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The great Indian privity trick: hundred years of misunderstanding nineteenth century English contract law

Shivprasad Swaminathan

O.P. Jindal Global University, Sonepat, Delhi (NCR), India

ABSTRACT

It has been the received wisdom for over a century now that the Indian Contract Act 1872 could not have meant to alter the English law's privity requirement as there is no specific language dispensing with the privity rule. In the 1860s, when the Act was being drafted, however, a person from whom consideration did not move did not have the right to sue at English law. This was the only barrier the drafters envisaged and dismantled with s 2(d), which allowed consideration to move from the 'promisee' or 'any other person'. But its effect was also to preempt any putative privity of contract based barrier; as long as the promisor got the desired consideration, not only the 'promisee' but 'any other person'—whether or not a party—could sue upon the contract.

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A. Isolating the Trick

It is, a student of English law would suppose, a moot question in both senses of the adjective, whether the label 'privity' in English contract law spans two distinct doctrines, namely, those of privity of contract—the idea that a stranger to the contract cannot sue upon it; and privity of consideration—the idea that consideration must move from the promisee.[1] For one, it is thought to be debatable whether the two rules are independent or 'represent a single rule of enforcement'.[2] For another, the rules coincide, for most practical purposes, as

CONTACT Shivprasad Swaminathan sswaminathan@jgu.edu.in

[1]The twin labels, which are owed to Lord Wright, are no longer in vogue in the literature in most of the common law world: Lord Wright 'Ought the Doctrine of Consideration to be Abolished from the Common Law?' (1936) 49 Harvard Law Review 1225, 1246. It is now common to refer to the ideas under discussion with the phrases 'parties-only rule' and 'consideration rule': see V Palmer, *The Paths to Privity* (Law Book Exchange 2006) 23; W Swain, *The Law of Contract 1670–1870* (CUP 2015) 221–28. See also J Baker, 'Privity of Contract in the Common Law Before 1680' in E Schrage (ed), *Jus Quaesitum Tertio* (Duncker and Humblot 2009) 41–57, 52–53. The labels, however, are still in currency in India: see A Singh, *Contract and Specific Relief* (10th edn, Eastern Book Company 2010) passim.

[2]M Furmston and G Tolhurst, *Privity of Contract* (Sweet & Maxwell 2014) 28–29; Palmer (n 1) 24–27.

they 'will often lead to the same result',[3] thus significantly blunting any pragmatic incentive for continuing to treat the two as separate. Fused though the rules may seem to be in practice, it would be wrong to suppose that the two are *a priori* conceptually identical.[4] The conceptual distinction between the two rules, as Treitel points out, is well illustrated by the Privy Council's decision in an appeal from Malaysia, *Kepong Prospecting v Schmidt*.[5]

> It is true that section 2(*d*) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England, particularly in that it enables consideration to move from another person than the promisee, but the Appellant was unable to show how this affected the law as to enforcement of contracts by third parties.[6]

The 'wider' definition of consideration discussed in the paragraph above is nothing but a replica of s 2(d) of the Indian Contract Act 1872, which is adopted by Malaysia as its contract code.[7]

> When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

From the early days of the Indian Contract Act, the provision has been understood as having liberated the promisee from the English law's privity of consideration requirementthus enabling him to sue even if consideration moved from the third party.[8] What was not altogether clear was whether it also liberated a third party beneficiary from the privity of contract requirement. The plaintiff in *Kepong Prospecting* argued that it did, and set great store by the 'wide' definition of consideration under s 2(d), adducing in support of the contention Indian authorities, which read the provision as permitting *jus quaesitum tertio*.[9]

[3]GH Treitel, *Law of Contract* (9th edn, Sweet & Maxwell 1995) 539.

[4]As we shall see later in Section C, the privity of consideration rule in English law developed independently from the privity of contract rule and predates the latter. There is one occasion on which the two rules clearly do not coincide, thus establishing their conceptual distinctness—and that is the case of the joint promisee. If A promises B and C jointly to do something for consideration moving from C alone, the only barrier that according to the English common law of contract prevents B from suing is not privity of contract—for B is a promisee, and hence party to the contract—but rather, that of privity of consideration. It is precisely for this reason that the Law Revision Committee (1937) chaired by Lord Wright had, in addition to proposing the abolition of the privity of contract rule, also proposed abolition of the privity of consideration rule so as to enable a person from whom consideration did not move to be able to sue: The Law Revision Committee, *Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration* (1937) 22. The illustration discussed here is also from the Law Revision Committee's report.

[5]*Kepong Prospecting Ltd v Schmidt* [1968] AC 810.

[6][1968] AC 810, 826 (per Lord Wilberforce).

[7]See Dato RR Sethu, 'The History Impact and Influence of the Indian Contracts Act 1872' (2011) 28 Journal of Contract Law 31.

[8]See *Chinnaya Rau v Ramaya* (1882) ILR 4 Mad 137 (Madras High Court) discussed in Section B below.

[9]The authorities are discussed in Section B below.

Lord Wilberforce, relying on a treatise on the Indian Contract Act by Frederick Pollock and Dinshah Mulla—and a few other Indian cases which, in essence, reiterated Pollock and Mulla's point—balked at the plaintiff's argument.[10] Lord Wilberforce held that although s 2(d) may not require privity of consideration, its effect is not to obliterate the privity of contract requirement, which was well established in English law. The syllogism that leads Pollock and Mulla to their conclusion is as follows.[11] They took the view that the question of who can sue upon the contract was analytically distinct from the question of who the consideration could move from. The former, their claim went, is exclusively answered by the privity of contract rule and the latter by the privity of consideration rule. The plain words of s. 2(d), they reasoned, although clearly relaxing the privity of consideration requirement had nothing to say on privity of contract one way or the other[12]—which was not to suggest that the statute was altogether silent on the question of privity of contract. Far from it, the definitions of 'promisor' and 'promisee' in s 2(c) read along with sections 2(a) and (b), which defined 'offer' and 'acceptance' respectively, they argued, precluded any third party who took no part in the operative transaction from suing on the contract. s 2(c) reads as under:

> The person making the proposal is called the 'promisor', and the person accepting the proposal is called the 'promisee'.

The argument by Pollock and Mulla—which in portmanteau form will be called the argument from s 2(c)—was that there must be a 'proposal from the defendant to the plaintiff, and a communication of the proposal to, and its acceptance by, the plaintiff.'[13] This effectively meant, as Sir George Rankin CJ put it in *Krishnalal Sadhu v Pramila Bala Dassi* (1928) echoing Pollock and Mulla's argument, that any room for a *jus quaesitum tertio* in India is 'rigidly excluded by the definition of "promisor" and "promisee".'[14]

The rule of privity of contract in India, mirroring the English rule, has by and large come to be hoisted on this syllogism due to Pollock and Mulla, and all discussion of the doctrine has remained within the confines staked out by it. And it is this syllogism that is labelled here: 'The Great Indian Privity Trick'. Its manoeuvre is to erect two silos: one being s 2(d) which is made to exclusively answer to the question of privity of consideration; and the other being s 2(c) which is made to exclusively answer to the question of privity

[10] *Kepong Prospecting v Schmidt* [1968] AC 810, 826 referring to M Gwyer (ed), *Pollock & Mulla. Indian Contract and Specific Relief Acts* (6th edn, Eastern Law House 1944) 21. The authorities relied on by Lord Wilberforce will be discussed in Section B below.

[11] This also forms the inarticulate major premise of Lord Wilberforce's opinion.

[12] F Pollock and D Mulla, *Indian Contract Act* (2nd edn., Sweet & Maxwell 1909) 19.

[13] Pollock and Mulla (n 12) 19. Lord Wilberforce in *Kepong* relies on this argument in its entirety but adds another provision s 2(e) to buttress it. This addition will be assessed with the rest of the argument in Section D below.

