functions of the court as defined in the early English decisions. The decisions in the *Bugle Press* case and the *Esso Standard* case are good examples of courts acting within their defined limits and also protecting the rights of the individuals involved. It is respectfully submitted that the court in the *Canadian Breweries* case seemed to be preoccupied with the fact that section 128 is confiscatory.

Although the soundness of the decision is questioned, justice may have been done. It is submitted that the real issue here is whether section 128 envisions a take-over offer under the section when a transferee company owns a large block of shares in the transferor company. It is certainly possible that a court may decide that such a situation is not in fact contemplated by that section although it would seem that the basic principle of a large majority accepting the offer is still present in this situation would thereby still be within the purport of the section.

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JUS QUAESITUM TERTIO IN THE COMMON LAW—RIGHT OF THIRD-PARTY BENEFICIARY TO SUE ON CONTRACT—COLLATERAL CONTRACTS—LETTERS OF CREDIT—EXEMPTION CLAUSES

In *Beswick* v. *Beswick* Lord Denning made another unsuccessful assault upon the doctrine of privity of contract. In that case the plaintiff's husband, who was a coal merchant, had transferred his business to the defendant, who was his nephew, on condition that he was employed as a consultant for the rest of his life at a salary of £6-10-0 a week, and that on his death his widow should be paid an annuity of £5-0-0 a week out of the business for the rest of her life. On the death of the plaintiff's husband the defendant paid to the plaintiff the annuity for one week, and then stopped payment. The plaintiff sued him personally and as her husband's administratrix. She failed in the Chancery Court of the County Palatine of Lancaster,[1] but succeeded on appeal to the Court of Appeal.[2] All three members of the Court of Appeal (Lord Denning, M. R., Danckwerts and Salmon, L. JJ.) allowed the appeal on the ground that the plaintiff was entitled to succeed as her husband's personal representative, while Lord Denning, M.R., and Danckwerts, L. JJ., held that by virtue of section 56(1) of the Law of Property Act, 1925 (U.K.) the plaintiff could enforce the agreement in her personal capacity, even though she was not a party to it. Lord Denning, M. R., however, went farther and said:[3]

> Although the third pesron cannot as a rule sue alone in his own name, nevertheless there is no difficulty whatever in the one contracting party suing the other party for breach of the promise. The third person should, therefore, bring the action in the name of the contracting party, just as an assignee used to do.

The defendant appealed to the House of Lords,[4] who unanimously dis-

1 [1965] 3 All E.R. 858.
2 [1966] 3 All E.R. 1.
3 *Id.*, at 7.
4 [1967] 2 All E.R. 1197.

missed the appeal on the ground that the plaintiff was entitled to enforce the agreement as administratrix of her husband's estate, but held that she could not succeed in her personal capacity nor by virtue of section 56 (1) of the Law of Property Act, 1925 (U.K.). It is clear, therefore, that *Tweedle* v. *Atkinson*[5] and *Dunlop* v. *Selfridge*[6] remain good law, and that there is no *jus quaesitum tertio* in the common law. Canadian authority for this proposition may be found in the decision of the Supreme Court of Canada in *Preferred Accident Insurance Co.* v. *Vandepitte*,[7] where Newcombe, J., in a judgment with which the rest of the Court agreed, said:[8]

> . . . where two persons for valuable consideration as between themselves covenant to do some act for the benefit of a third person, that person cannot enforce the covenant against the two, though either of the two might do so against the other.

Are there any exceptions to the rule that at common law a stranger to a contract may not sue on it? It is submitted that there are none, and that the exceptions sometimes cited by text-book writers are either false or more apparent than real.[9]

One group of cases sometimes cited as exceptions to the general rule are those concerned with collateral contracts or "floating warranties." In *Shanklin Pier Ltd.* v. *Detel Products Ltd.*[10] the plaintiffs were the owners of a pier which was badly in need of repair and the defendants were paint manufacturers. The defendants assured the plaintiffs that their paint was suitable for repainting the pier and that if two coats were used as a protective coat it should have a life of at least seven to ten years. In reliance on this assurance the plaintiffs inserted a clause in their contract with the contractor who was going to repair their pier that he should use the defendants' paint. The contractor did use the defendants' paint, but it proved unsatisfactory and lasted only about three months. The plaintiffs sued the defendants for breach of warranty, and the defendants pleaded absence of privity of contract. It was held that the plaintiffs could succeed because there was an implied contract between them and the defendants: under the terms of this contract the plaintiffs promised that, in return for the defendants' warranty that their paint would last at least seven years, they would insert in their contract with the contractor a clause requiring him to use the defendants' paint, which was a benefit to the defendants and formed good consideration for their warranty as to the paint's suitability. McNair, J. said:[11]

> . . . I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.

