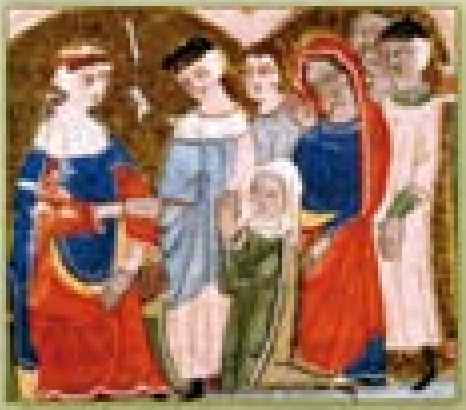
Contracts for a Third Party Beneficiary

A Historical and Comparative Account



Edited by
Jan Hallebeek & Harry Dondorp

Contracts for a Third-Party Beneficiary

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Contracts for a Third-Party Beneficiary

A Historical and Comparative Account

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Cover illustration: A miniature illustrating Digest title 25.1 in a Bolognese manuscript (end of 14th century). This depicts a court scene, where a woman and her daughter, assisted by a jurist, are claiming restitution of a dowry, while the defendants, standing at the back, refuse restitution until their expenses, previously incurred, are deducted. The plaintiffs are appealing to the judge to decide in their favour. Restitution of a dowry, according to some texts in the *Corpus iuris* (D. 24.3.45 and C. 5.14.7), was one of the few claims which could be brought by a third-party beneficiary. © Austrian National Library Vienna, Picture Archive.

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INTRODUCTION

Most of our present day systems of law are familiar with the idea that third parties can derive rights in contract without themselves having concluded the contract. This can be established in various ways. Firstly, one may become creditor of the obligation one did not enter into through a cession of the former creditor's right. Secondly, a principal can become creditor of the obligation as a result of the contract his agent entered into on his behalf. Thirdly, there is the contract in favour of a third party. This third party, not being a party to the contract, acquires the right stipulated for him by the contracting parties. In some systems of law (Germany, England) this right is derived directly from the contract itself, in other systems of law (the Netherlands, South-Africa) this right is acquired through an explicit acceptance by the third party. Only the first category mentioned here, i.e. the contract in favour of a third party which directly confers a right to the third beneficiary, will in this volume be designated with the technical term 'third-party beneficiary contract'. For the other systems of law, where the third party acquires his right in a different way or not solely from the contract in his favour, the term 'contract in favour of a third party' will be used. In order to describe the historical developments until 1900 the term *stipulatio alteri* will be used for all contracts where parties agree that something be given or done to a third beneficiary, irrespective of the question whether or not a right is stipulated for the other.

The three legal concepts just mentioned, i.e. cession, agency and the contract in favour of a third party, have in common that they clash with the fundamental rules of law which historically were part of the legal traditions on which our contemporary systems of law are built. Roman law was characterized by various maxims and rules of law which could be adopted as serious obstacles to stipulating a right for a third party. These maxims were firmly rooted in the Institutes of Justinian (482–565). It was considered impossible to stipulate that something be given or performed to another person, or as the Roman maxim reads *alteri stipulari nemo potest.*[1] Moreover, it was neither possible to acquire

[1] Inst. 3.19.4 and 19; Ulp. D. 45.1.38.17.

contractual rights through an *extraneus*, i.e. an outsider, somebody who was not one's slave or one's child under paternal control.[2] English contract law, which was not significantly influenced by the civil law tradition, was, especially during the nineteenth century, characterized by the so-called parties only-rule (privity of contract), which implied that only the parties to a contract can derive rights from their agreement.[3] Both traditions, the continental one, based on Roman law, and the Anglo-American one, based on English law, are nowadays familiar with the idea that a third party C can acquire a right which was stipulated in his favour between parties A and B. Thus, at a certain stage of development, as a result of a continuous process or new legislation, our Western legal traditions must have accepted a concept not easily compatible to their original principles.

In a number of Western European jurisdictions, it is only in recent times that it is acknowledged that a third party can acquire contractual rights stipulated for him by others. In some of the authoritative textbooks on Roman law the present-day contract in favour of a third party and the idea that third parties can acquire enforceable rights, is presented as incompatible with the Roman maxim *alteri stipulari nemo potest*. As a result of the recent developments just referred to, this maxim and its interpretation through the ages, has become a topical subject.

Whether it is justified or not to present the maxim *alteri stipulari nemo potest* as an obstacle to the idea of stipulating rights for a third party, is itself a legitimate question. In the well-known book by Max Kaser (1906–1997), *Das römische Privatrecht*, the maxim *alteri stipulari nemo potest* is seen as a general rule for the entire law of obligations, preventing generally both the stipulator and the third beneficiary from deriving a right from the contract concluded by the stipulator in the third beneficiary's favour, although there are exceptions to the rule. In some cases the stipulator who stipulated that something be performed to a third person, can bring an action, viz. if he has a monetary interest in the performance or if a penalty clause was added. Kaser qualified such stipulations as *unechter Vertrag zugunsten Dritter* (literally: non-genuine third-party benefit contract).[4] In the *Corpus iuris*, there are even exceptional

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[2] *Per extraneam personam nihil adquiri posse* (Inst. 2.9.5). This rule is similarly phrased in Paul D. 45.1.126.2 and Diocl. C. 4.27.1*pr*.

[3] See for the history of privity: Palmer, *The Paths to Privity*.

[4] Kaser I, p. 491.

cases where the third beneficiary was granted an action against the promisor.

In his much-praised book *The Law of Obligations; Roman Foundations of the Civilian Tradition*, Reinhard Zimmermann (1952) described the *alteri stipulari*-rule in a somewhat different way and stated that in the past it was taken to prohibit several things, not only what we call third-party benefit contracts, but also direct representation (agency). In view of the *alteri stipulari*-rule the modern German third-party benefit contract (BGB § 328 I) would have been inconceivable for the Roman jurists.[5]

As already stated above, in some systems of law, the possibility for third parties to acquire a right stipulated for them by others was only recently aknowledged. In the Netherlands it was not earlier than January 1st 1992, i.e. when book 6 of the present-day *Burgerlijk Wetboek* acquired force of law, that contracts in favour of a third party received a fully-fledged place within the law of obligations and that rights stipulated for a third party became generally enforceable by the latter, at least after he had accepted the clause in his favour.[6] The former Dutch civil code of 1838 only contained a provision derived from the French *Code civil*, which allowed the clause in favour of a third party to have certain effects only in more exceptional situations.[7]

A comparable development can be traced in English law, which until recently was characterized by the parties only-rule: only the parties to a contract can derive rights from their agreement. New legislation, however, has reformed this privity rule. The Contracts (Rights of Third Parties) Act 1999 introduced the possibility of third party rights into English law. According to this Act the third party "may in his own right enforce a term of the contract if (a) the contract expressly provides that he may, or (b) (…) the term purports to confer a benefit on him" unless "on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party".[8]

These recent modifications of private law in the Netherlands and in England introduced the validity of contracts in favour of a third party and the enforceability of the rights stipulated for the third in such contracts. The English version (as laid down in the Contracts [Rights of Third Parties] Act 1999) comes rather close to the Geman third-party

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[5] Zimmermann, pp. 41 and 34.
[6] Art. 6:253 BW.
[7] Art. 1353 of the Dutch Civil Code of 1838; cf. art. 1121 Code civil.
[8] §§ 1(1) and 1(2) of the Contracts (Rights of Third Parties) Act 1999.

benefit contract, which was acknowledged in the Bürgerliches Gesetzbuch of 1900.[9] Following the traditional literature on Roman law, these modifications can be seen as setting aside the principle expressed by the Roman maxim *alteri stipulari nemo potest*.