[14] *Krishna Lal Sadhu v Pramila Bala Dasi* (1928) 32 CWN 634, 640 (Calcutta High Court).

of contract. It will be the burden of this article to dismantle the silos in order to establish that, when seen with eyes rid of the illusion created by the trick, s 2 (d) will be found to be dispositive of the question of 'privity' in both its senses; and s 2(c), it will be argued, has nothing whatsoever to say on the question of who can sue upon a contract and is thus irrelevant as far as 'privity' is concerned.[15]

The most significant argument against Pollock and Mulla's two-silos theory is that it is based on a fundamental misunderstanding of 19th century English contract law—a factor that has been overlooked by both the adherents and detractors of the theory. It will be argued that when the Indian Contract Act was being drafted in the 1860s, the chief barrier to suing upon a contract at English law was the privity of consideration requirement. The privity of contract rule took roots in English law only after the Act was drafted. The drafters had envisaged the privity of consideration barrier alone and sought to remove it with their 'wide' definition of consideration. One of the effects of wide definition was also to preempt any putative privity of contract barrier; as long as the promisor got the desired consideration, not only the 'promisee' but 'any other person'—whether or not a party—could sue upon the contract.

The onerousness of the burden assumed here had better be acknowledged straightaway. To successfully discharge it would mean resurrecting an argument for which no backers have broken into print for the better part of the last century. Pollock and Mulla's two-silos theory as restated by Rankin CJ in *Krishnalal Sadhu* was decisively approved by the Supreme Court of India in *M C Chacko v State Bank of Travancore* (1969).[16] The privity of contract rule laid down by the Supreme Court in *M C Chacko* continues to remain good law.[17] As for the 'width' of the definition of consideration under s 2(d), it is now conclusively settled that the fact that consideration may move from the promisee or any other person, no doubt, alters the English rule of *privity of consideration* but that the definition has no bearing on the question of who can sue upon a contract—it is the independent *privity of contract rule* found in s. 2(c), which is taken as being dispositive of the question of who can sue upon a contract.[18]

To add to the onerousness of the project being undertaken here, the few cases—which are no longer good law in light of the Supreme Court's judgment in *M C Chacko*, some of which the plaintiff in *Kepong Prospecting* had cited before the Privy Council—which support the conclusion argued for here, will be found to be of limited value in constructing a coherent response

[15]This argument can be found in Section D below. It will be argued that s 2(e), with which Lord Wilberforce supplemented this argument from 2(c), adds nothing to it.

[16][1970] AIR SC 500 (Supreme Court of India).

[17]N Bhadbhade (ed), *Pollock and Mulla*, *Indian Contract Act 1872* (14th edn,, Lexis Nexis 2012) 84–88.

[18]'Although consideration for an agreement may proceed from a third party, a stranger to an agreement cannot sue upon it. There is … nothing in section 2 to allow a stranger to a contract to enforce it.': Bhadbhade (n17) 87.

to Pollock and Mulla's theory, resting as they do, on shaky doctrinal foundations. Little surprise then, that Lord Wilberforce in *Kepong* was content to brush them aside as being opposed to 'established principle and authority'.[19]

B. The Triumph of Privity of Contract in India

This section will set out the rise and triumph of the privity of contract rule in India, the support for which was provided by Pollock and Mulla's reading of the Act and the resistance—eventually abortive—it faced from cases in which s 2 (d) was read expansively so as to circumvent the English privity of contract rule. We would be particularly interested in assessing the strengths and weaknesses of the different kinds of argument advanced to sidestep the privity of contract rule with a view to salvaging whatever support possible for constructing a coherent response to the Pollock and Mulla theory in later sections.[20]

The earliest case raising questions surrounding the subject under discussion was *Chinnaya Rau v Ramaya* (1882),[21] a case which Pollock and Mulla read as defying the English privity of contract rule.[22] Their reading of the case, however, is not accurate. In *Chinnaya*, the mother transferred property to her daughter on the condition that she would pay an annuity to her uncles. The daughter separately (but contemporaneously) agreed with the uncles to pay the annuity. The daughter's main contention was that the uncles could not sue as they were 'strangers to the consideration'.[23] Holding that the rule in *Tweddle v Atkinson*[24] would be no bar to the action, and invoking *Dutton v Poole*,[25] the court permitted the uncles to sue upon the second contract although no consideration moved from them 'directly'.[26] *Chinnaya* invited the ire of Pollock and Mulla, who saw it as *per incuriam*, having ignored the argument from s 2(c) which, they claimed, rules out a third party from suing upon a contract.[27] The charge is unfounded. In their anxiety to keep third parties at bay, Pollock and Mulla overlooked the fact that the uncles were no 'third party', but the 'promisees' to the second promise. *Chinnaya* did not, therefore, defy the English rule of privity of contract—no such question arose in the case—but only adhered to the terms of s 2(d) which, having relaxed the English privity of consideration rule,

[19] *Kepong Prospecting v Schmidt* [1968] AC 810, 826 citing with approval the Bombay High Court's judgment in *National Petroleum Co Ltd v Popatlal Mulji* (1936) 60 ILR Bom 954 (Bombay High Court).
[20] See Singh (n 1) 108–18 for a detailed catalogue of cases following and going against the privity of contract rule.
[21] *Chinnaya v Ramaya* (1882) 4 ILR 4 Mad 137 (Madras High Court).
[22] Pollock and Mulla (n 12) 19.
[23] (1882) 4 ILR Mad 137, 138.
[24] (1861) 1 B&S 393.
[25] (1677) 2 Lev 210.
[26] *Chinnaya v Ramaya* (1882) 4 ILR Mad 137, 139.
[27] Pollock and Mulla (n 13) 19.

allowed consideration to move from the promisee or any other person. A similar issue—and response to it—were replicated two years later by the same court in the case of *Samuel v Anantha* (1883).[28]

Debnarayan Dutt v Chunnilal Ghose (1913) was really the first case which unequivocally supported the proposition that s 2(d) had the effect of obliterating the privity of contract rule in India.[29] The plaintiff's debtors transferred their property to the defendant with the stipulation to pay off the plaintiff. When the plaintiff brought an action, the defendant set up on the strut of *Tweddle v Atkinson*, the defence that the plaintiff being a stranger to the contract between the debtors and the defendant could not sue upon it. The lower courts had found an oral contract between the plaintiff and the defendant, enough to bring it within the realm of *Chinnaya v Ramaya*. Jenkins CJ, however, whether deliberately or not, declined to take the easier route which would have meant not having to decide on the privity of contract issue at all and dismissing the claim that there was such a contract[30]—thereby making a decision on the privity of contract doctrine indispensable—held that the privity of contract rule was wholly inapplicable in India.

> [W]e now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v Atkinson*.[31]

Jenkins CJ arrived at this conclusion on the strength of two arguments. First, the rule prevalent in England in the action on *assumpsit* that consideration must move from the promisee is inapplicable in India because of the wide definition of consideration in s 2(d), thus entitling a third party beneficiary to sue.[32] Second, courts in India which are authorized to do 'complete justice' between parties, Jenkins CJ argued, are free from the 'trammels' of the distinction that existed in England between the common law courts and courts of equity; and as the privity of contract doctrine is wholly inapplicable in courts of equity, he reasoned, so should it be in India where the fused system exists.[33] He found support for this conclusion in an interlocutory remark by Lord Macnaghten in the Privy Council's judgment in an Indian appeal, *Khwaja Mohammad Khan v Hussaini Begum* (1910).[34]

[28](1883) 6 ILR Mad 351 (Madras High Court). The promisor had executed a promissory note in favour of the plaintiff for consideration moving from a third party. The promisor's contention that the promissory note was not executed for sufficient consideration was dismissed.
[29]*Debnarayan Dutt v Chunnilal Ghose* (1913) 41 ILR Cal 137 (Calcutta High Court).
[30]'There are expressions in the judgments of the [lower] Courts which are suggestive of an oral contract between the plaintiff [third party beneficiary] and defendant No. 5 [the promisor], but that, I think, was a misconception of the position.': (1913) 41 ILR Cal 137, 144.
[31](1913) 41 ILR Cal 137, 145.
[32](1913) 41 ILR Cal 137, 145.
[33](1913) 41 ILR Cal 137, 145; As we will see below (n 36), Jenkins CJ was mistaken on this point.
[34]*Khwaja Mohammad Khan v Hussaini Begum* (1910) 14 CWN 868 (Privy Council).