A common example of the application of the doctrine of the collateral contract or floating warranty is the usual triangular hire-purchase agreement. In such cases a person who wishes to obtain goods, for which he is unable or unwilling to pay cash, indicates to a dealer in those goods that he is desirous of obtaining them on hire-purchase terms; whereupon

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5 (1861), 1 B. & S. 393, 121 E.R. 762.
6 [1915] A.C. 847.
7 [1932] 1 D.L.R. 107, affirmed by the Privy Council [1933] A.C. 70.
8 *Id.*, at 113.
9 It should be stressed that this submission applies only to exceptions at common law; this paper is not concerned with exceptions created by statute or in equity.
10 [1951] 2 K.B. 854.
11 *Id.*, at 856.

the dealer sells the goods to a finance company which then hires them to the would-be purchaser on hire-purchase terms. Frequently the purchaser[12] will have been induced to obtain the goods by the blandishments of the dealer; if those blandishments amount to a warranty and also prove untrue, the question arises—can the purchaser sue the dealer for breach of warranty? The dealer may plead absence of privity of contract, as the only contract made by the dealer was the contract of sale with the finance company, and the only contract made by the purchaser was the contract of hire purchase with the finance company. However the purchaser will succeed in his action, because the courts will hold that there is an implied contract between the purchaser and the dealer: under the terms of this contract the purchaser agreed that, if the dealer would warrant the soundness or suitability of the goods, he would indicate to the finance company his willingness to take the goods from them on hire-purchase terms.[13] Such a promise is clearly a benefit to the dealer, such as to form good consideration for his warranty; for if the purchaser did not so indicate to the finance company, the finance company would not buy the goods from the dealer, and the dealer would either be left with the goods on his hands for a long time until a cash purchaser arrived, or would have to sell them at a greatly reduced price in order to effect a quick cash sale. Such was the fact situation in *Brown* v. *Sheen and Richmond Car Sales Ltd.*,[14] where a purchaser obtained a motor car from a finance company on hire-purchase terms, after being assured by the dealer that it was in perfect condition. The condition of the car was far from being perfect, and the purchaser suffered loss as a result. When the purchaser sued the dealer for damages for breach of warranty he succeeded, and Jones, J. said:[15]

> I find that the defendants gave a warranty as to the condition of this car; that the plaintiff was induced by the warranty to enter into the hire-purchase agreement; that the warranty was broken; and that the plaintiff suffered damage through the breach . . .

A similar set of facts arose in *Andrews* v. *Hopkinson*,[16] where the purchaser again succeeded in an action for breach of warranty, and McNair, J. said:[17]

> . . . there may be an enforceable warranty between A, the intended purchaser of the car, and B, the motor dealer, supported by the consideration that B should cause the hire-purchase finance company to enter into a hire-purchase agreement with A, the intended purchaser.

These cases have now received the seal of the Court of Appeal's approval in *Yeoman Credit Ltd.* v. *Odgers*.[18] It is submitted that these cases do not constitute an exception to the rule that a stranger to a contract may not sue on it, as in every case the plainiff was suing not on a contract between third parties but on a separate and distinct, if implied, contract between himself and the defendant.

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12 Strictly speaking, of course, he is not a purchaser, but a hirer with an option to purchase or, if the expression will be pardoned, a hire-purchaser. For the sake of brevity and simplicity, however, and to avoid undue mauling of the English language, he will be referred to henceforth as a purchaser.

13 For a consideration of the problems involved when the purchaser trades in old goods in part exchange for the new, see *The Inadequacy of Contract. A Further Comment*, (1962) 5 *U. West. Aust. L. Rev.* 549.