However, one should be cautious in reading Roman maxims from a purely contemporary perspective, which includes not only the acknowledgment of third-party rights in contract, but also of cession, agency and an open system of contracts. What we do encounter in the sources of Roman Law and in the development of Western legal thought is the problem of the way parties to a contract can validly stipulate that something be performed to a third person and of the way parties can achieve enforceability by the third beneficiary. The present day third-party benefit contract may be seen as the eventual answer to this problem. However, it was not invented before the end of the nineteenth century.[10]

The purpose of this study is to show the way in which the problem of the third-party beneficiary was dealt with during the various periods of Western legal thought. Four chapters review the doctrine and practice of the civilian tradition (Roman law, Middle Ages, seventeenth and eighteenth centuries, nineteenth century), two chapters deal with English law (before 1900, twentieth century), while the final chapter discusses the subject from the perspective of present-day comparative law. Some of the authors who contributed to this volume have investigated the question of third-party rights in contract for many years. Some results of this meticulous labour are already published, others will be published shortly. This volume, although based on a thorough investigation of primary sources, is characterized by a steady balance between the major lines of development and a profusion of technical details. Moreover, the story is told from a consistent perception of how doctrine and practice concerning the complicated subject of contracts in favour of a third beneficiary must have developed during the course of time, i.e. from the Middle Ages until our present day. Throughout the volume a consistent terminology is applied and special attention

[9] BGB § 328 I; the German Civil Code does not require an explicit acceptance by the third beneficiary in order to enforce performance.

[10] Although it may be argued that a comparable concept was already acknowledged in Stair's Institutions of the Law of Scotland (1693) and by some of the Roman-Dutch authorities.

is paid to basic notions of English law which for the continental jurist sometimes take a lot of thought. By so doing, it is hoped that this study, although primarily intended for those who are specialized in legal history, will also be of interest for all who are engaged with present-day private law—scholars, practicioners and advanced students.

CHAPTER ONE

ROMAN LAW

1.1 *Introduction*

Justinianic law, as found in the *Corpus iuris civilis*, the codification of the Roman Emperor Justinian (527–565), dating from the sixth century A.D., is sometimes compared with the double-faced head of Janus, the Roman God of time, looking backwards and looking forwards. The *Corpus iuris* reflects the final result of legal developments in Roman Antiquity and at the same time it is the starting point for medieval legal scholarship from the twelfth century onwards. In this chapter we will focus on the law of Roman Antiquity, in the next chapter medieval developments will be dealt with.

The law of Roman Antiquity covers a period of almost one thousand years, from the Law of the XII Tables in the fifth century before Christ until the days the *Corpus iuris* was compiled. In this chapter we will mainly deal with Justinianic law and not so much with the law of earlier periods. Roman law in its Justinianic form was studied and interpreted by the medieval jurists and eventually it was in its medieval interpretation adopted into the legal practice of indigenous law in many parts of continental Europe. However, some attention will also be paid to the classical Roman law, which covers roughly the period from the beginning of our era until the end of the third century A.D.

As mentioned already in the introduction, the *Corpus iuris* contains a maxim, stating that "nobody can stipulate for another (*alteri stipulari nemo potest*)". However, the significance of this maxim had altered considerably prior to the compilation of the *Corpus iuris*. The meaning of these words in their Justinianic context can only be properly explained when we take into consideration pre-Justinianic developments.[1] For this reason we will first examine the maxim *alteri stipulari nemo potest* in its historical

[1] Although we must realize that for the medieval understanding of the maxim these developments did not play an important role. As a consequence the medieval significance of the maxim may deviate from what it was supposed to mean in its original Justinianic context.

development from the classical period until the days of Justinian. By so doing we will also see in which exceptional cases the *stipulatio alteri* was nevertheless effective for the parties. As will be shown, the verbal contract called *stipulatio* could indeed be used to stipulate for a third party, at least if certain conditions were met. But also another Roman law contract was suitable for the purpose of stipulating in favour of a third party, namely the mandate for another (*mandatum alteri*). Subsequently, we will pay attention to another maxim relevant for the subject we investigate, namely that one cannot acquire a right through an extraneous person (*per extraneam personam nihil adquiri posse*). Finally, we will depict some of the other exceptional categories and cases in the *Corpus iuris*, where the agreement between parties that something be performed to a third person was effective, and the third-party beneficiary sometimes acquired a remedy against the promisor, in spite of the fact that he was not party to the contract.

1.2 *Justinian's Institutes*: alteri stipulari nemo potest

As was stated in the introduction, the Institutes of Justinian, a textbook with force of law and part of the *Corpus iuris civilis*, contained two maxims, which in later times were seen as serious obstacles to stipulate for a third party. One of these, *per extraneam personam nihil adquiri posse*, we will discuss below in § 1.7. The other was the rule *alteri stipulari nemo potest*: no one can stipulate for another.

The Roman stipulation (*stipulatio*) was a contract with its origin in a distant past. It was a verbal contract, which came into being through a formally phrased question pronounced by the stipulator (*stipulator*), followed directly by the answer of the promisor (*promissor*). The stipulator had to ask, for example, "do you promise (*promittis*) to give to me the slave Stichus?" upon which question the promisor would answer "I promise (*promitto*)". Thus, it was required that parties were present. Moreover they had to use the same verb in question and answer. Normally, the stipulator would stipulate that something be given to himself. If all formal requirements were met, this contract would result in only one obligation. The promisor (debtor) was by his promise bound to the stipulator (creditor) to fulfil his commitment. In the event of non-performance, the stipulator could sue the promisor.

The maxim from Justinian's Institutes just referred to, namely *alteri stipulari nemo potest*, seems to consider this verbal contract (the Roman

law *stipulatio*) unsuitable for stipulating for another, i.e. that something be given to or done for a third-party beneficiary, not being the stipulator. The maxim explicitly mentions the verbal contract of stipulation and no other contracts. For this reason it was in later times questioned whether the maxim by analogy could be applied to other contracts. The *stipulatio alteri* was discussed within a title of the Institutes dealing with ineffective stipulations (Inst. 3.19 *de inutilibus stipulationibus*), which implies that this kind of stipulation was not prohibited by law, but as a principal rule it simply had no effects.

1.3 *Classical Roman law*: alteri stipulari dari nemo potest

And yet we may question whether this is the correct meaning we should ascribe to the rule in Justinianic law. This has to be explained more fully. There are some texts in the sources, which make it clear that the involvement of a third person does not always render the *stipulatio* ineffective. What these texts emphasize is that as soon as a third person, not being the promisor or stipulator, is involved, apparently the stipulator's interest became a relevant criterion.[2] This also holds good for the *stipulatio alteri*. Whenever the stipulator had an interest in the performance to the third-party beneficiary, the *stipulatio alteri* was nevertheless effective, at any rate between promisor and stipulator. In the event of non-performance it was the stipulator who could sue the promisor. The beneficiary, not being a party to the contract of the *stipulatio* and in all probability absent at the moment the *stipulatio* was entered into, was not capable of enforcing what was promised in his favour, but the stipulator could claim damages.[3] The stipulator's interest had to be actionable, i.e. it should have a monetary character. As will be shown below, it could for example consist in the fact that the third-party beneficiary was the stipulator's creditor. The stipulator also could construe a kind of artificial interest, namely by stipulating the payment to himself of a fine for the unhoped case that performance to the third-party beneficiary did not take place. This could be achieved by adopting a penalty clause into the *stipulatio alteri*.[4]

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[2] Cf. Cels. D. 42.1.13pr, Cels. D. 45.1.97.1, and Pap. D. 45.1.118.2.
[3] Ulp. D. 45.1.38.17, Inst. 3.19.19.
[4] For the idea that the penalty clause constitutes an interest see Pap. D. 45.1.118.2.

