, Danckwerts, L.J. at p. 560 and Salmon, L.J., at pp. 565-6.
23 40 A.L.J.R. 471, at p. 477 and at p. 487, respectively.
24 *Keenan* v. *Handley* (1864), 12 W. R. 930; *Peel* v. *Peel* (1869) 17 W. R. 586; *Drimmie* v. *Davies* [1898] I. Rep. 176.
25 (1951), 82 C.L.R. 463.
26 See note 22, *supra.*
27 [1967] 2 All. E.R. 1197, at p. 1212E and at p. 1221D, respectively.
28 40 A.L.J.R. 471, at pp. 486-7.

The majority of their Lordships appear to have based the order for specific performance upon the same grounds as were adopted in the High Court in *Turner* v. *Bladin*. In the words of Lord Upjohn:

> When the money payment is not, however, made once and for all but in the nature of an annuity there is an even greater need for equity to come to the assistance of the common law. It is to do true justice to enforce the true contract that the parties have made and to prevent the trouble and expense of a multiplicity of actions.[29]

Lord Upjohn alone referred to the element of personal service required from the uncle and he dismissed it as being *de minimis*. The question arose out of the requirement of mutuality for a decree of specific performance but, at the risk of heresy, one may venture to suggest that it would be somewhat artificial to refuse an order for specific performance to a person who has fully performed his part of the contract on the sole ground that, if he had not, he could not have been compelled to do so.

Although their Lordships were not unanimous in their views as to what is the precise effect of s. 56(1) of the English Law of Property Act, they emphatically rejected the view that it had abrogated the rule in *Tweddle* v. *Atkinson*. They took the view that, because the statute was a consolidating Act, there is a prima facie presumption that it was not intended to alter the pre-existing law and that, although the section speaks of an 'interest in land or other property,' it appears in a part of the act headed 'Conveyances and Other Instruments,' so that the context excludes the wide definition of 'property' in s. 205 (xx) of the Act.

In *Coulls* v. *Bagot's* only Windeyer J. referred to the South Australian equivalent of s. 56(1) and, although he found difficulty in seeing in it a complete reversal of the rule that only those who are parties to a bargain can enforce it at law, he considered the question to be debatable.[30] In Tasmania, because the comparable provision was inserted by an *amending* Act, it is respectfully submitted that the reasoning of the House of Lords has done nothing to render its construction less debatable.[31]

To sum up, it appears that neither case has in any way shaken the doctrine of privity of contract. However, *Beswick* v. *Beswick* has highlighted the possibility of specific performance as a means of mitigating the severity of the doctrine and, as Windeyer J. said in *Coulls* v. *Bagot's*, there is no reason today for limiting by particular categories, rather than by general principles, the cases in which orders for specific performance will be made.[32] On the other hand, the

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29 [1967] 2 All. E.R. 1197, at p. 1218E. Cp. *Turner* v. *Bladin* (1951) 82 C.L.R. 463, at pp. 474-5.

30 40 A.L.J.R. 471, at p. 488.

31 S. 61 (c) Conveyancing and Law of Property Act, inserted by s. 3, Conveyancing and Law of Property Act, 1935, which was an Act *to amend* the earlier Act.

32 40 A.L.J.R., at p. 487.

'joint-promisee' concept advanced in *Coulls* v. *Bagot's* may well have far reaching effects in the field of consumer protection.

P. F. P. Higgins.

LEWIS CONSTRUCTION CO. PTY. LTD. v. M. TICHAUER SOCIETE ANONYME[1]

Conflict of Laws—Order XI procedure where contract made within the jurisdiction—Discretion of Court—Forum Conveniens.

This case raises a number of interesting problems in the Conflict of Laws. The plaintiff, a Victorian company, contracted with the defendant, a French company, for the purchase from the defendant of two cranes. The goods were manufactured in France and shipped to Melbourne. Shortly after one of the cranes was erected in Melbourne part of it fell, causing loss of life and damage to property. As a result the plaintiff company was put to considerable expense in satisfying or settling a number of claims at common law and under the Workers Compensation Act, and it issued out of the Supreme Court of Victoria a writ claiming damages against the defendant for breach of contract, with an alternative claim in tort for negligence.