14 [1950] 1 All E.R. 1102.

15 *Id.*, at 1104.

16 [1957] 1 Q.B. 229.

17 *Id.*, at 235.

18 [1962] 1 W.L.R. 215.

Another exception more apparent than real is the case of a banker's irrevocable letter of credit. This problem arises when a buyer in one country wishes to buy goods on credit from a seller in another country. The buyer establishes a credit with a banker in his own country, who then informs the seller that he has opened an irrevocable credit in his favour, usually conditional on production of the shipping documents. The question arises—if the banker refuses to honour his irrevocable credit, can the seller force him to pay, or can the banker plead that there is no privity of contract between him and the seller? Cheshire and Fifoot[19] suggest that the seller should succeed on the basis of commercial practice, and in *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.*[20] Jenkins, L. J. said *obiter*:[21]

> . . . it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built upon the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice.

Cheshire and Fifoot also state:[22]

> No bank, it is believed, has yet taken the objection, preferring its honourable to its legal obligations.

However there are at least two reported cases where a banker has refused to honour an irrevocable letter of credit, and in each case the seller sued the banker and succeeded. In *Urquhart Lindsay and Company, Limited* v. *Eastern Bank, Limited*[23] the plaintiffs entered into a contract with buyers in Calcutta to manufacture and ship machinery by instalments, and the defendants, who were the buyers' bankers, opened an irrevocable credit in the plaintiffs' favour. After two instalments had been shipped under the contract the defendants repudiated their letter of credit on the buyers' instructions. The plaintiffs sued the defendants and succeeded, and Rowlatt, J. said:[24]

> There can be no doubt that upon the plaintiffs acting upon the undertaking contained in this letter of credit consideration moved from the plaintiffs . . .

Not long afterwards, in *Dexters, Ltd.* v. *Schenher & Co.*,[25] Greer, J. came to the same decision on a similar set of facts, and approved of the observations of Rowlatt, J. quoted above.[26] Rowlatt, J. did not say why consideration moved from the plaintiffs as soon as they acted upon the undertaking contained in the letter of credit; presumably because the plaintiffs had suffered a detriment, although it is hard to see where the detriment lay. It is submitted that a better reason for the plaintiffs being able to succeed is that, as in the collateral contract cases, here was an implied contract between the sellers and the bankers: under the terms of this contract the bankers agreed not to revoke their letter of credit if the sellers would sell their goods on credit to the buyers. The promise by the sellers to sell their goods on credit to the buyers would be a

19 Cheshire & Fifoot, *Law of Contracts* 384 (6th ed. 1964).
20 [1958] 2 Q.B. 127.
21 *Id.*, at 129.
22 Cheshire & Fifoot, *op. cit. supra*, at n. 19.
23 [1922] 1 K.B. 318.
24 *Id.*, at 321.
25 (1923), 14 Ll. L. Rep. 586.
26 *Id.*, at 588.

benefit to the bankers, because if the sellers did not sell to the buyers on credit the buyers would not borrow money on interest from the bankers, and if people did not borrow money from the bankers on interest the bankers would go out of business. Whichever is the correct explanation, it is clear that the sellers are suing, not on the contract between the buyers and the bankers, but on a separate implied contract between the bankers and themselves, and that bankers' irrevocable letters of credit do not constitute an exception to the general rule of privity of contract.