In classical Roman law the maxim *alteri stipulari nemo potest* was phrased in a slightly different way than in Justinianic law: nobody can stipulate that something be given to a third person (*alteri stipulari dari nemo potest*). This wording can only be explained against the background of the formulary procedure, which was the common way of litigation during the classical era of Roman law (from the beginning of the first until the end of the third century A.D.). Even if the stipulator had an actionable interest in the *stipulatio alteri*, there could be a procedural obstacle rendering the *stipulatio* ineffective.

Which remedies were normally used, when a stipulator stipulated for himself and what had to be proved in legal proceedings? Where it was stipulated that a certain amount of money (*certa pecunia*) or a certain specific object (*certa res*) be given, the stipulator had to use the *condictio* to enforce the payment or to claim the object. In such a case, the formula of the *condictio* would require that the stipulator had demonstrated that a certain amount of money or a certain object was owed to him. At the same time the *formula* was the instruction to the judge. The formula of the *condictio* for money owed, the *actio certae pecuniae*, reads as follows:

> if it appears that the defendant has to give to the plaintiff 10.000 sesterces, thou, judge, hast to sentence the defendant towards the plaintiff to a payment of 10.000 sesterces; if this does not appear, thou hast to absolve the defendant.[5]

In the event of a *stipulatio alteri* of a *certum*, i.e. the stipulation to give a certain amount of money or a specific object to a third-party beneficiary, it was impossible for the stipulator to furnish the required proof. There was no amount of money or specific object which the promisor owed him, since this performance was 'owed' to the third party. As a consequence, there was no performance to the plaintiff which the judge could estimate in money.[6] In such cases it may well be possible that the stipulator had a financial interest in the payment to the third party or in the transfer of the object to the third party and it may well be that this interest could be valuated in money, but the formula of

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[5] Si paret Numerium Negidium Aulo Agerio sestertium decem milia dare opertere, iudex Numerium Negidium Aulo Agerio sestertium decem milia condemnato, si non paret, absolvito.

[6] In classical Roman Law something could only be due, if such obligation could be nullified by paying money, the so-called *condemnatio pecuniaria*-principle of the formulary procedure.

the *condictio* simply did not allow the judge to estimate this interest, for it first had to be proven that a certain amount or a specific object was owed to the plaintiff.[7]

Where it was stipulated that something be done for a third-party beneficiary (*stipulatio alteri facere*), this procedural problem did not occur. The performance was phrased as *incertum* (not precisely determined), i.e. as an act the promisor promised to perform and not as an amount or object the promisor promised to give. In such a case the *actio ex stipulatu* could be used, allowing the judge to estimate the plaintiff's interest in money. The formula of the *actio ex stipulatu* reads as follows:

> In view of the fact that the plaintiff has stipulated from the defendant to…(more detailed description of the promised act), thou, judge, hast to sentence the defendant to the payment of all he owes the plaintiff in view of this fact; if this does not appear, thou hast to absolve the defendant.[8]

In view of the procedural problems in classical times resulting from the stipulation that something be given to a third-party beneficiary, i.e. that this stipulation was ineffective, since the stipulator could have no remedy in spite of the fact that he could have a monetary interest in the performance to the third party, the classical jurists formulated a rule of law, prescribing that nobody can stipulate that something be given (*dare*) to a third person (*alteri stipulari dari nemo potest*). The jurist Gaius (middle second century A.D.), for instance, referred to this rule.[9] It was, by contrast, certainly possible to stipulate that something be 'done' (*facere*) for a third person. Provided the promisee had a monetary interest in this performance, he could bring an *actio ex stipulatu* against the promisor to claim damages in the event of non-performance to the amount of his interest. A tutor, for example, when giving up his part of the administration of the pupil's tutilage and leaving it entirely to his fellow tutor, could stipulate from the latter to guarantee through a *cautio rem pupilli salvam fore* the safety of the pupil's property. This was done to

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[7] For this very reason the Proculians considered the stipulation *sibi et Titio dari* to be partially valid (Gai. 3.103, cf. Inst. 3.19.4). In such a case it could be demonstrated that part of the performance was owed to the stipulator and this part could be estimated in money.

[8] Quod Aulus Agerius de Numerio Negidio incertum (more detailed description) stipulatus est, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito.

[9] See Gai. 3.103.

avoid that the former tutor would be held liable by the pupil under an *actio tutelae* at the moment of the pupil reaching majority.

In later classical time, when the formulary procedure was on its return, we trace in some jurists a somewhat different approach. Where it was stipulated to give something to a third party, the jurist Papinian († 212) considered this performance to the third person to be a *certum*, but at the same time towards the stipulator it was an *incertum*, at least if the latter had an interest.[10] This could imply, but this cannot be said for sure, that the stipulator would have an *actio ex stipulatu* at his disposal.

1.4 *Later developments*

Outside the sphere of the formulary procedure, i.e. in proceedings outside Italy and from the moment the *extraordinaria cognitio* had taken the place of the formulary procedure, the stipulation that something be given to a third person (the *stipulatio alteri dari*) could be effective, provided that the stipulator had an interest. The formula of the *condictio* was no longer used in litigation. As a consequence it was no longer required that the plaintiff demonstrate that a certain amount of money or a certain object was owed to him. Whether it was stipulated to give something to a third party or to do something for him, as long as the plaintiff could show a monetary interest in the performance of the *stipulatio*, he could sue the promisor in the event of non-performance. Thus, in post-classical times, the classical rule *alteri stipulari dari nemo potest* had actually become redundant. After the decline of the formulary procedure, there was no longer any difference between stipulations that something be given to a third person and stipulations that something be done for him. In both cases the stipulation was effective, if the stipulator had an interest. At the same time the requirement that the stipulator should have an interest for the *stipulatio alteri* to be effective, was still there.

The classical rule *alteri stipulari dari nemo potest* is not only handed down in the text of Gaius mentioned above, which was not affected by the elaboration of the compilers of the *Corpus iuris*, but also in a few scattered texts in the *Corpus iuris* itself.[11] However, the purpose of post-classical elaborations of the classical texts—or that of the compilers

[10] Pap. D. 45.1.118.2. See about this text also Apathy, pp. 102–103.
[11] Diocl. C. 8.38(39).3 (290); cf. also Ulp. D. 45.1.22.

themselves—was not to abandon the maxim but to transform it into the more generally phrased rule that nobody can stipulate for another. As a matter of fact, this rule had a limited significance: it was only applied to the cases where the stipulator lacked a monetary interest in the performance to the third party. As a consequence, we find the newly formulated rule in the Digest side by side together with the major exception to this rule "unless the stipulator has an interest", probably also the result of post-classical or Justinianic elaborations.

> Ulp. D. 45.1.38.17
> Nobody can stipulate for another, except a slave for his master and a son for his father. Such obligations are invented for the purpose, that everyone acquires what is in his interest. That something be given to another is not in my interest at all. It is clear that if I want to achieve this, it is useful to stipulate a fine, so that, if the performance is not carried out as agreed, the stipulation is also effective for the one who has no interest at all. For in case of a penalty clause it does not matter what kind of interest someone has. What counts is the amount of the fine and the condition of the stipulation.