On application by the defendant to have service of the notice of the writ set aside, Hudson J. held that the action was one in respect of an alleged breach of a contract made within the jurisdiction and, furthermore, that the case was a proper one for the exercise of the Court's discretion under 0.XI of the Rules of Court, since the questions to be litigated were more closely connected with Victoria than with France and therefore the action was one which properly belonged to the courts of Victoria. For these reasons he found that leave had been properly given by the Master under 0.XI of the Rules of Court to serve notice of the writ on the defendant out of the jurisdiction.

Three alternative bases upon which the plaintiff attempted to show that the Court had jurisdiction under 0.XI were rejected. In the first place, on the authority of *George Monro Ltd.* v. *American Cyanamid and Chemical Corporation,*[2] the Court did not accept the argument that a tort had been committed within the jurisdiction. Secondly, it denied that any breach of the contract had occurred within the jurisdiction, since the sale had been on C.I.F. terms, and the seller's obligation had been performed upon shipment. Finally, the submission that the contract was governed by the law of Victoria was rejected, the proper law of the contract being found to be French law. This latter point is an interesting one. It is an accepted principle of English law that where the parties to a contract make an express selection of a particular forum to determine disputes which may arise they thereby impliedly select the law of that forum to be the proper law of the

1 [1966] V.R. 341.
2 [1944] 1 K.B. 432.

contract.[3] In the present case, one of the conditions of sale endorsed on the invoice which accompanied the goods stated that all disputes were to be referred to the Commercial Court of Lyons and, in view of the decision in the *Kwik Hoo Tong Case*,[4] the Court held the proper law of the contract to be French law.

As has been said, the existence of the Court's jurisdiction to make an order permitting service of the notice out of the jurisdiction was established by the finding that the contract was made in Victoria. The Court's view was that the contract was concluded by the plaintiff accepting the counter-offer of the defendant to supply the goods at an increased price. This acceptance was not made in express terms, but could be inferred from the plaintiff's conduct in increasing the amount of the letter of credit which it had opened in favour of the defendant, and in informing the defendant of this by cable from Melbourne. The sending of this cable amounted to communication of the plaintiff's acceptance and the contract was therefore made in Victoria.

Nevertheless the Court had a discretion whether it would make the order and in deciding how this should be exercised it derived assistance from *The Athenee*[5] and *The Fehmarn*.[6] These cases were referred to as showing that although great weight was to be put on the parties' agreement to submit to the Commercial Court of Lyons, yet this choice of a particular tribunal and the consequent choice of law by the parties was not to be decisive. Hudson J. adopted the approach of Lord Denning in *The Fehmarn*:[7] 'to look to see with what country the dispute was most closely concerned.'[8]

On the one hand, in favour of hearing the action in Victoria was the factor that the plaintiff, in attempting to prove the allegations contained in the statement of claim, would have to adduce evidence of the condition of the cranes when they arrived in Victoria, prove that they were assembled in accordance with the directions received by the plaintiff from the defendant, prove the occurrence of the accident, and the consequences thereof, and adduce evidence of the cause of failure of the crane. All of these matters would involve the calling of witnesses either engaged in the operation of the crane, or in the investigation made pursuant to the accident—*i.e.* witnesses living in Victoria. On the other hand, the defendant might desire to call evidence from witnesses resident in France who were concerned in the design and manufacture of the crane.

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3 *N.V. Kwik Hoo Tong Handel Maatschappij* v. *James Finlay & Co. Ltd.* [1927] A.C. 604. where Viscount Dunedin said (p. 608): '. . . what the parties here did was to submit their possible disputes to a forum which was an English forum and . . . they therefore impliedly consented that the law which was to regulate the decision was the law of that forum.'

4 [1927] A.C. 604.

5 (1922) 11 Lloyd's Rep. 6.

6 [1958] 1 W.L.R. 159.

7 *Ibid.*

8 [1966] V.R. 341, 349.