> "Supposing she (that is the plaintiff were an English woman, it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in Equity?" The answer of the learned Counsel was "yes." … It is possible that this distinction can be explained by the history of the action of assumpsit which was a development of the writ of trespass … The bar then in the way of an action by the person not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels … [35]

Jenkins CJ's point about the 'width' of s 2(d) is never really pressed as a serious argument—it is more a statement of an un-argued for conclusion—and he does very little to substantiate it, let alone join issue with Pollock and Mulla's competing conception of the provision. The only real argument here is the one which draws conclusions of far reaching consequences from the Privy Council's judgment in *Khwaja Mohammad Khan*. But there seems to be little warrant for this reading as regards both the status of the privity rule in equity;[36] and what the Privy Council decided in *Khwaja Mohammad Khan*. In *Khawaja Mohammad Khan*, the defendant A. who was the father of the husband agreed with B. who was the father of C., the wife (plaintiff) to pay her a certain amount of money as a personal allowance in furtherance of which he also specifically created a charge upon land.[37] Lord Macnaghten put to the defendant's counsel two interlocking questions: a) whether there was not a trust with a charge created by A in favour of C; and b) whether a similarly situated plaintiff could not have succeeded in equity despite lack of privity.[38] As Pollock and Mulla rightly note, in deciding in the plaintiff's favour, the Privy Council invoked the well settled trust exception to the privity of contract rule that had its origins in courts of equity and allowed the plaintiff to sue upon the contract though she was no party to it.[39] This reading of the case has since been confirmed by the Supreme Court of India.[40] Jenkins CJ misreads the interlocutory remarks as proceeding on the premise that *any* third party could succeed in a court of equity—a proposition that would clearly be wrong as a statement of English law.[41] From that flawed premise he moved to the flawed conclusion that since courts in India are

[35] *Debnarayan Dutt v Chunnilal Ghose* (1913) 41 ILR Cal 137, 146 (Calcutta High Court).

[36] Jenkins CJ assumes that equity nullifies the privity requirement in its entirety. This conclusion is unwarranted. See F Pollock, *Principles of Contract* (7th edn, Stevens & Sons 1902) 210–13. Pollock notes that the equitable exceptions are in cases of trust; marriage settlements and provisions made by parents in case of their children. Also see AC Patra, *The Indian Contract Act 1872* (Asia Law House 1966) 217.

[37] The husband and wife in this case were both minors.

[38] *Khawaja Mohammad Khan v Hussaini Begum* (1910) 14 CWN 865, 869 (Privy Council).

[39] Pollock and Mulla (n 12) 19. The trust exception applies when the promisor promises to the promisee to hold a property in trust for a third party. The effect of the trust is that a third party can sue despite the privity rule: Treitel (n 3) 57–82.

[40] *M C Chacko v State Bank of Travancore* [1970] AIR SC 500 (Supreme Court of India).

[41] See above (n 37). Oddly, from the interlocutory remarks Jenkins CJ makes, it appears that he too took this case to be falling within the well-recognized 'trust' exception. His final opinion however, inexplicably, takes a different track: *Debnarayan Dutt v Chunnilal Ghose* (1913) 41 ILR Cal 137, 139–40.

fused courts of equity and law where the rules of equity should prevail in case of a conflict, the privity of contract rule is wholly inapplicable in India.

To read in the best light the argument Jenkins CJ was vaguely clutching at, one cannot do more than rest it upon the scaffolding of Arthur Corbin's seminal article published in the Law Quarterly Review in 1930, pleading for the abolition of the doctrine of privity of contract in England as Corbin's arguments are of a kindred type with Jenkins CJ's.[42] Corbin's argument, which blends the descriptive and normative, is two-fold. First, that the trust exception, which had its origins in equity, was little more than a fiction as the courts in England were using it as a fig-leaf to nullify the privity of contract doctrine prevalent at the common law. And second, that the logical consequence of the fusion of courts of common law and equity by the Judicature Act 1873 was that equity should prevail, and therefore that the common law doctrine of privity should be abolished.

Interestingly, we are presented with just such a blend of Jenkins CJ's and Corbin's arguments in the decision of the Calcutta High Court in *Khirodbehari Dutt v. Mangobinda* (1934), which sought to uproot the privity of contract rule in India by deepening and extending the lines drawn by Jenkins CJ in *Chunnilal Ghose*.[43] Although Lort-Williams J does not cite Corbin's article, he rests his case on the two points made by Corbin and relies on the same set of cases cited in the latter's article. Lort-Williams J concludes that he would prefer to base his decision that the privity of contract rule will not apply in India 'on a frank recognition that these [the trust and agency exceptions] are fictions and that in India no necessity arises for resorting to them'.[44]

But even this attack on privity of contract fell short for three reasons. First, Corbin's article endeavoured to make the point that there was a difference between the paper rule found in textbooks and repeated by judges as the statement of the law, and the real rule; and that, as a matter of real rule, the courts were disregarding privity of contract to a far greater extent than the paper rules recognized, through the 'fictions' of trust and agency.[45] But this analysis, as Corbin himself acknowledged, threw 'doubt' on what received wisdom regarded as a 'well-settled doctrine'.[46] That 'well-settled doctrine' was further cemented by the House of Lords in *Dunlop v Selfridge* (1915).[47] This was something the courts in India could not easily trifle with as it would

[42] A Corbin, 'Contracts for the Benefit of Third Persons' (1930) 46 LQR 12. Corbin's article, however, is confined to the status of the doctrine at English law.
[43] (1913) 41 ILR Cal 137. *Khirodbehari Dutt v Mangobinda* AIR 1934 Cal 682 (Calcutta High Court).
[44] AIR 1934 Cal 682, 691.
[45] The distinction between 'paper' rules and 'real' rules is a recurring motif in the works of the American Legal Realists, among whose ranks also belonged Corbin: see F Schauer, 'Editor's Introduction' in Karl Llewellyn, *The Theory of Rules* (University of Chicago Press 2011) 20.
[46] Corbin (n 43) 12. Lort-Williams J also recognizes that the privity of contract doctrine is 'beyond dispute' and he also notes that being confirmed by *Dunlop v Selfridge*; *Khirodbehari Dutt* [1934] Cal 682, 684.
[47] *Dunlop Pnuematic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

have meant taking the onerous step of holding that the decision of the House of Lords in *Dunlop* was mistaken.[48] Second, this plea for the abolition of privity was of such a nature that if extended to its logical conclusion, it intimated that privity of contract in England too should have been abolished. However attractive the logic of the argument relying on the trump of equity after the fusion effected by the Judicature Act 1873, experience belied it, and the privity of contract doctrine not just survived the Judicature Act but, in fact, thrived.[49] This is a consideration that would have weighed against any argument that coupled the destiny of the privity of contract doctrine in India with that of the doctrine in England, because that meant that the courts in India would have had to assert that the courts in England were mistaken about English law when they were repeatedly upholding the doctrine. As Rangnekar J opined in *National Petroleum v Popatlal Mulji*[50]—the Bombay High Court decision which was cited with approval by the Privy Council in *Kepong*[51]—Lort-Williams J's decision was 'contrary to all recognized decisions in English law';[52] and Beaumont CJ noted in the same judgment that 'it was opposed to established principle and authority'.[53]

Third, these arguments did not really join issue with Pollock and Mulla's theory which found increasing acceptance with the courts as their treatise grew in stature as a *vade mecum* on contract law. Despite the flaws with Pollock and Mulla's argument—which we will consider in the following sections—it gained significant traction in the absence of anything that effectively countered their reasoning. What was sorely missing was an argument that not only articulated a principled counter to Pollock and Mulla but also decoupled the fate of the Indian law on privity from that of the English law.[54] The importance of this factor cannot be overstated: any such counter to Pollock and Mulla would have required grounding the argument on a reading of the Indian Contract Act which established that the Act purported to diverge

[48]To this is to be added another significant consideration noted by Cross and Harris that greatly increased the gravitational pull of a decision of the House of Lords on courts in British dominions although they were not strictly speaking bound by it:

> As long ago as 1879 it was said to be of the utmost importance that in all parts of the Empire where the English law prevails, the interpretation of that law by the courts should be as nearly as possible the same. It is for this reason that in the absence of some special local consideration to justify a deviation, the Australian and Canadian Courts would be loath to differ from the decisions of the House of Lords. (R Cross and JW Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991) 23.)
>
> The courts in India too were subject to the same gravitational pull. As A.C. Patra notes: where the Act is silent … courts in India have generally tended to follow the day-to-day decisions of the English courts governing like fact situations.' (AC Patra, *The Indian Contract Act 1872* (Asia Law House 1966) 220.)