> Ulp. D. 45.1.38.20
> If I stipulate for another, while I have an interest, let us see whether a stipulation is concluded. And Marcellus states that the stipulation is valid in the following specific case. Someone, who started to take care of the administration of a pupil's tutilage, left it entirely to his fellow tutor and stipulated that the pupil's patrimony will be intact. Marcellus says it can be defended that this stipulation is valid, because the stipulator has an interest that is done what he stipulated, since if this would not be done, he will be obligated towards the pupil.[12]

These were the fragments adopted in Justinian's Institutes.[13] Thus, generally phrased and in its Justinianic context the *alteri stipulari*-rule does not

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[12] Ulp. D. 45.1.38.17. Alteri stipulari nemo potest, praeterquam si seruus domino, filius patri stipuletur: inuentae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur, nihil interest mea. plane si uelim hoc facere, poenam stipulari conueniet, ut, si ita factum non sit, ut comprehensum est, committetur stipulatio etiam ei, cuius nihil interest: poenam enim cum stipulatur quis, non illud inspicitur, quid intersit, sed quae sit quantitas quaeque condicio stipulationis.

Ulp. D. 45.1.38.20. Si stipuler alii, cum mea interesset, uideamus, an stipulatio committetur. et ait Marcellus stipulationem ualere in specie huiusmodi. is, qui pupilli tutelam administrare coeperat, cessit administratione contutori suo et stipulatus est rem pupilli saluam fore. ait Marcellus posse defendi stipulationem ualere: interest enim stipulatoris fieri quod stipulatus est, cum obligatus futurus esset pupillo si aliter res cesserit.

[13] Inst. 3.19.19 and 20.

express that there is a procedural problem for the stipulator to enforce the *stipulatio alteri* or to claim damages in case of non-performance, but that there is a requirement of substantive law for the *stipulatio alteri* to be effective, namely that the stipulator has an interest.

To summarize, in classical law the rule *alteri stipulari dari nemo potest* was applied to all situations where it was stipulated that something be given to a third person, whether the stipulator had an interest or not. The phrasing of the *condictio* would prevent the stipulator from suing the promisor in case of non-performance. In Justinianic law the more generally phrased maxim *alteri stipulari nemo potest* was a rule of substantive law, prescribing that a certain interest was required for the *stipulatio alteri* to be effective and this is irrespective of the question whether the performance to the third party was a *certum* or an *incertum*.[14]

1.5 *The stipulator has an interest himself*

But what exactly could this interest in the performance to the third-party beneficiary be, which rendered the *stipulatio alteri* effective, at least between the parties? The Roman law sources mention specific examples of the interest the stipulator may have in the performance to the third party. Firstly, it could be that the third party was the stipulator's creditor. The promisor's performance to this creditor was meant to release the stipulator from his debt and by so doing to avoid the enforcement of a penalty or the alienation of mortgaged property.[15] More generally, it seemed sufficient to stipulate a performance to one's creditor, if this performance would contribute to the performance that one was obliged to perform.[16] A second example, referred to already as an example of the promise to do something for a third party, is recorded in a text displayed above, viz. Ulp. D. 45.1.38.20. A tutor, when giving up his part of the administration of the pupil's tutilage could stipulate from his fellow tutor to guarantee the safety of the pupil's patrimony.

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[14] See Ankum, De voorouders, and Ankum, Une nouvelle hypothèse.
[15] Inst. 3.19.20.
[16] Three examples are given in Ulp. D. 45.1.38.21.

1.6 Mandatum alteri *and pacts in favour of a third party*

Apart from the stipulation, there was only one other contract in Roman law which could be used for the principal purpose of contracting that something be performed for a third party, namely a mandate (*mandatum*).[17] Mandate was one of the consensual contracts, which came into being by the mere consent between parties that one of them, the mandatary (*mandatarius*), would do something for the other, the mandator (*mandator*). In the case of a mandate there were usually two obligations. The mandatary was obligated to perform the mandate, while the mandator was obligated to reimburse the expenses incurred by the mandatary. The mandator could, for example, instruct the mandatary to pay a sum of money or to deliver a horse to a third party. A mandate that something be given to or done for a third party was valid, although the mandator could not enforce the mandate in situations where he lacked a monetary interest. However, the mandatary had the *actio mandati contraria* at his disposal in order to claim from the mandator the expenses he incurred in order to perform the mandate.[18] In case of a *stipulatio alteri* there was no room for a claim of expenses, because this contract resulted in only one obligation, namely that of the promisor towards the stipulator.

Apart from these two contracts, *stipulatio* and mandate, which could be used for the mere purpose of stipulating a performance to a third party, there were many more legal acts, where it could be stipulated in a clause or in an informal pact that—apart from the parties' main obligations—something be done or given to a third party, such as in contracts of sale, deposit, in donation, the granting of a dowry, etc. However, without the monetary interest of the 'stipulator' of the contractual clause—and what is meant here is not the *stipulator* of the verbal contract (*stipulatio*), but the vendor, depositor or donor—only in a number of exceptional cases, does the *Corpus iuris* consider such clauses to be effective and even enforceable by the third-party beneficiary. We will examine some examples below.

[17] Inst. 3.26.3.
[18] See Ulp. D. 17.1.6.4 and Ulp. D. 17.1.8.6.

1.7 Per extraneam personam nihil adquiri posse

So far we have discussed the question whether the stipulator (or mandator) has a right of action. Now we will review whether the third party himself could claim from the promisor. From Ulp. D. 45.1.38.17, reproduced above, it appeared that according to the Roman law sources, parties to a contract can only acquire what is in their own interest. They only represent themselves.[19] The fact that in principle third parties are considered as locked out was also expressed in a maxim, which was—just as the maxim *alteri stipulari nemo potest*—embodied in Justinian's Institutes. It stated that it is impossible to acquire something through an extraneous person, an outsider, i.e. not one's slave or one's child under paternal control: *per extraneam personam nihil adquiri posse.*[20] Only a few exceptions to this rule can be found. A principal can, for example, acquire possession through his agent and through such possession, ownership. Similarly phrased, the rule '*per extraneam personam*' can be found in the *Codex Justinianus.*[21]

There was only one case where acquisition of contractual rights through an extraneous and independent person was possible. When someone, acting as a kind of representative, lent out money to another in the name of his principal, the recipient would be bound towards the principal, irrespective of whether the coins were owned by the principal or his representative. In this way the principal acquired a right to claim reimbursement of the amount so lent.[22]

> Ulp. D. 12.1.9.8[23]
> Aristo writes that, if I shall have handed over coins in your name as if they are yours, while you are absent and ignorant, you acquire the condiction. Also Julian, consulted about this question, writes in book X that it should not be doubted that this judgement of Aristo is correct, i.e. that if I will have given my money in your name and in conformity with your wish, you will acquire an obligation, because in order to grant a credit

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[19] See also Paul. D. 44.7.11.
[20] Inst. 2.9.5.
[21] Diocl. C. 4.27.1pr.
[22] See also Paul. D. 45.1.126.2.
[23] Ulp. D. 12.1.9.8: Si nummos meos tuo nomine dedero velut tuos absente te et ignorante, Aristo scribit adquiri tibi condictionem: Iulianus quoque de hoc interrogatus libro decimo scribit ueram esse Aristonis sententiam nec dubitari, quin, si meam pecuniam tuo nomine uoluntate tua dedero, tibi adquiritur obligatio, cum cottidie crediturus pecuniam mutuam ab alio poscamus, ut nostro nomine creditor numeret futuro debitori nostro.

we daily request from someone else to hand over money as creditor in our name to our future debtor.