Having weighed up these matters, Hudson J. concluded that the volume of evidence which would be required to be called from witnesses in Victoria made it 'for more than a balance of convenience to have the trial in this Court rather than the Commercial Court of Lyons.'[9] His Honour continued:

> To compel the plaintiff to resort to the latter tribunal would, I think, be likely to result in a positive injustice, having regard to what would be involved, whereas I think no such result would be likely as against the defendant if it were compelled to contest the case here, even if it meant bringing some of its witnesses to this State instead of having their evidence taken on commission, I have no reason to think a great number would be involved.[10]

It is important to note that the question of the more convenient forum would never have arisen had the Court not decided initially that the contract was made in Victoria. Was this decision correct? Should the Court have applied the internal law of Victoria, as it did, to decide that Victoria was the place of contracting? Why should the internal law of Victoria, rather than French law—the law which the Court had decided was the proper law of the contract—have been used to determine the place where the contract was made? The problem is highlighted if one assumes a slight variation in the facts of the present case e.g. that the plaintiff had mailed its acceptance of the defendant's counter-offer, and that the acceptance was lost in transit. Applying Victorian internal law, the place where the acceptance is posted is decisive; but according to French law, as with many other systems, the contract is made at the place where the acceptance is received.[11] Which system of law, in this situation, should be used to determine whether or not a completed contract is in existence?

No doubt, as Cheshire[12] says, it is the instinct of a judge in deciding such a question to adopt the test recognised in the forum; but on this approach, if a different test applies in each of the countries concerned as to whether or not there is a concluded contract, the decision will vary with the forum in which the action is brought. Moreover, the approach may lead to absurdity. Thus when, (in the example given) the Victorian Court applies the internal law of Victoria to decide the question of jurisdiction, it will find that a concluded contract has been made in Victoria. However, when the Court comes ultimately to determine the substantive rights and obligations of the parties under the contract, and applies the proper law of the contract—*i.e.* French law—it will be drawn to the conclusion that no contract exists.

It is submitted that this is an appropriate situation in which to apply the proper law from the outset. Some support for this approach is found in the decision in *Albeko Schuhmaschinen A. G.* v. *The Kamborian Shoe Machine Co. Ltd.*[13] In this case an English company posted a letter in England to a Swiss company, offering to appoint

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9 *Ibid.*
10 *Ibid.*
11 See Planiol: *Traite Elementaire De Droit Civil*, Vol. II, Pt. I. 569.
12 Cheshire: *Private International Law* (7th ed.) p. 203.
13 (1961) 111 L.J. 519, and see P.S.C. Lewis: (1961) 10 *I. & C.L.Q.* 908.

the latter its agent in Switzerland, with a commission on sales there. The Swiss company claimed to have accepted this offer by subsequent letter, and that it was therefore entitled to commission on subsequent sales. The question was whether a completed contract of agency in fact existed. Salmon J. found that the letter of acceptance had not been posted, but also considered the matter on the assumption that it had, but had not been received. His Lordship was of the opinion that no completed contract of agency could be found to exist, since the fact of agreement was determinable by Swiss law (which, like French law, requires communication of the acceptance) because that was the law which would have been the proper law of the contract, had one been concluded.

On the other hand, one is faced with the highly insular approach of the English Court of Appeal in *Entores Ltd.* v. *Miles Far East Corporation.*[14] The plaintiff was an English company, and the defendant was a corporation with headquarters in New York. The plaintiff made in London an offer by Telex to the agents of the defendant in Holland, for the purchase of a quantity of copper cathodes. The offer was duly accepted by a communication received on the plaintiff's Telex machine in London. The plaintiff sought leave to serve notice of a writ on the defendant corporation in New York, claiming damages for breach of the contract so made, on the ground (*inter alia*) that the contract was made within the jurisdiction. The Court of Appeal automatically applied English rules of contract to decide that the contract was made in London. Each of their Lordships found that, because communication was made by a method which was virtually instantaneous, the rule relating to acceptance by post—*i.e.* that the acceptance is complete as soon as the letter is posted—was inapplicable. Acceptance was required to be communicated, this occurred in London, and therefore London was the place where the contract was made. As Denning L. J. said: 'I find that most of the European countries have substantially the same rule as that I have stated. Indeed, they apply it to contracts by post as well as instantaneous communication.'[15]

Although it was found that English law was the proper law of the contract, this was not the reason which caused the Court to apply English law in deciding where the contract was made. Thus Denning L. J. , having stated his conclusion on this latter point, continued: 'I am inclined to think *also* that the contract is by implication to be governed by English law, because England is the place with which it has the closest connexion.'[16]