[49]While at one point the courts were willing to infer a trust quite easily, it appears that the courts departed from such a course after the decision in *Les Affréteurs Réunis SA v Leopold Walford (London) Ltd* [1919] AC 801 and began insisting on a clear intention to create a trust in the strict sense: see The Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) 9–10.

[50]See *National Petroleum v Popatlal Mulji* (1936) 60 ILR Bom 954 (Bombay High Court).

[51]*Kepong Prospecting Ltd v Schmidt* [1968] AC 810.

[52]*National Petroleum v Popatlal Mulji* (1936) 60 ILR Bom 954, 997.

[53](1936) 60 ILR Bom 954, 982.

[54]This was especially important given the considerations highlighted in (n 49) above.

from the English law on the point. Jenkins CJ hints at what the *conclusion* of such an 'argument' should look like when he points that the 'wide' definition of consideration has the effect of nullifying the privity of contract doctrine. He does not, however, back it up with an argument and lets that conclusion hang suspended mid-air.[55]

One can also find the odd case between *Chunnilal* (1913)[56] and *Khirodhbehari* (1934)[57] where the courts followed Jenkins CJ's lead in holding that the privity of contract doctrine will not be applicable to India. Consider for instance *Areti Singarayya v Areti Subbaya* (1924).[58]

> [W]here a Court has before it all persons and is in a position to do complete justice to the case, it would be straining the law to hold that the suit should fail on the ground that the defendant did not contract with the plaintiff to pay the amount which he contracted to pay on his behalf.[59]

Even the most trenchant critic of the privity doctrine would find it difficult to overlook the flaw in this argument. The fact that the party was before the court is irrelevant to the question whether it is entitled to be before the court as a matter of law and that question depends on determining independently whether the third party had the *right* to sue.[60]

While the fortunes of the camp opposed to the privity doctrine fell, the Pollock and Mulla theory steadily gained in strength. The earliest occasion where Pollock and Mulla's views appear to have found endorsement is the 1913 Madras High Court decision, *Iswaram Pillai v Sonivaveru Taragan*.[61]

> Section 2(d) does not require that consideration should necessarily move from the party seeking to enforce the contract. It does not seem to me … that the definition can affect the question whether a third party (who is neither the Promisor nor the Promisee) can enforce the contract. [62]

Tyabji J's opinion unequivocally approves the Pollock and Mulla theory and holds that the definition of consideration has no bearing on the question of who can sue upon the contract.[63] In the same year this view was welcomed by the Bombay High Court in *Shankar Vishvanath v Umabai*.[64] The same

[55] And it is a similar Jenkins-type conclusion bereft of any real argument that one sees repeated decades later by the plaintiff in *Kepong*. Little surprise then that Lord Wilberforce made short work of it.
[56] *Debnarayan Dutt v Chunnilal Ghose* (1913) 41 ILR Cal 137
[57] *Khirodbehari Dutt v Mangobinda* [1934] AIR Cal 682 (Calcutta High Court)
[58] (1924) 20 Law Weekly 721 (Madras High Court). For other examples, see *Dwarika Nath v. Priyanath*, (1916) 36 Indian Cases 792 (Calcutta High Court) following *Chunnilal Ghose*; *Ramaswami Aiyar v. Deivasigamani Pillai* (1922) 43 MLJ 129 (Madras High Court).
[59] (1924) 20 Law Weekly 721, 723–24.
[60] This obviously flawed argument came in for criticism by a Full bench of the Madras High Court which overruled the decision: *Subbu Chetti v Arunachalam Chettiar* (1930) 31 The Law Weekly 371, 382–83 (Madras High Court).
[61] [1914] AIR Mad 701 (Madras High Court).
[62] [1914] AIR Mad 701, 706.
[63] [1914] AIR Mad 701, 706.
[64] (1913) 37 ILR Bom 471 (Bombay High Court).

result also followed in the Madras High Court when a full bench in *Subbu Chetty v Arunachalam Chettiar* (1929), overruling all earlier decisions to the contrary, upheld the privity of contract requirement as being mandated by the Indian Contract Act.[65] Around this time also came the Calcutta High Court decision in *Krishnalal Sadhu v Promila Bala Dassi* (1928), Rankin CJ's opinion in which, was to become enormously influential.[66]

> Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of 'promisor' and 'promisee.'[67]

Unsurprisingly, Pollock and Mulla—their editor, that is—termed Rankin CJ's view in *Krishnalal Sadhu* as 'the best statement of the law.'[68] This proposition of law was confirmed by the Bombay High Court's judgment in *National Petroleum v Popat Mulji* (1936)[69]—a decision that was cited with approval by the Privy Council in *Kepong Prospecting v Schmidt*.[70]

> It is true that the definition of 'consideration' in Section 2 of the Indian Contract Act gives a wider meaning to that term than is accepted in English law, because it includes consideration moving from the promisee or any other person. But the fact that consideration may move from a third party does not involve the proposition that a third party may sue upon a contract.[71]

Despite the odd contrary judgment, by 1936, the three major High Courts in India had firmly approved the Pollock and Mulla doctrine of privity of contract.[72] A bench of the Calcutta High Court in *Adhar Chandra Mondal v Dalgobinda* (1936) reaffirmed Rankin CJ's decision in *Krishna Lal Sadhu* (1928) and disapproved Lort-Williams J's statement of the law in *Khirodhbehari* (1934).[73] By the next decade, there was little doubt that the 'generally

[65] *Subbu Chetty v Arunachalam Chettiar* (1930) 31 Law Weekly 371 (Madras High Court). A full bench comprises three judges and is typically constituted in cases where there are conflicting decisions on points of law of division benches (benches comprising of two judges).

[66] *Krishna Lal Sadhu v Pramila Bala Dasi* (1928) 32 CWN 634 (Calcutta High Court). This was a resounding endorsement of Pollock and Mulla's theory.

[67] (1928) 32 CWN 634, 640.

[68] Maurice Gwyer (ed), *Pollock & Mulla, Indian Contract and Specific Relief Acts* (6th edn, Eastern Law House, 1944) 19.

[69] (1936) 60 ILR Bom 954 (Bombay High Court). For a similar piece of reasoning see *Raj Rani v Prem Adib* [1949] AIR Bom 215 (Bombay High Court).

[70] *Kepong Prospecting v Schmidt* [1968] AC 810.

[71] (1936) 60 ILR Bom 954, 981.

[72] A High Court in India is not bound by decisions of the other High Courts and all High Courts are bound by decisions of the Supreme Court: See S Swaminathan, 'Schrodinger's Constitutional Cat: The Effect of the High Court's Declaration of Unconstitutionality' (2013) 25(2) National Law School of India Review 100. For some time, the answer to whether the Indian law did have the privity barrier or not seemed to vary with the size of the Chancellor's foot. In one case, for instance, from the great number of cases cited at the bar, the court just picks out *Chunnilal Ghose* and follows it, for no ostensible reason in particular: *Fateh Chand v Nihal Singh* (1922) 44 ILR All 702 (Allahabad High Court). For a decision reaching the opposite result, see *Itti Panku Menon v. Pharman Achan* (1917) I.L.R. 41 Mad 488 (Madras High Court).

