**Chapter 12: Privity of Contract and the Assignment of Contractual Rights**

**Third Party** – a person who is not one of the parties to a contract but is affected by it

**Privity of Contract** – the relationship that exists between parties to a contract

General rule is that a contract doesn’t confer any benefits or impose any obligations on a stranger to the contract. To succeed in an action in contract, the plaintiff must prove *privity of contract* with the defendant (ie. must show that they are both parties to the same contract).

**A** owes $4000 to **B**  
**C** owes a debt for services to **A**  
**B and C** have no privity of contract since they are not related within the same contract.

Liability of Sellers of Goods  
- if a woman buys a can of salmon and is sick because of it, she can successfully sue the merchant whom she purchased it from, but members of her family cannot since the contract of sale was with the buyer

Liability of Manufacturers  
- the manufacturer may well be liable for negligence, even though the family has no rights against them  
- the manufacturer caused the product to be poisonous and the merchant has no way of knowing that sealed goods are not up to standard

**Vicarious Performance** – a third party performs on behalf of the promisor who remains responsible for proper performance

- an employee may perform on behalf of the promisor and if the work is not done satisfactorily, the promise may seek a remedy for breach of contract against the promisor, but not the employee  
- the employee can look only to the employer for payment and not to the promise  
- a promisor may employ a 3rd party to perform the work vicariously (on the promisor’s behalf) when personal performance by him was not the reason why the promise entered into the contract

Sometimes a party arranges for its obligations to be performed vicariously when it should have performed personally, but the other party may not have an opportunity to protest until the work is finished. In this case, the promisor breached a term in the contract. The promise may sue for damages to compensate for whatever loss he can show resulted from vicarious, rather than personal, performance.

Tort Liability  
- if a contract is performed vicariously and an employee commits a tort (negligently damages something of the promise), the employee may be sued for vicarious liability

**Exemption Clause** – a clause in a contract that exempts a party from liability  
- employers often protect themselves from tort liability  
- ex. carriers and storage companies usually insert *exemption clauses* in their standard form contracts to exclude or limit liability for negligence

**Trust** – an arrangement that transfers property to a person who administers it for the benefit of another person

**Trustee** – a person or company who administers a trust

**Beneficiary** – a person who is entitled to the benefits of a trust

**Beneficial Owner** – a person who, although not the legal owner, may compel the trustee to provide benefits to him

**Trust Agreement** – the document that conveys property to a trustee to be used for the benefit of a third party beneficiary

**Constructive Trust** – a relationship that permits a third party to obtain performance of a promise included in a contract for his benefit

- in some circumstances equity recognizes that a promise who has obtained a promise for the benefit of a 3rd person is a trustee; this would permit a 3rd party to enforce the contract in his/her favour

**Undisclosed Principal** – a contracting party who, unknown to the other party, is represented by an agent

The limits of privity of contract don’t apply generally in land law. If the owner of land leases it to a tenant who promises to pay rent/keep property in good repair, and the owner than sells it, the tenant must perform the promises for the new owner.

**Collateral Contract** – an implied contract that binds a party who made a representation or promise that induced a person to enter into a contract with another party

Courts have sometimes been prepared to enlarge the scope of a contract so that people who are closely associated with a business transaction (though not strictly a party to it) may nevertheless find themselves subject to its terms.

The Nature of an Assignment  
  
**Assignor** – a party that assigns its rights under a contract to a 3rd party

**Assignee** – a 3rd party to whom rights under a contract have been assigned

**Assignment** – a transfer by a party of its rights under a contract to a 3rd party

**Choses in Possession** – rights to tangible property that may be possessed physically

**Choses in Action** – rights to intangible property such as patents, stocks, and contracts that may be enforced in the courts

Choses in action give people the means of accumulating savings in bank accounts and through ownership of shares to put those assets to work as capital of corporations. This device links personal saving to business investment.

**Statutory Assignment** – an assignment that complies with statutory provisions enabling the assignee to sue the other party without joining the assignor to the action

The requirements are:  
a) the assignment was absolute (unconditional and complete)  
b) it was in writing  
c) the promisor received notice of it in writing

**Equitable Assignment** – an assignment other than a statutory assignment

The Effect of Notice on the Promisor  
- to be effective, *all* assignments require that notice be given to the promisor, but that doesn’t mean the promisor’s consent is required  
- a promisor ignores a notice of an assignment at his peril  
- confronted with a demand for payment from one who claims to be an assignee, the promisor should, of course, require proof of the assignment to protect himself from fraud, but if it is legitimate, he must make the payments to the assignee  
- if he persists in making payment to his original creditor, he can be sued by the assignee and required to pay the amount a second time

The Effect of Notice from Contending Assignees  
- more than one person may claim to be the assignee of the same right  
- the assignee who first gave notice to the debtor is the one entitled to payment

An assignee can never acquire a better right to sue the promisor than the assignor himself had.

**Set Off** – the right of a promisor to deduct an existing debt owed to it by the promise  
  
- an important defence of a promisor is his right to *set off* a debt owed to him by the assignor at the time the assignment is made  
- it is important for an assignee to give notice as soon as possible; if he delays, his rights may deteriorate

**Assignments by Operation of Law**  
Upon the Death of a Party

**Executor** – the personal representative of a deceased person named in his or her will  
- the law automatically assigns his/her rights and obligations under outstanding contracts to a personal representative known as an *executor*

**Intestate** – when a person dies without leaving a will

**Administrator** – the personal representative of a person who dies intestate

Bankruptcy

**Receiving Order** – a court order to commence bankruptcy proceedings

**Bankrupt** – declared insolvent by the court

If the creditors satisfy the court that their debtor is insolvent, the court will declare him *bankrupt* and appoint a licensed trustee to take charge of his property. It is then the duty of the trustee to liquidate the assets and to settle the creditors’ claims.

**Negotiable Instruments**

**Negotiable Instrument** – a written contract containing a promise, express or implied, to pay a specific sum of money to the order of a designated person or to “bearer”

**Negotiation** - the process of assigning a negotiable instrument

**Endorse** – sign one’s name on a negotiable instrument

**Holder** – a party who acquires a negotiable instrument from the transferor

Notice does not affect the transfer of a negotiable instrument because the promisor is liable to pay only one person, the holder of the instrument for the time being.

An assignee for value of a negotiable instrument may succeed in an action against the promisor where the assignor himself wouldn’t have succeeded. Ex. even when a promisor is induced to sign a negotiable instrument because of fraud/undue influence, he may be sued successfully by a subsequent innocent holder who has given consideration for the instrument to the party guilty of the fraud; yet the rogue could not himself enforce the promise in the instrument.