1.8 *Acquisition of remedies through slaves and children under paternal control and similar cases*

As we have seen, in general one could not enter into a contract through an extraneous person, or derive rights from a contract entered into by someone else. Even a husband was not capable representing his wife in a contract of sale.[24] However, in the event of contracts entered into by persons not being independant, such as slaves and children under paternal control, the situation was quite different. Even if these slaves or children acted in their own name, it was their masters and fathers who acquired their contractual claims.[25] In a similar way other 'principals' could acquire rights through their 'agents'. The municipality (*municipium*) acquired the rights stipulated by its *actor municipum*, as did the one under legal restraint and the pupil, when their curator or tutor contracted for them.[26] The owner of a business undertaking could acquire the rights stipulated by his *institor*, i.e. the manager he appointed to the undertaking, slave or free man, at least if this was the only way to secure his interest.[27] A principal only acquired rights stipulated by his procurator, if he was present at the moment the stipulation took place.[28]

Furthermore, the *stipulatio alteri* seems to have been effective when the promise was made in the presence of a magistrate. If the praetor compelled someone to promise to a *procurator* or *institor*, it was the principal of this *procurator* or *institor* who acquired the action.[29] There was also the promise to a public slave (*servus publicus*) in the presence of the magistrate. By means of a *cautio* a tutor had to promise to his pupil to take well care of the latter's goods and to restore these after the pupil reached majority. If the pupil could not be present or was unable to speak, the pupil's slave could stipulate from the tutor. However, if the

[24] Diocl. C. 4.50.6.3 (293).
[25] See Ulp. D. 45.1.38.17, Paul. D. 45.1.39, Ulp. D. 45.1.45 and Pomp. D. 41.1.53.
[26] Ulp. D. 13.5.5.9. According to medieval doctrine the tutor and curator were presumed to have assigned their remedy derived from the contract in favour of their ward or pupil to the latters.
[27] Ulp. D. 14.3.1–2.
[28] Ulp. D. 45.1.79; cf. also Pap. D. 3.3.68.
[29] Ulp. D. 3.3.27.1, Paul. D. 39.2.18.16 and Paul. D. 46.5.5.

pupil had no slave, a public slave (*servus publicus*) would stipulate in the presence of the magistrate, in which case the pupil would acquire an action.[30]

1.9 *Exceptional cases where a third-party beneficiary has an action*

Apart from these categories of specific persons such as slaves, children under paternal control, tutors, curators, magistrates, etc. who are apparently capable of binding the promisor to someone absent, i.e. their ward, their pupil, or an absent beneficiary, there are in the *Corpus iuris* only a limited number of casuistic texts where it seems that the third-party beneficiary himself can claim what was stipulated in his favour in spite of the fact that he was no party to the contract. There are various texts dealing with cases where restitution of a dowry was stipulated for a third party, but only in two of these it appears that the third person has an *actio utilis*.[31]

Furthermore, there are some texts where it was stipulated to restore to a third party the objects deposited. One of these, a constitution originating from the Roman Emperor Diocletian (ca. 243–316), would appear to be most important for the development of dogmatics in later legal scholarship. According to Diocl. C. 3.42.8, a depositor had stipulated restitution of the object deposited for a third party who owned this object.[32] Because of equity this third party will have an *actio utilis depositi*, although he was not a party to the contract.

> Diocl. C. 3.42.8[33]
> (pr) If the one you mention in your request, has lent out or deposited your things, you can use the *actio ad exhibendum* or the *rei vindicatio* against the holder. (1) If he concluded in a pact, that these things will be restored to you and you have succeeded the depositor, you will not be prevented from using the *actio depositi* in your capacity as heir. But if you are neither on the basis of civil law, nor on the basis of praetorian law, entitled to

[30] Ulp. D. 27.8.1.15, Paul. D. 46.6.1 and Ulp. D. 46.6.2–4.
[31] Paul. D. 24.3.45 and Diocl. C. 5.14.7.
[32] A similar case can be found in Paul. D. 16.3.26*pr*.
[33] Diocl. C. 3.42.8: (pr) Si res tuas commodauit aut deposuit is, cuius precibus meministi, aduersus tenentem ad exhibendum uel uindicatione uti potes. (1) Quod si pactus sit, ut tibi restituantur, si quidem ei qui deposuit successisti, iure hereditario depositi actione uti non prohiberis: si uero nec ciuili nec honorario iure ad te hereditas eius pertinet, intellegis nullam te ex eius pacto contra quem supplicas actionem stricto iure habere: utilis autem tibi propter aequitatis rationem dabitur depositi actio.

> the inheritance, you will understand that according to strict law you will have no action at all against the one your request is directed to. However, because of equity an *actio depositi utilis* will be granted to you.

Also another constitution from Diocletian, C. 8.54(55).3, would play a significant role in development of legal dogmatics in later times. It deals with the so-called *donatio sub modo*. An object was donated on the condition that it passed on to another person after a certain lapse of time. The latter, although not a party to the agreement, was granted an *actio utilis* in conformity with the wish of the donor. This was done through a benevolent interpretation of the law.[34]

> Diocl. C. 8.54(55).3[35]
> (pr) As often as a donation is granted in such a way that what is donated after a lapse of time is restored to someone else, it is prescribed on authority of ancient law, that if the one for whom the profit of generosity was intended, did not stipulate before the period has elapsed, the one who emanated the generosity or his heirs are capable of bringing a condiction. (1) However, because in later times the divine emperors on the basis of a benevolent interpretation of the law, in conformity with the wish of the donor, granted the one who had not stipulated an *actio utilis*, the action to which your sister was entitled, if she was still among the living, will be granted to you.

1.10 *Conclusions*

Justinianic law was, on the one hand, characterized by the idea that a stipulation in favour of a third party was ineffective: *alteri stipulari nemo potest*. It could not result in an enforceable obligation. This idea was, on the other hand, undermined right away by a major exception, viz. that the *stipulatio alteri* was indeed effective between parties as soon as the stipulator had a monetary interest or a penalty clause was added.

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[34] Another case where the third party acquired an action is D. 13.7.13*pr*, a case where a pact in favour of a third party (the seller's debtor) was made when selling mortgaged property.

[35] Diocl. C. 8.54(55).3: (pr) Quotiens donatio ita conficitur, ut post tempus id quod donatum est alii restituatur, ueteris iuris auctoritate rescriptum est, si is in quem liberalitatis compendium conferebatur stipulatus non sit, placiti fide non impleta, ei qui liberalitatis auctor fuit uel heredibus eius condicticiae actionis persecutionem competere. (1) Sed cum postea benigna iuris interpretatione diui principes ei qui stipulatus non sit utilem actionem iuxta donatoris uoluntatem competere admiserint, actio, quae sorori tuae, si in rebus humanis ageret, competebat, tibi accommodabitur.

Similarly, Justinianic law was, on the one hand, characterised, by the idea that only parties to a contract can derive rights from the contract they entered into. It was impossible to acquire rights through an 'intermediary' without entering into the contract oneself: *per extraneam personam nihil adquiri posse*. This idea was, on the other hand, undermined by the fact that persons not being extraneous, such as slaves and children under paternal control, always acquired contractual claims for their master or father. Moreover, there were major exceptions: as was shown above, rights could be acquired through the municipality's *actor municipum*, through the curator of the one under legal restraint, through the pupil's tutor, through the principal's *institor*, sometimes through the principal's procurator, through the principal's representatives in court, as his *procurator* or *institor*, and through the public slave, representing a pupil. Moreover, there were more casuistic cases in the *Corpus iuris*, which cannot be characterized as belonging to one of these categories, but which nevertheless showed that the third-party beneficiary had an action at his disposal to enforce what was stipulated in his favour.

In the following chapter will be demonstrated how the medieval legal scholarship developed its ideas about the contract in which the parties intended to confer a benefit upon a third party. If the maxims of Roman law discussed above were isolated from their context and adopted as basic rules of law, predominating the entire law of obligations, it would become difficult to consider the *stipulatio alteri* in general terms as effective, and not to speak about the third-party beneficiary generally deriving a claim from the *stipulatio alteri*. However, if the maxims were adopted as mere guidelines which could quite easily be derogated from, and if the exceptional categories and exceptional cases would start to play a life of their own and be regarded as the expression of general principles, this would pave the way for the acceptance of an effective and enforceable *stipulatio alteri.* But whatever course legal scholarship adopted, the chance that the original character of Justinianic law and the original purport of many Roman law texts would be altered when these texts are brought to life in different social and legal circumstances, is considerable. As we will see in the next chapter, this is what actually happened.