[73] *Adhar Chandra Mondal v Dalgobinda* (1936) 67 Ind Cas 604 (Calcutta High Court).

accepted' view was the 'orthodox' one: that the privity of contract doctrine was applicable in India,[74] and that the law in India was the same as the English law.[75]

In 1958, the First Law Commission of India—incidentally, chaired by MC Setalvad, the co-editor of the seventh edition of Pollock and Mulla's treatise—surveyed the law relating to privity of contract in India and reported that the 'preponderating view' was that the 'English rule of privity of contract applies to India, notwithstanding s 2(d).'[76] It also noted that Rankin CJ's decision in *Krishna Lal Sadhu v. Pramila Bala Dassi* struck a 'decisive blow' to the argument against the privity of contract doctrine based on the language of s 2(d).[77] The preponderating view became the last word when this position was finally upheld by the Supreme Court of India in *M C Chacko v State Bank of Travencore* (1969) thus marking the triumph of Pollock and Mulla's views on the subject.[78] *M C Chacko* continues to remain good law and has gone unchallenged judicially or academically. The latest edition of Pollock and Mulla sums up the law on 'privity' in India as follows:

> Under the Act, the consideration for an agreement may proceed from a third party, but it does not follow that the third party can sue on the agreement … Even though under the Contract Act, the definition of consideration is wider than in English law … only a party to the contract is entitled to enforce the same.[79]

C. Privity and the Drafting of the Indian Contract Act

1. The 'Silence' of the Indian Contract Act

The Indian Contract Act has nothing specific to say, in so many words, on who can enforce the contract. All it says is that consideration may move from the promisee or any other person. The only question is whether this does enough to nullify the privity of contract rule. There are those like Warren Swain who

[74]Patra (n 49) 221

[75]Maurice Gwyer (ed), *Pollock & Mulla, Indian Contract Act and Specific Relief Acts* (6th edn, Eastern Law House 1944) 19.

[76]The Law Commission of India, *Thirteenth Report, Contract Act, 1872* (1958) 10. Cases decided around this time, in the 1950s, also unequivocally affirmed the privity of contract requirement: see *Protapmull v State of West Bengal* (1957) 61 CWN 78 (Calcutta High Court); *Baburam v Dhan Singh* [1957] AIR Punjab 169 (Punjab High Court). Both the cases found mention in *Kepong* as being 'recent' affirmations of the principle of privity of contract: *Kepong* [1968] AC 810, 826. It would be fair to say that by this time, the view opposed to this principle had no takers. See MC Setalvad and R Gooderson (eds), *Pollock & Mulla, Indian Contract Act 1872* (7th edn, Tripathi 1957).

[77]The Law Commission of India (n 76) 10.

[78]The judgment recognizes some exceptions to the privity rule namely: trust and beneficiaries in family arrangements. It misses out another long recognized exception to privity, namely, 'agency': see *National Petroleum v Popat Mulji* (1936) 60 ILR Bom 954, one among a long list of cases which recognizes agency as an exception to the privity rule. When a third party (principal) authorises an agent (promisor or the promisee) to enter into a contract on his behalf, the principal can sue upon the contract: Treitel (n 3), 576.

[79]N Bhadbhade (ed), *Pollock & Mulla, Indian Contract Act 1872* (2012 edn, Lexis Nexis 2012) 86.

believe it does. Swain notes that the Act brought this result about by never expressly introducing any privity based restrictions on the enforcement of contracts.[80] The silence of the Act, on this view, licences us to infer that no privity of contract rule was intended.

But the silence of the code has also been relied upon to make the exact opposite point. The fact that the drafters of the Indian Contract Act said nothing about privity, Sir George Rankin—whose decision in *Promila Bala* was ultimately approved by the Supreme Court of India—argues in his extra-judicial writing, that they did not mean to alter the English rule on privity of contract at all.

> [B]ut neither in their report nor in their illustrations does it appear that they had given any special consideration to this particular point [privity]. There is nothing in either clause to suggest that a person who is not a party to a contract can sue upon it … Having regard to the date of this last mentioned decision [*Tweddle v Atkinson*] it is difficult to doubt that the commissioners had it well in mind and that it had overruled previous decisions [*Dutton v Poole*].[81]

While there is nothing objectionable about Rankin's observation that the drafters would have had the rule in *Tweddle v Atkinson* in mind and that the provisions of the Indian Contract Act should be read consistently with their having done so, Rankin seems to be mistaken about the *content* of the rule. And this mistake was particularly easy to make in the middle of the twentieth century when Rankin was writing. As we will see, the *real* rule in *Tweddle v Atkinson* was that only the person providing consideration could sue (the privity of consideration rule). However, since the 1870s, until fairly late in the twentieth century, *Tweddle v Atkinson* by a consensus amongst academic lawyers came to be understood as supporting the proposition that only a party to the contract can sue (the privity of contract rule). The latter rule was, however, far from blipping the radar when the decision in *Tweddle v Atkinson* was handed down. The *only* barrier to sue at the relevant time was the privity of consideration rule. Once we bear this detail in mind, we will find that the Indian Contract Act is not 'silent' on this point, if by 'silent' it is meant that the issue was left *unregulated*. It will be argued that the way in which the commissioners who drafted the Indian Contract Act recast the privity of consideration requirement sufficed to negate *any* putative privity barrier. If the only extant privity rule at the relevant time was that 'consideration must move from the promisee' and this was the *only* barrier to sue

[80] W Swain, *Law of Contract 1670–1870* (CUP 2015). Swain observes that despite allowing consideration to move from a third person 'it remained unclear' whether 'it was possible for a third party to sue on another's contract' (269). However, this silence according to Swain speaks against the privity of contract as he notes 'any such restriction was absent from the Indian Contract Act 1872' (227). He also adds that 'The Act shows that a parties only principle was not an inevitable consequence of adopting the Will Theory' (227).

[81] G Rankin, *Background to Indian Law* (CUP 1946) 104. Rankin also endorses the wrong proposition that *Tweddle* overruled *Dutton v Poole*: See Corbin (n 43) 18.

upon the contract, then the effect of s 2(d) which allowed for consideration to move from the promisee or any other person, it will be argued, was to pave the way for a *tertius* to sue upon the contract by removing the *only* impediment in the way.[82] A brief adumbration of the history of the third party action until *Tweddle*, which is a necessary precursor to understanding the scope of s 2(d) and the connotation of its phraseology, upon which the argument turns, follows in the remainder of this section.