It must be conceded that the *Albeko Case* is concerned with the question of choice of law, whereas the *Entores Case* is concerned with the question of jurisdiction, and therefore affords a direct precedent for the manner in which the problem raised by the example should be

14 [1955] 2 Q.B. 327.
15 *Ibid.* p. 334.
16 [1955] 2 Q.B. 327, 335. Italics supplied.

determined. Nevertheless it is submitted that the approach taken in the *Albeko Case* is the more attractive. Leaving aside the example, and returning to the present case, it is submitted that the Court should have applied the *Albeko* rather than the *Entores* doctrine. Although a contract would be regarded as having been created under either Victorian or French law, the result would be different had the Court been guided by the proper law in deciding where the contract was made. It would have found that according to French domestic law[17] the place of contracting was France, and would not have been able to assume jurisdiction under 0.XI.

However, while it is submitted that the Court should not have assumed jurisdiction on the ground that the contract was made within the jurisdiction, it is further submitted that jurisdiction might have been assumed on the basis that a tort had been committed within the jurisdiction. As has been noted in passing, the Court in the present case, following the decision of the Court of Appeal in the *Monro Case*[18] came to the opposite conclusion on this point.

In the *Monro Case* the plaintiffs, an English company, purchased rat poison in New York from the defendants, an American corporation. A third party in England purchased some of the rat poison from the plaintiffs and, owing to its dangerous condition, suffered damage, for which he was able to recover from the plaintiffs. The latter, wishing in turn to recover from the defendants, sought leave to serve notice of the writ in New York on the ground that the tort had been committed in England. The Court of Appeal unanimously decided that, because of the defective affidavit put in by the plaintiffs, it should not in this case exercise its discretion to grant leave under 0.XI. However, both Goddard and du Parcq L. JJ. were clearly of opinion that no tort had been committed in England. Du Parcq L. J. said: 'The question is: Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be the gist of the action.'[19] The effect of the decisions of Goddard and du Parcq L. J. has been summarised thus:

> In the result, in an action based on negligence, it would appear that the determinative or predominant element in the selection of the *locus delicti* (at any rate for purpose of *ex juris* service under O.XI is the place where the act or default occurred.[20]

Apparently Hudson J. in the present case took much the same view for he said of the *Monro Case* that it was

> a case on all fours with the present so far as the present ground is concerned. It establishes, in my view that if the defendant committed a tort as alleged it was not committed within the jurisdiction.[21]

There are two possible objects which a Court may have in seeking to determine the *locus delicti*: either to decide a question of juris-

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17 Planiol: *op. cit.*
18 [1944] 1. K.B. 432.
19 *Ibid.*, p. 441.
20 P. Gerber: 'Tort Liability in the Conflict of Laws' (1966) 40 *A.L.J.* 44, 45.
21 [1966] V.R. 341, 346.

diction (under 0.XI), or to assist in the application of the substantive law under the second limb of *Phillips* v. *Eyre.*[22] Whichever of these is the object of the inquiry it is submitted that the Court's approach should be uniform and that the only relevant law to apply in characterising conduct as tortious or otherwise is its own municipal law. Thus in the present case it is a question of determining what the domestic law is in the context of negligence.

In the tort of negligence, as known to the presently applicable domestic law, the cause of action only arises when a legally recognised interest of the plaintiff has suffered damage. The element of damage is essential to the cause of action and not merely a condition precedent to bringing the action. It is therefore submitted that the appropriate place of the commission of the tort of negligence is the place where the damage was suffered—*i.e.* the place where the cause of action, as known to the domestic law, arose. Since the Court in the *Monro Case* had regard only to where the act of the defendant occurred, and did not consider the place where the damage was suffered, it is respectfully submitted that its approach to the problem was wrong.[23]

It is arguable then that the place of the contract was France and the place of the tort was Victoria. On this basis the Court could be said to have rightly allowed service out of the jurisdiction, but for the wrong reason.

John Dewar.

F. & G. SYKES (WESSEX), LTD. v. FINE FARE, LTD.[1]

Contract—Uncertainty of Terms—Performance of the contract—Arbitration clause

This case is an interesting illustration of the concern of courts to uphold contracts by a willingness to resolve problems relating to uncertainty of terms. Although there are numerous cases[2] where the courts, having found by reference to agreed terms that the parties must have intended further negotiation to reach finality upon essential terms, are compelled to hold that no contract came into existence, there are many ways, which do not depend upon further agreement between the parties, by which the contractual terms can be made certain. Thus the parties may agree that a third party is to determine the contract price and in this way they provide the machinery for making

22 (1870) L.R. 6 Q.B. 1.

