except those in which some public duty has been undertaken or public naisance committed, are all cases in which an action might have been maintained on the contract. It was considered, therefore, that the combined effect of this principle and of the rule that no one but a party to a contract can sue on it, was that in no case whatsoever create any right of action arise in favour of a stranger to the contract as a result of the non-performance.

That there is an obvious petitio principii involved in the argument seems evident. It does not by any means follow that, because a party to a contract can recover in tort only when the rights acquired by his contract are sufficient to enable him to maintain an action, a person who had nothing to do with the contract, but who subsequently finds himself damaged by what the parties to it have done or left undone, should be told that he has no remedy at all. To declare such a person unable to sue on the contract itself is one thing (*b*). It is quite another thing to argue that the principle by which a party to the contract, whatever the form of his action, can recover only where he could have recovered in a suit directly upon the contract, involves the corollary that a stranger to the contract, being unable to sue upon it, is precluded from redress altogether. In the one case, as the parties have chosen to define their relations by an agreement between themselves as to the subject matter, it is reasonable enough to say that the agreement shall be the measure of their rights in regard to the same subject matter. But the reasoning which would make this principle controlling with respect to a stranger to the contract, a person who has not assented to it and has no means of securing its proper performance, seems to savour strongly of that scholasticism which has so often led the English Courts to emphasize the shadow

(*b*) It is an interesting example of the conservatism of English jurisprudence that, even after the supremacy of equity over law is supposed to have become an accomplished fact, the rule that a stranger to a contract cannot sue on it, even when it was made for its express benefit, should subsist side by side with the doctrine that such a contract will create a right of action in favour of the stranger to it when it amounts to a declaration of trust: *Re d'Angebau* (1880) 15 Ch. D. 57; *Re Flavell* (1883) 25 Ch. D. 93; *Gandy* v. *Gandy* (1885) 30 Ch. D. 57. The theory upon which, according to Crompton, J., in *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393, the common law rule is based, viz.: that it would be a "monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued," would, if admitted as valid by equity courts, prove fatal to most declarations of trust. The obvious inference seems to be that, unless some reasonable way of differentiating declarations of trust in favour of a designated person from other contracts for the benefit of a third party, the equitable and common law rules cannot logically co-exist in the same system of jurisprudence.