2. A Brief History of Privity and the Rule in Tweddle v Atkinson

The rule in *assumpsit* in the early nineteenth century, which is to say the period before *Tweddle v Atkinson* (1861),[83] was clearly that of privity of consideration: 'consideration must move from the plaintiff';[84] or 'plaintiff must not be a stranger to the consideration'[85]; or the later day formulation which ostensibly survives to this day that 'the consideration must move from the promisee'.[86] What each of these formulations denoted was the privity of consideration rule that only a person giving consideration could sue upon the contract. Thus, the only barrier to sue was that of having provided consideration.[87] The legal historian would counsel us to tread cautiously here as to the twenty first century lawyer's ear the occurrence of the word 'promisee' in the last of the three formulations enumerated above must already suggest the privity of contract rule, as 'promisee' in our understanding, must necessarily be a party. But the term 'promisee' in the nineteenth century context was capacious enough to include the so-called 'promisee in law', which would be anyone providing consideration whether or not a party (the promisee in fact) since consideration was said to 'draw' the legal promise to it.[88]

When the old cases are read in ignorance of this idiosyncratic meaning of 'promisee', they could all too easily—and erroneously—be made to yield the privity of contract rule. Even high authorities are sometimes charged with this basic conflation.[89] If one combines the rule 'consideration must move from the promisee' with the fact that the promisee is at all times a party to the

[82]See Section D below.
[83](1861) 1 B&S 393.
[84]Palmer (n 1) 160.
[85]Palmer (n 1) 161.
[86]D Ibbetson and W Swain, 'Third Party Beneficiaries in English law: From Dutton v Poole to Tweddle v Atkinson' in E Schrage (ed), *Ius Quaesitum Tertio* (Duncker & Humblot 2008) 191–213, 207. Palmer notes that replacing the word 'plaintiff' with 'promisee' is due to Henry Stephen's *New Commentaries on the Laws of England* (1842): Palmer, (n 1) 161.
[87]M Lobban, 'Consideration' in William Cornish et al (eds) *Oxford History of the Laws of England Vol VIII* (OUP 2010) 359–400, 388.
[88]HT Street, *Foundations of Legal Liability: Vol II* (Edward Thompson 1906) 154; Palmer (n 1) 162: 'the promisee in law is not to be confounded with the person to whom the promise is communicated'. See also S Stoljar, *History of Contract at Common Law* (Australian National University Press, 1975) 136.
[89]Palmer believes such an error also permeated Anson's and Pollock's reading of *Price v Easton*: Palmer (n 1) 164–65.

contract, one automatically rules out a third party, who, by definition, cannot be a party to the contract.[90]

In cases involving contracts by seal, a privity of contract rule existed in English law since the thirteenth century.[91] In the case of contracts not under seal, for which action in *assumpsit* lay,[92] the idea of who can sue came to be intertwined with that of consideration in the course of the shift in emphasis in the definition of consideration from 'benefit'—whereby any subjective benefit, however insignificant, to the promisor sufficed—to the 'detriment' to the promisee.[93]

> If the issue is the promisee's detriment in the form of an act or promise by him related to the promisor's promise, any person not suffering detriment by performing an act or accepting an obligation cannot recover even though he is a promisee or a beneficiary of a promise. By contrast if the issue may in the alternative be the promisor's motivation for making the promise or the benefit received by him from that promise, it ceases to matter whether the promisee or beneficiary has himself done anything to secure the promise providing that the promisor has obtained a benefit from some other person or from the promisor's own actions.[94]

This metamorphosis appears to have been complete by the second half of the 17th century[95] and can be found exemplified in *Bourne v Mason* (1670).[96] The claimant could not succeed because he 'did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration', making it the earliest case where the privity barrier was cut entirely from the cloth of consideration.[97] The celebrated case of *Dutton v Poole* (1677) clearly revolved around this rule and it was held that consideration given by the father inured to the benefit of the daughter due to their nearness of relation thus enabling

[90]P Kincaid, 'The UK Law Commission's Privity Proposals and Contract Theory' (1994) 8 Journal of Contract Law 51, 55.

[91]D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) 76, 241; Ibbetson and Swain (n 87) 192–96; D Ibbetson and E Schrage, 'Ius Quaesitum Tertio: A Comparative and Historical Introduction to the Concept of Third Party Contracts' in Schrage (n 87) 1–34, 26.

[92]In action on the case, which was a predecessor of *assumpsit*, it was possible for a third party to bring an action given the tortuous nature of the action. However, with the advent of *assumpsit* the right to sue came to be tied to consideration as the plaintiff had to establish detriment: James Wicks, *Consideration in the Law of Simple Contract* (Stevens and Sons 1939) 42. The action of *assumpsit* rose in the sixteenth century. Before its rise, and in fact, even well after it, until the eighteenth century contract law was dominated by contracts by deed: Ibbetson and Schrage (n 92) 25.

[93]R Merkin, 'Historical Introduction to the Law of Privity' in Robert Merkin (ed), *Privity of Contract* (Hart 2013) 1–20, 7. See also WS Holdsworth, 'The Modern History of the Doctrine of Consideration' (1922) 2 Boston University Law Review 87, 95–96; Ibbetson and Swain (n 87) 196–97; Street (n 89) 156; Stoljar, (n 89) 136–37; Swain (n 81) 62–63.

[94]Merkin (n 94) 10. See also JB Ames, *Lectures on Legal History* (Harvard University Press 1913) 145.

[95]As Ibbetson and Schrage note 'such a rule is found stated as early as 1575 and it appears with increasing firmness through the seventeenth century': Ibbetson and Schrage (n 92) 27. Also see Stoljar (n 89) 136–37.

[96]*Bourne v Mason* (1670) 1 Vent, 6; Merkin (n 94) 11; V Palmer, 'The History of Privity: The Formative Period' (1989) 33 American Journal of Legal History 1, 26–27.

[97]Street (n 89) 153; Merkin (n 94) 11; *Bourne v Mason*, quoted by Merkin, (n94) 12.

her husband to bring an action.[98] It is believed to be likely that the result would have been different had the consideration moved from an unrelated party.[99] There appears to have been a lull in third party beneficiary actions in the 18th century but whatever little activity in this area confirms this principle—*Crow v Rogers* (1724) being a case in point.[100] When the activity in this area resumed in the nineteenth century, the privity of consideration rule continued to remain 'the sole operative test of privity'.[101] Even the formulation that the 'plaintiff must not be a stranger to the consideration' which is found in the nineteenth century appears to have been taken 'verbatim' from *Bourne v Mason*.[102] By this time, however, it was more common to hear the idea being expressed in the more familiar 'melancholy phrase'[103] that consideration must move from the promisee.

Tweddle—as also its supposed predecessor, *Price v Easton* (1833)[104]—was an authority for nothing more than the privity of consideration rule.[105]

> [I]t is significant that, according to four versions of the judgments (*Best & Smith, Jurist, Law Times, Weekly Reporter: aliter Law Journal*) all the judges, Wisghtman, Crompton and Blackburn JJ., based their judgments squarely on the principle that no action can be maintained on a promise by a stranger *to the consideration*, and held that even a son is a stranger to consideration provided by his father. The court clearly relied on the old rule of Assumpsit that consideration must move from the plaintiff.[106]

> If it [the parties-only principle] truly derives from Tweddle, where is it found in the decision? No actual declaration of the principle was made and there was no attempt to overturn the promisee in law theory.[107]

3. Retrospectively Projecting the Privity of Contract Rule in Tweddle

Academic commentators have retrospectively projected onto *Tweddle v Atkinson* what appears to be a phantasmal, privity of contract rule.[108] This

[98] *Dutton v Poole* (1677) 2 Lev 210. See Palmer (n 1) 75–78 for discussion.
[99] Ibbetson and Swain (n 87) 197. AWB Simpson argues that cases such as *Bourne v Mason* and *Dutton v Poole* illustrate the rule that 'so long as a plaintiff could get over the difficulty about consideration, he ought to be allowed to sue even if he was not the promisee': AWB Simpson, *History of the Common Law of Contract* (OUP 1975) 479.
[100] *Crow v Rogers* (1724) 1 Stra 592; Palmer (n 1) 160; Ibbetson and Swain (n 87) 198–99.
[101] Palmer (n 1) 160.
[102] Palmer (n 1) 161.
[103] Simpson (n 100) 475.
[104] *Price v Easton* (1833) 110 ER 518.
[105] WS Holdsworth, 'The Modern History of the Doctrine of Consideration' (1922) 2 Boston University Law Review 175, 200; J Wicks, *Consideration in the Law of Simple Contract* (Stevens 1939) 31, 32; FE Dowrick, 'A Jus Quaesitum Tertio by way of Contract in English Law' (1956) 19 Modern Law Review 374. Palmer notes that this formulation is also found in *Thomas v Thomas* (1842): Palmer (n 1) 161.
[106] Dowrick (n 106) 383–84; but see Ibbetson and Swain (n 87) 211–12 who note that there was also a smattering of the parties-only rule in the Law Journal version of the case.
[107] Palmer (n 1) 166.
[108] Palmer (n 1) 166.