CHAPTER TWO

MEDIEVAL LEGAL SCHOLARSHIP

2.1 Alteri stipulari nemo potest; *the medieval approach in general*

In the Roman *stipulatio alteri* (and *mandatum alteri*) it was the *stipulator* (or the mandator) who stipulated that something be performed to someone absent, a third-party beneficiary. It was the *stipulator* (or mandatary) who made the first move, not the promisor (or the mandatary). As was shown, the main question was whether the contract was effective. In the Middle Ages, both in Canon law and in the indigenous law of Castile, a similar question was discussed. These jurisdictions were not as hostile towards the idea of stipulating in favour of a third party as the Roman law of obligations and demonstrated that the Roman approach deviated from prevailing legal practice at the time the study of the *Corpus iuris* was taken up. In Canon law and in Castilian law the central issue was not whether it was possible to stipulate in favour of a third party, but rather in which way one could obligate oneself by way of a promise towards an absent person. It was the promisor who wanted to bind himself. The question was whether this could be achieved through a promise made in the presence of a kind of intermediary, someone who accepted the promise instead of the absent person. Henceforth this intermediary will be termed stipulator, i.e. the recipient of the promise who was present when the promise was made.

In theory, one could argue that this stipulator could act as a kind of intermediary, who ensured that consent between the promisor and the third party was established, someone comparable to the present-day agent or representative. However, not only was the concept of agency or representation—except for the exceptional case of a money loan—not accepted in the Roman law of obligations, but for many contracts mere consent did not suffice. Both the *stipulatio* and usually also the real contracts required the presence of both parties. Thus, from a Roman law perspective, it was doubtful whether it was possible, in general terms, to bind oneself to someone absent through an 'intermediary'.

In the medieval context the Roman maxim *alteri stipulari nemo potest* was understood to express various things, not only that the *stipulatio alteri* was

ineffective for the parties to the contract without the stipulator having an interest in the performance. It also implied that a third party could not acquire an enforceable right, regardless of the kind of contract or legal act the pact in his favour was concluded. For those exceptional cases in the Digest where the third party did acquire a right, it was argued that the maxim *alteri stipulari nemo potest* did not apply.[1] Moreover, as we will see below, the maxim was also regarded to be an obstacle to binding oneself through a promise to an absent beneficiary by means of someone physically present at the time the promise was made and acting as an intermediary.

2.2 *The example of Canon law*

Let us have a closer look at a medieval system of law which already existed before the study of Roman law was taken up, viz. Canon law. In so doing one should realize that the character of Canon law differed from that of Roman law. In a great deal of the Roman sources not much doctrine can be found and many texts have a casuistic character. Canon law, on the other hand, was dominated by axioms, universally applicable standards resulting from Divine Revelation or defined by theology and principles which can be reduced to authoritative texts in the Scriptures and the Church Fathers.[2] Also the Canon law of contracts was dominated by a general ethical principle, viz. that there should be no falsity in our speaking. Gratian's Decree (1140/45), a private but authoritative compilation of Canon law texts, contains a fragment derived from the commentary upon the Gospel according to St Matthew by bishop Chromatius of Aquileja († 407).[3] Chromatius took as a starting point the Lord's exhortation in the Sermon on the Mount not to swear: "Let your yes mean yes and your no mean no. Anything more is from the evil one" (St Matthew 5.37). On the basis of these words, he argued that there should be no difference between

[1] See the gloss *nihil agit* ad Inst. 3.19.4.

[2] The first lines (D.1 a.c.1) of Gratian's Decree (1140/45), inspired after St Matthew 7.12, already set the pace: Omnia ergo quaecumque uultis ut faciant uobis homines et uos facite eis. Haec est enim lex et prophetae.

[3] Chromatius, *Tractatus in Matthaeum* XXIV.4, in CCSL 9A, pp. 185–498. The fragment can be found on p. 311. In Gratian's Decree these lines are ascribed to St John Chrysostomos († 407), but this fact will not have decreased the moral authority of the text.

our speaking and a statement on oath.[4] Originally this commentary of Chromatius did not apply specifically to contractual agreements, but for the canonists it became the basic rule for the law of contracts: sticking to one's word as a standard of natural reason (*naturalis ratio*). Moreover, of primary concern was the moral and legal obligation of the debtor. The question whether the creditor acquired a right which could be enforced in the *forum externum*, was of secondary importance.[5]

There are indications that against this background the canonists of the twelfth century considered the promise that something be given or performed to an absent beneficiary to be effective. In Gratian's Decree we find a formula used by a schismatic bishop who wished to return to the Church. His promise to observe thenceforth the teachings of the Church is addressed to someone present, but also through this person to St Peter. The text is not clear as to who the person present exactly is. It may have been a fellow-bishop or the Metropolitan of the Church Province. According to some canonists it is the Pope. His role seems to be twofold: on the one hand he accepts the promise made to himself and on the other hand he appears to serve as a kind of intermediary, through whom the promisor is bound to St Peter. The formula reads "I promise you and through you St Peter, the first of the Apostles, and to his vicar and his successors…".[6]

In various ways the decretists have attempted to interpret this text and to explain how one can be bound to an absentee through a promise accepted by someone present. In his *Summa decreti* (ca. 1188) Huguccio († 1210) maintained in general terms that it is indeed possible to promise through another (*per alium*). However, the exact meaning of *per alium* is not clear, at least if we want to know which legal institution Huguccio had in mind. Is *alius* a *stipulator alteri*? Is *alius* the agent of the other? Or is he a mere messenger (*nuntius*) who only serves to transfer the promisor's intention to the other, so that consent can be established between the promisor and the absentee? Huguccio's further explanation does not elucidate his view. "This is true" he argued "as

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[4] C.22 q.5 c.12: (…) ita quoque in uerbis nostris nullum debet esse mendacium (…), with a reference to Wisdom 1.11 (os autem quod mentitur occidit animam) and to Proverbs 14.5 (testis fidelis non mentietur).

[5] Literature: Spies, Roussier, and Helmholz.

[6] C.1 q.7 c.9 (…) atque promitto tibi N. et per te Sancto Petro, apostolorum principi, atque eius uicario N. beatissimo uel successoribus eius, me numquam (…).

if it was the mandatary to whom the promise was made".[7] Again, the mandatary may be an agent acting under his principal's mandate,[8] but also just a messenger. In general terms Huguccio considered it possible to be bound through an intermediary whose exact position towards the promisor and towards the third party remains unclear. It may be that Huguccio considered it possible that a principal would enforce the promise made to his agent, but this view was later explicitly rejected. It was seen as incompatible with canon 27 of the Council of Lyons (1274), the decretal *Quamquam* (VI 5.5.2).

An apparatus strongly oriented towards Roman law was the anonymous *Animal est substantia* (Paris, 1206–1210). Since the phrase "I promise you and through you St Peter" somehow resembled the Roman *stipulatio alteri*, the author of the *Animal* made a comparison and considered this promise incompatible with the Roman maxim *alteri stipulari nemo potest* because one cannot acquire for another.[9] He subsequently referred to one of the *regulae iuris* with a similar purport, viz. that it is impossible to stipulate something for a third party, neither through a pact or clause of a contract nor through a *stipulatio* (D. 50.17.73.4). The underlying reason must have been, as he explained, that one can only consent to a contract for oneself and not for another. "In this text it is different" the author of the *Animal* continued and noted that *alteri stipulari nemo potest* is only the basic rule; actually things appear to be more complicated

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[7] See Huguccio, *Summa Decretorum* ad C.1 q.7 c.9 (Ms. Paris, BN lat. 15396, fol. 106vb) s.v. *per te*: quod per alium alii potest fieri promissio, quod uerum est, et si sit mandatarius cui promittitur". The decretist Alanus ascribed a similar opinion to Bar. (the canonist Bazianus?). In Alanus the phrasing is slightly different. It reads "(…) quod uerum est si mandatarius sit secundum bar.". See Padoa Schioppa, p. 115.