23 See generally on this P. Gerber, *op. cit.*, and P.R.H. Webb and P.M. North: 'Thoughts on the Place of Commission of a Non-Statutory Tort' (1965) 14 *I.C.L.Q.* 1314.

1 [1967] 1 Lloyd's Rep. 53.

2 *Eg. Loftus* v. *Roberts* (1902) 18 T.L.R. 532, *Love & Stewart Ltd.* v. *Instone (S.) & Co. Ltd.* (1917) 33 T.L.R. 475, *Scammell (G.) & Nephew Ltd.* v. *H.C. and J.G. Ouston* [1941] A.C. 251, *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.* [1944] 1 K.B. 12. *British Electrical & Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd.* [1953] 1 W.L.R. 280, *In re W.G. Apps & Sons Pty. Ltd. and Hurley* [1949] V.L.R. 7, *May & Butcher* v. *The King* [1934] 2 K.B. 17n.

certain one of the essential terms of their contract.[3] Alternatively, the contract which contains undefined terms may provide that disputes shall be submitted to arbitration; this arbitration clause would be a method by which disputes as to the operation and scope of the undefined terms could be dealt with.[4] Again, the parties may have acted upon their agreement for some time before one of them attempts to excuse his non-performance on the ground that there is no contract because the terms are too indefinite. In such a case, the court will be very ready to imply terms which preserve the agreement because the other party may have been put to considerable expense in performing the contract. This is well illustrated by *British Bank for Foreign Trade Ltd.* v. *Novinex Ltd.*[5] and also by *Sykes' Case.*[6] (The contract in *Sykes' Case*[7] also contained an arbitration clause which provided additional assistance to the court).

In the *Sykes' Case*[8] the plaintiffs were producers of broiler chicks and they agreed with the defendants, who operated supermarkets, to produce from 30,000 to 80,000 chicks a week during the first year of the agreement (which was to last for a period of not less than five years) '. . . and thereafter such other figures as may be agreed between the parties hereto . . .' It was also agreed that any difference between the parties should be referred to arbitration. Eighteen months after the contract took effect, the defendants repudiated the agreement and refused to submit to arbitration. They argued that there was no binding contract after the first year but merely a contract to enter into a contract and that it was too indefinite and uncertain to create legal relations. This argument was rejected by the Court of Appeal (affirming the decision, on this point, of Roskill J. at first instance.)[9]

The Court of Appeal were all clearly of the opinion that there was a binding contract for the full period of five years. There were two factors which led the court to this conclusion. The first was the fact that the parties had acted upon the contract for a period of eighteen months and the other was the presence of an arbitration clause. Thus Dankwerts L. J., after stating that the parties had acted for some time on the basis that there was a contract which they believed they were bound to carry out, pointed out that:

> It would be deplorable if, after the considerable expenditure of money on both sides which has taken place, the Court were to reach the conclusion that there was no binding agreement between the parties at all and it was all thrown away. In those circumstances I think the Court would be slow to reach that conclusion if it could possibly be avoided.[10]

Lord Denning, in similar terms stated that:

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3 See *Allcars Pty. Ltd.* v. *Tweddle* [1937] V.L.R. 35.

4 See *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B.1, *F. & G. Sykes (Wessex), Ltd.* v. *Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53.

5 [1949] 1 K.B. 623. See also *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.* [1944] 1 K.B. 12.

6 [1967] 1 Lloyd's Rep. 53.

7 *Ibid.*

8 *Ibid.*

9 *F. & G. Sykes (Wessex) Ltd.* v. *Fine Fare Ltd.* [1966] 2 Lloyd's Rep. 205.

10 [1967] 1 Lloyd's Rep. 53, at p. 57.

