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Contractual Rights and Third Parties

Mia Hoffrén*

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Abstract

If a promisee has a contractual right (e.g. a lease or a right of pre-emption) in an object belonging to a promisor, and the promisor transfers the property to a transferee, it has to be decided if the transferee is bound by the promisee's right. According to the traditional theory, property rights are *prima facie* binding on third parties while mere personal rights are not. If the right of the promisee is a property right, it is enforceable against the transferee. If it is not, it will not affect the transferee even if he knew of it at the time of the transfer. This rule leads to outcomes that are neither efficient nor fair.

In Finland, the sharp division between property rights and personal rights has been rejected. Rights can be binding on some third parties and not binding on others. It is often suggested that, as a rule, a contractual right should bind a transferee who knows of it at the time of the transfer. Protection should be denied only from rights that are considered undesirable from a social and economic perspective.

To find a new approach to the issue I utilize the framework introduced by *Guido Calabresi* and *A. Douglas Melamed* in their article "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (85 Harv. L. Rev. 1089). Promisee's contractual right can be protected by a property rule or a liability rule. If it is protected by a property rule, it is enforceable against the transferee. If it is protected by a liability rule, it is not enforceable against the transferee, but the transferee is liable to the promisee for damages for interference with contract.

There are no grounds for denying the promisee protection if the transferee knew of the promisee's contractual right at the time of the transfer. Therefore, contractual rights should be protected against transferees with actual knowledge of them. Since

enforcing a contractual right against a transferee who is not a party to the contract can present a variety of problems, it is, as a rule, better to employ a liability rule than a property rule.

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*University of Turku, Faculty of Law, FI-20014 Turku, Finland, mia.hoffren@utu.fi