[8] However, in such a case according to Roman law the promisor would not be bound to the principal, except for the case the principal was present at the moment the *stipulatio* was entered into (see D. 45.1.79) and in case it was a praetorian stipulation (see D. 46.5.5).

[9] *Animal est substantia* ad C.1 q.7 c.9 (Ms. Luik 127 E, fol. 94vb) : *Petro*. Et ita per alium iste potuit obligari. Contra Inst. De inutilibus stipulationibus § Alteri (Inst. 3.19.19). Et hoc est quia nemo potest alteri acquirere, ff. De regulis iuris, Quod tutela (D. 50.17.73). Et hec est ratio, quia nemo potest pro alio consentire. Aliud est hic. Et notandum quod prorsus nemo etc. Testator bene potest, arg. ff. de certis l. Annis (C. 2.3.28?). Vnde per papam hic eius acquiritur obligatio et per iudicem, et bene, et ex lege potius quam ex natura, ff. Rem pupilli saluam fore l. ii. (D. 46.6.2), idem ff. De procuratoribus, In cause § ult. (D. 3.3.27.1) et ff. De pactis Sities (D. 2.14.62?). Si penitus extranea persona, tunc nichil acquirit in contractibus qui retrahuntur uel non, Cod. Ad exhibendum, Si res (C. 3.42.8). In quantitatibus secus est. Si det pecuniam nomine meo, acquiritur michi directa actio, ff. Si certum petatur, Certi condictio § penult. (D. 12.1.9.8). Ratio est quia pecunia habet suum esse in genere. The latter he explained again by referring to D. 50.17.73.4.

because, according to the *Animal*, Roman law acknowledges exceptions to this principle.[10] It is possible to become obliged towards a third party through the Pope or through a judge.[11] Here the *Animal* refers to Roman texts, in which promises to give something to an absent person were made in court in the presence of a court official, and for this reason appeared to bind the promisor towards the absentee.[12] This was an exception to the rule since, in general, absent persons cannot acquire through an *extraneus* (someone other than his son or slave).[13] It seems as if the author of the *Animal* considers the one present, to whom the promise was made, to be the Pope, but here the Pope does not function as a kind of intermediary. He is not an agent who accepts the promise on behalf of St Peter, neither is he a mere messenger. According to the *Animal*, he is a magistrate, and the promise to an absent beneficiary made in the magistrate's presence, is binding. The comparison of the Pope with the judge is by no means unusual. The Pope was considered to be the immediate judge of appeal for the entire Church.

In the Ordinary Gloss upon Gratian's Decree (ca. 1216–1217) by Johannes Teutonicus (c. 1170–1245) there is another attempt to explain the validity of the promise "through you to St Peter".[14] Again, the promise is compared with the Roman *stipulatio alteri*. The Gloss first mentioned the Roman counter-arguments: it is impossible to stipulate or conclude a pact for another person, unless one is the other's slave or his

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[10] A testator can stipulate for someone else, the author of the *Animal* maintained. The reference to the allegation in the manuscript, however, is corrupt. Possibly, the remark refers to cases where one stipulates restitution of the dowry for his heir (Cf. C. 5.14.7 and D. 24.3.45).

[11] In C.1 q.7 c.9 it is not clear who the person is to whom the promise is made. The text does not say it is the Pope or a judge, but this was apparently the opinion of some of the canonists.

[12] Reference is made to D. 46.6.2 and D. 3.3.27.1. Both concern promises made before a magistrate—the first a Roman *stipulatio alteri* by a *servus publicus*, the other a *stipulatio alteri* by a procurator.

[13] Except in the case of a money loan in his (the absentee's) name, referring to D. 12.1.9.8.

[14] The gloss *et per te* ad C.1 q.7 c.9: Arg. contra Inst. de inuti. stipulat. § Si quis alii (Inst. 3.19.4), quia ibi dicitur quod alteri stipulari, uel pacisci nemo potest, nisi sit seruus eius ut ibi, uel procurator praesentis ff. de uerbo. obliga. Si procuratori praesentis (D. 45.1.79). Dic ergo ideo hoc fieri, quia papa est seruus beati Petri. Vnde dicit de se in epistolis suis seruus seruorum Dei. Vnde uersus, seruierant tibi Roma prius domini dominorum. Seruorum serui nunc tibi sunt domini. Vel hoc fit fauore religionis. Sed credo iure canonico me teneri, si ego promitto tibi me daturum Titio decem, arg. xxii q.v Iuramenti (C.22 q.5 c.12), maxime si interuenerit sacramentum arg. ff. de constit. pecu. l. i et l. Eum qui (D. 13.5.1*pr*).

agent. Two explanations were subsequently proffered why the promisor will nevertheless be bound by using the formula of Gratian's Decree. The first explanation derived from the *Glossa Palatina* (1210–1215) of Laurentius Hispanus († 1248). It considered the promise in Gratian's text to be made to the Pope and through him to St Peter and maintained that the Pope may stipulate for another because he is a *servus*, viz. the servant of St Peter, since in his letters the Pope always refers to himself as the servant (*servus*) of God's servants and in Roman law a *servus* acquires for his master. The second explanation has its roots in the apparatus *Ius naturale* (1202–5) of Alanus († 1238).[15] Alanus taught that an absentee cannot acquire through an agent (*procurator*). However, exceptionally, for the sake of the Church and the Catholic religion (*favore religionis*) the Pope, this time the absentee, is capable of acquiring through an agent. The general rule, however, that a promisee cannot acquire the benefit of a promise through someone physically present at the time the promise was made is upheld.

The Gloss then ends with: "I believe, however, that according to Canon law I will be bound, when I promise you that I will give ten to Titius (cf. C.22 q.5 c.12), especially when an oath is used (cf. D.13.5.1pr)".[16] Do we have to interpret these final lines against the background of the preceeding discussion, viz. whether one is bound by a promise towards an absent person through an intermediary (*per te*)? Or should we emphasize the difference in phrasing between the formula used by the schismatic bishop in C.1 q.7 c.9 and the wording in these last lines of the Gloss? The bishop promises "through you" to St Peter. In the Gloss, however, "I promise you" to give something to Titius.[17] In modern terms: did the Gloss discuss contracts concluded

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[15] See *Ius naturale*, gloss *per te* ad C.1 q.7 c.9 (ed. Padoa Schioppa, p. 115): Sed dicas hic pape per procuratorem obligationem adquiri speciali ratione ob favorem ecclesie et sic catholice religionis (…) per procuratorem acquiritur obligatio (…).

[16] See note 14. This is copied from the *Glossa Palatina* of Laurentius; see Padoa Schioppa, p. 116.