projection began with Leake's treatise (1867) followed by treatises by Pollock (1876) and Anson (1879).[109] These commentators canonized *Tweddle* as the source of the privity of contract rule: a legend which has only grown in strength ever since.[110] Indeed, as Atiyah points out specifically with reference to *Tweddle v Atkinson*, a case becomes 'important, not for what the judges said, but for what the legal profession came to believe the case stood for.'[111]

The real impetus for the projection appears to have come not from any real confusion about gleaning the ratio of *Tweddle v Atkinson* but rather from an external theoretical ambition, namely, that of rationalizing the welter of rules that were hitherto strewn among the complex web of forms of action under a neat unified system of contract law, ordered by the 'will theory' borrowed from the continent.[112] The particular model of the will theory that was especially influential was the one found in Robert-Joseph Pothier's *Traité des Obligations* which was rendered into English in 1806.[113] Pothier ruled out any benefit for the third party by advancing the proposition that 'agreements can have no effect except between the contracting parties.'[114] A deductive application of the central principle of the will theory, however, did by no means entail such a conclusion.[115] The organizing principle of Pothier's will theory was the consent of parties.[116] And in a system revolving around this principle the requirement of privity of contract was out of place because:

> If rights and liabilities were created by the agreement of the parties, there was no compelling reason why those rights could not be generated in favour of others.[117]

A codifying system in the mid-nineteenth century seeking to apply the will theory might very well have found privity in either of its forms as incongruous and discarded it altogether.[118] Despite this obvious incongruity, most continental adherents of the will theory, including Pothier, continued to endorse the privity of contract rule for no good theoretical reason other than its pride of place in Roman law (the doctrine of *alteri nemo stipulari potest*), which, in turn, provided the blueprint for their theoretical

[109]D Ibbetson 'Privity before 1900' in J Hallebeek and H Dondorp (eds), *Contracts for a Third Party Beneficiary: A Historical and Comparative Account* (Martinus Nijhoff 2008) 93–114, 113; Ibbetson, *Historical Introduction* (n 92) 242; Ibbetson and Swain (n 87) 212–13.
[110]P Atiyah, *Consideration in Contracts: A Fundamental Restatement* (Australian National University Press, 1971) 39.
[111]P Atiyah, *Rise and Fall of the Freedom of Contract* (Clarendon 1979) 414; Swain (n 81) 224.
[112]Ibbetson and Swain (n 87) 208. Also, this is not the only area of law where this happened. See Ibbetson, (n 92) 220–44 for the retrospective projections in various areas of contract law, particularly mistake.
[113]AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247, 255.
[114]Palmer (n 1) 183.
[115]Ibbetson (n 92) 242.
[116]Ibbetson (n 92) 220.
[117]Ibbetson (n 92) 241–42.
[118]Ibbetson (n 92) 236.

model.[119] The English treatise writers who were seeking to fit the English law to this Potherian mould, took this idea on board and become votaries of the privity of contract principle.

4. Indian Contract Act and the Rule in Tweddle

The Indian Contract Act had been substantially drafted by 1866, long before the privity of contract rule could be projected onto *Tweddle v Atkinson*—which was only by the 1870s—[120] and hence the drafters are not likely to have been subjected to the obfuscating influence of the commentators' interpretation of the case. To be sure, there were many differences between the commissioners' draft of 1866 and the final Act, but among the points on which there is no substantial difference is the definition of consideration, including its feature that has assumed much importance for us here, namely, its *width*. Clause 10 explanation 3 of the commissioners' draft defined consideration as:

> A good consideration must be something which at the desire of the person entering into the engagement another person has done or abstained from doing or does or abstains from doing or promises to do or abstain from doing.[121]

In the Act, 'promisor' replaced 'person entering into the engagement' and 'promisee or any other person' replaced 'another person'. The first pair of terms is synonymous as is the second because the disjunctive 'or' between 'promisee' and 'any other person' does not vary the scope achieved by the phrase 'another person'.

The commissioners would have found in *Tweddle v Atkinson* a confirmation of the rule that only a party providing consideration could sue upon it. And on the plain terms of *Tweddle*, the principle obstacle in the way of the third party appears to have been that 'a *tertius* must provide consideration to acquire a contractual right'.[122] Being a mid-nineteenth century code moulded out of the English common law, the will theory, expectedly, exerted an enormous influence in the framing of the Indian Contract Act.[123] But as we have already seen, the will theory did not necessarily dictate a privity of contract rule. Far from it, a scrupulous adherence to the principles underpinning it required just the opposite—a proposition confirmed by the fact that the

[119]Palmer, *Paths to Privity* (n 1) 183; Swain describes this as the one situation where 'Civilian learning trumped Pothier's central premise.': Swain (n 81) 223; Ibbetson notes that the 'purist' Savigny was an exception to this trend: Ibbetson (n 92) 242. For a survey of privity from Roman law to civil law see MH Bresch, 'Contracts for the benefit of Third Parties' (1963) 12 ICLQ 318; H Kotz 'Rights of Third Parties, Third Party Beneficiaries and Assignment' in R David et al (eds) *International Encyclopedia of Comparative Law VII (Contracts in General)* (Brill 1992) 5.

[120]Swain (n 81) 227–28 notes that 'it may have been well into the 1870s' before this happened. Atiyah notes that 'the modern doctrine of privity … was not really known as such until very late in the nineteenth century.' See also Atiyah (n 112) 414.

[121]House of Commons (India), *Parliamentary Papers* (1867–68), 8–9.

[122]Dowrick (n 106) 384.

[123]Swain (n 81) 276.

recognition of third party rights by legislation in England is seen as a belated triumph of the will theory.[124] Furthermore, allowing third parties the right to sue would also have been in 'accord with the spirit'[125] of the Hindu and Islamic (or Mohammedean as it was commonly referred to then) laws relating to contract which, much like the will theory, founded liability on consent.[126] It should come as no surprise then if the framers of the Indian Contract Act would have wanted to provide some succour to third party beneficiaries.

D. Questioning the Pollock and Mulla Theory

1. Dismantling the Silos

How might the framers of a code that was drafted in the 1860s—should they have been intent upon removing the privity of consideration requirement in *Tweddle*—go about the task? It would surely be anachronistic to find them giving expression to the principle in the language of privity of contract which, familiar though it is to our ears, was at this point, still some time away from being in currency.[127] Their chosen method would, instead, have naturally implicated the definition of consideration because the question of who can sue, as we have seen, was at this point of time inextricably intertwined with the doctrine of consideration. If the problem to be overcome by the drafters of the Indian Contract Act was that a person had to give consideration in order to sue upon a contract, they could have addressed it by two means: both of which involved tinkering with the definition of consideration. One could be the radical means of abolishing consideration altogether and along with it, any barrier to sue, tethered to the doctrine. The other, far less radical method could be by tracing the way out for the privity of consideration doctrine through the very door by which it entered—namely, by regarding once more, benefit to the promisor, regardless of from whom it comes, as sufficient consideration.[128] Doing so, as Merkin notes, would automatically erode the doctrinal basis of the third party rule—as long as the promisor gets consideration and it does not matter who it comes from, there can no longer be an objection to a third party suing upon the contract.[129] This is

[124]Ibbetson (n 92) 242–4.
[125]PN Daruvala, *The Doctrine of Consideration Treated Historically and Comparatively* (Butterworth 1914) 228.
[126]Daruvala (n 125).
[127]Although by this time William Macpherson, who was also one of the drafters of the Act in his capacity as Secretary to the Indian Law Commission, was vaguely rooting for this idea in his treatise on Anglo-Indian contract law, the idea was most certainly far from being the law in England let alone being projected upon cases such as *Tweddle*: W Macpherson, *Outlines of the Law of Contracts* as *Administered in the Courts of British India* (2nd edn, Lepage & Co 1864) 70. As Ibbetson notes, Macpherson's treatise was based more on natural law than 'contemporary English law': Ibbetson (n 92) 227.
[128]See Merkin (n 94). The doctrine got entangled with consideration in the move towards requiring some tangible detriment from the person seeking to enforce the promise.
[129]Merkin (n 94) 19.