> In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain.[11]

There was also the importance which the court attached to the presence of the arbitration clause. As Lord Denning said 'In this case there is less difficulty than in others because there is an arbitration clause which, liberally construed, is sufficient to resolve any uncertainties which the parties have left.'[12] Lord Denning, with whom the other members of the court agreed, then held that the provision that the figures were to 'be agreed' did not nullify the contract because it could be made certain by reasonable figures being ascertained by an arbitrator. Effect could thus be given to the contract by saying that, in default of agreement, the quantity of chicks should be such reasonable number as may be ascertained by an arbitrator under the arbitration clause.

The willingness of the court in the *Sykes' Case*[13] to imply a term where the contract has been acted upon is quite consistent with the approach of the Court of Appeal in the earlier case of *British Bank for Foreign Trade Ltd.* v. *Novinex Ltd.*[14] which is another example of the principle that performance of the contract by both parties, or by one with the knowledge and approval of the other, is clear evidence that the parties intended to be bound. There the court interpreted an 'agreed' commission as meaning a 'reasonable' commission and held that the defendant must pay this commission where he had promised the plaintiff to 'cover you with an agreed commission on any other business transacted with your friends. In return for this you are to put us into direct contact with your friends,' and the plaintiff performed his part of the bargain. Where the parties have left essential terms undetermined and neither party has acted upon the agreement then it will be easier for the court to say that no contract has been entered into. *May & Butcher* v. *The King*[15] can be explained in this way. In that case the House of Lords held that no contract had been formed for the sale of tentage where the contract provided that 'The price or prices to be paid . . . shall be agreed between the parties' and there was no performance of the promise to deliver the tentage. Had the tentage been delivered it is suggested that this would have enabled the court to hold that the parties intended to be bound and they then could have implied a term that the price should be a reasonable one. The subsequent conduct of the parties is thus of considerable importance because it indicates that the parties intended to be bound and it may also assist in making clear what the parties intended by their undefined terms.

Where there is no performance of the contract but there is other evidence that the parties intended to be bound by their contract (e.g.

11 *Ibid.*, p. 57.
12 *Ibid.*, p. 58.
13 *Ibid.*
14 [1949] 1 K.B. 623.
15 [1934] 2 K.B. 17n.

where there is clear agreement upon some of the essential terms), there appears to be no good reason why the court should not attempt to resolve uncertainties in accordance with practices or usages which are familiar to the parties. Thus if there is agreement upon all essential terms and it is provided that the contract is subject to 'strike clause' or 'war clause' or that payment is to be made by means of a hire-purchase arrangement and there is evidence before the court that the parties are familiar with a particular type of strike or war clause or a particular form of hire-purchase agreement which they may have used in the past then the courts ought to be in a position to give meaning to the terms and uphold the contract. On existing authority there appears to be a reluctance to do this. Thus in *Love & Stewart Ltd.* v. *Instone* (S) *& Co. Ltd.*[16] the House of Lords rejected the suggestion that they should imply a 'reasonable' strike clause into the parties contract where the agreement contained the words 'all offers are subject to strike and lock-out clauses.' Similarly in *Scammell (G) & Nephew Ltd.* v. *H. C. and J. G. Ouston*[17] it was stated by Lord Wright[18] that the law could not define what was the normal and reasonable terms of a hire-purchase payment and the House of Lords refused to uphold an agreement where the vendor's acceptance of an order from the plaintiff contained the following clause 'This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years.' It is submitted, with respect, that where the contractual intention is clear it would be quite proper for a court in cases such as these to select a reasonable or customary clause or form where there was evidence that the parties were familiar with that clause or form.

In *Sykes' Case*[19] the Court of Appeal refused leave to appeal to the House of Lords. This is to be regretted because many of the cases in this difficult area of the law are not easy to reconcile and in none is there a thorough examination of the principles. When the matter does come up before the High Court or the House of Lords it is suggested that it would be of particular value if attention was directed to the provisions of the *American Uniform Commercial Code.*[20] §2-204 (3) states that 'Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.' Adopting the words of Corbin,[21] 'The application of such a rule is believed to come nearer to attaining the purpose of the contracting parties than any other, to give more business satisfaction and to make contract a workable instrument.'

M. Howard.

16 (1917) 33 T.L.R. 475.
17 [1941] A.C. 251.
18 *Ibid.*, p. 273.
19 [1967] 1 Lloyd's Rep. 53.
20 *Uniform Laws Annotated.*
21 Corbin on Contracts, Vol. 1, p. 406.