It had at one time been thought that third parties could claim the benefit of exemption clauses, and that the protection of exemption clauses could be invoked against third parties, at any rate in contracts of carriage of goods by sea, and this did happen in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[27] In that case sellers delivered a fire tender sold under contract of sale alongside a ship nominated by the buyers. While the tender was being loaded on board the ship, and before the property in it had passed under the contract of sale to the buyers, it was dropped and damaged. The sellers sued the shipowners, who admitted liability but claimed the protection of a clause limiting damages contained in the Hague Rules, which were incorporated into their contract of carriage with the buyers by virtue of section 1 of the Carriage of Goods by Sea Act, 1924 (U.K.). The sellers pleaded that these rules had no application as between themselves and the shipowners because they were not a party to the contract of affreightment. Devlin, J. held, however, that it was the intention of all three parties that the sellers should participate in the contract of affreightment, and that therefore the sellers were bound by the Hague Rules. However, the notion that contracts of carriage of goods by sea constitute an exception to the general rule of privity of contract was rejected by the House of Lords in *Midland Silicones Ltd.* v. *Scruttons Ltd.*[28] In that case stevedores engaged by the carrier negligently damaged goods while delivering them to the consignees, and when sued by the consignees they relied on a clause in the bill of lading limiting their liability. The House of Lords (Viscount Simmonds, Lord Reid, Lord Keith of Avonholm and Lord Morris of Borth-y-gest; Lord Denning dissenting) held that the stevedores could not rely on the limitation clause as the consignees were not parties to the contract of affreightment, and Viscount Simmonds said:[29]

> . . . Devlin, J.'s decision in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* can be supported only upon the facts of the case, which may well have justified the implication of a contract between the parties.

Six years previously the High Court of Australia had reached the same decision in *Wilson* v. *Darling Island Stevedoring and Lighterage Company Limited.*[30] In that case goods shipped to the plaintiffs, who were buyers, were damaged by the negligence of the defendants, who were stevedores, and the defendants relied on an exemption clause contained in the bill of lading. The High Court of Australia (Dixon, C. J., Fullagar and Kitto, JJ.; Williams and Taylor, JJ. dissenting) held that as the stevedores were not parties to the contract evidenced by the bill of

27 [1954] 2 Q.B. 402.
28 [1962] A.C. 446.
29 *Id.*, at 471.
30 (1955-56) 95 C.L.R. 43.

lading, they could neither sue nor be sued on it, and therefore could not rely on the exemption clause; and Fullagar, J., in a judgment with which Dixon, C. J. concurred, said:[31]

> The obvious answer to that argument is that the defendant is not a party to the contract evidenced by the bill of lading, that it can neither sue on that contract, and that nothing in a contract between two other persons can relieve it from the consequences of a tortious act committed by it against the plaintiff, ... I doubt if there was any true exception at common law to the rule laid down by *Tweedle* v. *Atkinson*.

It is submitted, therefore, that at common law there are no exceptions to rule that a stranger to a contract may not sue on it, and that there is no *jus quaesitum tertio* in the common law.

—W. E. D. DAVIES*

31 *Id.*, at 67.
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RECOGNITION OF FOREIGN DIVORCES—BASIS—RECENT ENGLISH CASES: *INDYKA* v. *INDYKA* (HOUSE OF LORDS DECISION), *ANGELO* v. *ANGELO*, *PETERS* v. *PETERS*—FOREIGN JURISDICTION BASED ON A REAL AND SUBSTANTIAL CONNECTION.

The past summer has witnessed a major development in the English law concerning the recognition of foreign divorce decrees. Before May, the position was briefly as follows. The English court would directly recognize a divorce decree pronounced in a foreign court if:

a. the foreign court was the court of the parties' domicile;[1]

b. the foreign court had accepted jurisdiction on the basis of legislation similar to English legislation which widened the English court's jurisdiction in divorce—if there was *legislative* similarity in the basis of jurisdiction;[2]

c. the foreign court based jurisdiction on circumstances similar to those on which an English court could have based divorce jurisdiction—if there was *facutla* similarity in the basis of jurisdiction.[3]

The crucial point of all this was that, if the English court was to recognize the foreign decree, there had to be a relationship between the foreign court and the parties which was similar to the relationship that had to obtain between the English court and parties before it in order for the English court to accept divorce jurisdiction. Thus, because an English court would not accept divorce jurisdiction solely on the basis that the parties were British nationals, it would not recognize foreign divorce decrees where the sole basis of jurisdiction was that the parties were nationals in the foreign court's territory. Since the nationality of the parties is a major basis of jurisdiction in civil law systems, the difficulty of the pre-May English position is obvious.

1 *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; *Bater* v. *Bater*, [1906] P. 209.
2 *Travers* v. *Halley*, [1953] P. 246.
3 *Robinson-Scott* v. *Robinson-Scott*, [1958] P. 71.