precisely the route followed by the framers of the Indian Contract Act. By providing that consideration could move from the promisee or any other person, the Act stipulated that as long as the promisor got the consideration he *desired*, it did not matter who it came from. The class of persons to whom the provision threw open the right to sue was capacious enough to encompass in its fold third parties as well. Thus, it preempted any putative privity of contract barrier. By allowing consideration to move from the promisee or any other person at the promisor's desire, s 2(d) paved the way for both of the following: a) for the promisee to sue upon consideration having been provided by a third party; b) and for a third party to sue upon consideration being provided by the promisee. Long after, Pollock and Mulla's interpretation of the Indian Contract Act has become firmly entrenched in the collective consciousness of Indian lawyers, textbook writers and courts only recognize situation (a) as permitted by s 2(d).[130]

The argument outlined above must be hedged in with a caveat. The claim is *not* that the framers envisaged the problem of privity of contract and intended that s 2(d) specifically preempt it. Envisaging privity of contract as a barrier to sue upon a contract was still some time away at the point the Act was being drafted. The claim is rather that if the drafters posited the rule that any person (regardless of whether consideration moves from them) may sue upon a contract, such a rule is wide enough to include in its ambit, third party beneficiaries as well.

2. The Irrelevance of the Definitions of Promisor and Promisee

What we have considered up to this point dismantles Pollock and Mulla's silos in order to establish that s 2(d) is dispositive of the question of 'privity' in both its senses. What remains to be considered now is Pollock and Mulla's other argument based on s 2(c). Pollock and Mulla argued that the definitions of 'promisor' and 'promisee' effectively ruled out a third party from suing upon the contract. They reasoned that s 2(c) meant that there must be a 'proposal from the defendant to the plaintiff, and a communication of the proposal to, and its acceptance by, the plaintiff.' The motivation for such a move could be traced to some versions of the will theory in which the Roman *alteri stipulari* doctrine was supported by the emphasis on contract formation and right to sue was tied to participation in this process.

> If a contract was made by offer and acceptance, then it could be said that a third-party beneficiary who had not accepted the offer should necessarily be denied a claim … this was the line of argument which could be traced back through Pothier to Grotius and the Spanish neo-scholastics before him.[131]

[130]Patra (n 49) 129; *Pollock and Mulla* (14th ed) (n 18) 87.
[131]Ibbetson 'Privity before 1900' (n 110) 112.

This stratagem, too, like the *alteri stipulari* doctrine it served, is informed by a tendency typical to Roman law, namely, that of looking for a 'unity' between 'legal acts and their effects.'[132]

> Legal effects were not abstracted from the persons performing the formalities and could therefore not be made to originate in the person of an independent outsider.[133]

It is this route through which the privity of contract idea was inducted into the Indian Contract Act by Pollock and Mulla. What they did was exclude anyone not participating in the formation of the contract from suing upon it. They not only transplanted an alien principle tracing its roots to Roman law and made it govern the interpretation of the Indian Contract Act without regard to its congruity but also erroneously claimed that s 2(c), which did nothing more than define 'promisor' and 'promisee', incorporated such a principle. As if by a sleight of hand, the issue, it was claimed, was clinched by the definitions of 'promisor' and 'promisee' in s 2(c)—a provision which has nothing whatsoever to say on the question of 'who can sue?' It is nobody's claim that the third party beneficiary is the person *to* whom the promise is made and therefore the 'promisee': the third party is the person *for* whom a promise is made *to the promisee*. Pollock and Mulla's argument amounts to saying that a third party cannot sue because he is not the 'promisee'—which by definition he can never be. It involves a leap of logic to claim that the definitions of 'promisor' and 'promisee' are dispositive of the completely unrelated question of whether the promisor or promisee are the *only* ones who can sue upon a contract. S 2(e) which Lord Wilberforce, albeit without any elaboration, relied upon in *Kepong*, purportedly to supplement this argument, does nothing to strengthen it. S 2(e) defines an agreement as 'every promise and every set of promises forming consideration for each other'. But the argument from s 2(e) is in and of itself redundant and must borrow its normative force from s 2(c) insofar as it postulates that only a promisor and promisee may sue. The requirement that only those who participate in the formation of the contract could sue upon it is not found anywhere in the Act, let alone in s 2(c). Nor do any conceivable considerations of fit, coherence or integrity imply such a principle. S 2(h) defines a contract as 'an agreement enforceable by law.' The real effect of Pollock and Mulla's argument is to interpolate the words 'at the option of either party' into the definition of contract in s 2(h). The interpolation is unwarranted. The fact that those words are not to be found in s 2 (h) suggests that such a barrier was never intended, for where required, the drafters made sure to use such language. S 2(i), for instance, defines a voidable

[132]R Zimmermann, *The Law of Obligations :Roman Foundations of the Civilian Tradition* (Clarendon Press 1996) 34.
[133]Zimmermann (n 132).

contract as one which is enforceable at the option of one of the parties and not the other.

E. A Thwarted Homing

A code that comes to occupy a field hitherto occupied by a fasciculus of common law doctrine runs a significant risk—that the ones charged with the task of administering it would re-imagine the code in the image of the common law, which the code was purported to supplant.[134] And this is one of the factors that appear to have influenced the unwarranted injection of the privity of contract doctrine into the body of the Indian Contract Act. The gravitational pull of the English doctrines appears to have been too strong to escape from for judges and scholars alike in this area, as indeed, in many others areas of contract law.[135]

Another factor that played out significantly in this case was something the commissioners drafting the Indian Contract Act could not have anticipated, namely, the shifting connotations of some of the ideas they used in the code in the decades after the code was drafted. When the Indian Contract Act was being drafted, the chief barrier to suing upon a contract at English law was the privity of consideration requirement. All the evidence we have considered in this essay suggests that the drafters had envisaged this barrier alone and sought to remove it with their 'wide' definition of consideration. One of the effects of wide definition, as we have seen, was also to preempt any putative privity of contract barrier. The privity of contract rule took roots in English law only after the Act was drafted. Oblivious to this smidgen of historical detail, many looked for direct evidence of the abolition of the privity of contract rule in the Indian Contract Act and not having found language to that effect, concluded that the Act could not have meant to alter the English law on the subject.

It cannot, of course, be denied that the Indian Contract Act did not outline the precise contours of the third party beneficiary action, nor did it prescribe how this principle should interact with a majority of the provisions of the Act, which clearly envisage disputes arising only between parties to a contract. But, then, one can hardly expect these doctrines to sprout fully developed —much less, in a nineteenth century code—with their limits sharply defined as one finds them in the Contracts (Rights of Third Parties) Act 1999. It took decades of combined work by generations of judges, lawyers, and academics after *Lawrence v Fox* (1859) for the doctrine of privity of

[134]See W Swain, 'Codification of Contract Law: Some Lessons from History' (2012) 31 University of Queensland Law Journal 39.
[135]See RN Gooderson, 'English Contract Problems in Indian Code and Case Law' (1958) 16 Cambridge Law Journal 67, at 68–69.

contract in the United States to assume a definite shape.[136] Should the doctrine have been allowed to take root in India as envisaged by the Indian Contract Act, the common law would have worked on it in an incremental fashion to form, in due season, a well-defined indigenous body of doctrine.

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Notes on contributor

Shivprasad Swaminathan, B.S.L; LL.B (Pune); B.C.L (Oxford); D.Phil (Oxford) is Associate Professor and Executive Director, Centre on Public Law and Jurisprudence, O.P. Jindal Global University. He works in the areas of legal philosophy and contract law.

[136] *Lawrence v Fox* (1859) 20 NY 268 (New York Court of Appeals).