[17] There is a striking resemblence in phrasing with the formule Accursius († 1263) prescribed for a valid *stipulatio alteri.* Cf. his gloss *supra dictum est* ad Inst. 3.19.19. Accursius maintained it should be phrased as "Do you promise me to give to him (*promittis mihi quod dabis illi*)?" and not "Do you promise Titius to give to him?". Accursius, however, gave the phrasing of a *stipulatio* ("do you promise me?") and Johannes Teutonicus that of a promise ("I promise you") to give something to an absent person. Moreover, Accursius was, when prescribing the correct formula of the *stipulatio alteri*, dealing with stipulations where a penalty clause was added or the promisee had an interest, not with the *stipulatio alteri* in general.

through agents (promises to someone absent), contracts in favour of a third party (promises to someone present to perform towards an absent party), or both? And to what extent does Canon law deviate from Roman law? Can one, according to Canon law, stipulate for a third party without having an interest? Can an absent person acquire rights and subsequently enforce the promise? The Gloss does not clarify to whom I am bound, when I promise you to give to Titius. Am I bound towards you, or towards Titius?

According to Antonius de Butrio (1348–1408) I am bound towards Titius and it is Titius who can enforce the promise, albeit not through an action. De Butrio explained that there are various ways to bring a case before an ecclesiastical court, viz. by an action and by means of a *denuntiatio evangelica*. To enforce contracts made in his favour, an absent person cannot bring an action because neither he nor his slave were present to accept the promise, unless the stipulator ceded his (the stipulator's) claim by appointing him as *procurator in rem suam.* This was no cession (assignment) in the modern sense, but it had the same effect, viz. that the beneficiary could claim what was stipulated in his favour. He appointed the absent beneficiary as an attorney who would bring the action of the stipulator (subject to any defences which could have been raised against him) without any obligation to account for anything he recovered in the action. This would, as a matter of fact, only be possible, if the stipulator (the person to whom the promise is made) had acquired an action himself. If this is not the case, there is no action to assign. This was in conformity with Roman law. However, Antonius de Butrio continued, on the grounds of canonical equity (*equitas canonica*), promises to give something to an absent person can be enforced through *denuntiatio evangelica*.[18] The latter was a specific procedure of Canon law, which found its origin in a passage in the Gospel of St. Matthew.[19] It implied that someone may approach the ecclesiastical court and request the bishop to compel his fellow Christian to do penance and make restitution in circumstances where the latter had sinned against him by not giving the object or quantity owed.

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[18] Antonius de Butrio, ad proemium no. 69 (*Super librum I–V decretalium commentaria* ed. Venice 1578; reprint Turin 1967, fol. 4ra): In extraneo stipulante non querit actio sine cessione nisi in casibus notatis in dicto § Si quis insulam (Inst. 3.19.4). De equitate canonica uidetur quod querat ut in c. Quoties cordis oculus i. q. 7 (C.1 q.7 c.9) et quod ibi not. Quod credo ut agi possit via denuntiationis euangelice sed non ordinario iure, ut dicto c. Quamquam in 6 (VI. 5.5.2).

[19] St. Matthew 18.15–17.

The later canonists agreed with Antonius de Butrio that Canon law deviated from Roman law in providing an alternative remedy. One could apparently acquire 'rights' through an extraneous person without assignment when the stipulator did not acquire an enforceabele right himself because he had no monetary interest in the performance. The Church would then compel the promisor to keep his word towards the absentee. This did not imply that the promisor and stipulator were entirely free in phrasing the promise. Antonius de Butrio did not yet attach much value to the fact that in the last lines of the gloss *per te* ad C.1 q.7 c.9 the promise was phrased as directed to 'you' (the stipulator). According to Nicolaus de Tudeschis (or Panormitanus, 1386–1445), however, he should have done so. He should have differentiated between promises directed to the absent person as promisee and those addressed to someone present as promisee to give something to an absent person.[20] The glossators of Roman law had drawn such a distinction between two different phrasings of the *stipulatio alteri* and already maintained that a *stipulatio* phrased as "do you promise Titius to give to him?" was void, even if the stipulator would have an interest.[21] When the promise is directed towards the absent person, according to Canon law it would not have effect, albeit for another reason. Canon law did not require for a valid stipulation an immediate answer by the promisee, but it did require that the promisor's offer was at a later stage accepted by the promisee. As long as such acceptance had not yet taken place, the promise addressed to the absent beneficiary as promisee was without effect.

The view of Nicolaus de Tudeschis was followed by many more canonists and became the majority view. Hence, with regard to promises addressed to the absent beneficiary, Roman and Canon law were in agreement. Such promises, though made in the presence of an intermediary, were not enforceable. One could not stipulate: "do you promise Titius (my principal) to give to him?". Canon law deviated, however, with regard to promises addressed to the intermediary. When the *stipu-*

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[20] So that it would be in conformity with the formula, as prescribed by the Accursian gloss for the *stipulatio alteri*. Cf. Panormitanus, proemium no. 25 (*Super v. decretalium* ed. Lyons 1509, fo. 6rb); ad X 2.22.14 no. 6 (*Super secunda parte secundi decretalium*, ed. Lyons 1510, fo. 45va).

[21] The words expressing to whom the promise is made (the *verba promissoria*) should contain the name of the one present to accept the promise. The words expressing to whom something has to be given (the *verba executoria*) should contain the name of the absentee.

latio alteri was correctly phrased (with the person present to accept it as the promisee) according to Roman law there could be no remedy when the stipulator had no interest in the performance to the third party, neither for the stipulator himself, neither for the third party, although the Accursian Gloss acknowledged that the stipulation would result in a natural obligation between promisor and stipulator.[22] The Church, by contrast, had the means to compel a promisor to fulfil his natural obligation, although not through the ordinary procedure, where the *alteri stipulari*-rule still applied. Moreover, according to some canonists, a natural obligation would emerge not only towards the stipulator, but also towards the absentee. Further, this natural obligation includes a moral duty. As a consequence the promise is enforceable because it is considered sinful not to fulfil what was promised. In a specific procedure, the *denuntiatio evangelica*, ecclesiastical courts were able to hear the case *ratione peccati*. This enabled the canonists to maintain that the absentee is capable of bringing legal proceedings against the promisor—albeit through *denuntiatio evangelica*, not through an action. It was not unusual for the canonists to give priority to the principle that one should stick to his word. For this same reason they had set aside the formalities of Roman law and taught that every agreement was binding (as they deduced from the decretal *Antigonus*, X 1.35.1).[23]

2.3 *The example of Castile*

One of the regions in Europe where reception of Roman law took place at an early stage was the Kingdom of Castile.[24] In 1265 King Alphonse X (1221–1284) declared the *Siete Partidas* to apply to all inhabitants of his realm. These *Siete Partidas* contained texts which, to a large extent, were based upon or derived from the *Corpus iuris civilis* and the opinions of authoritative glossators, such as Azo († 1220). The law of contracts in the *Partidas* was characterized by the formalities

[22] The gloss *nihil interest* ad D. 45.1.38.17: stipulantis scilicet cui naturalis est quesita obligatio, ut alii detur (…).

[23] It was the majority view amongst the canonists from the days of Bartolus de Saxoferrato (1314–1357) that a promise under oath to give something to an absent person, no matter whether someone was present to accept the promise, would result in an obligation, enforceable by the absent beneficiary. The medieval canonists denied, though, that unilateral promises—not accepted by the promisee—could be enforced in an ecclesiastical court.

[24] See Dondorp-Hallebeek, Grotius' doctrine, p. 211ff.

which Roman law required to be observed, in particular the rule for stipulations and real contracts that parties had to be present and the rule for stipulations that the promise had to be the answer to the stipulator's question.[25]

The *Siete Partidas* also contained a provision inspired by the maxim *alteri stipulari nemo potest*. This seems to have been even more restrictive than the Roman rule, since it does not mention the major exception of the Justinian Institutes, i.e. that the Roman *stipulatio alteri* is nevertheless effective when the stipulator has an interest. It simply ruled that no one is capable of accepting the promise that something be given to another person.[26] Such a transaction did not create an obligation on the part of the promisor. It was, the *Partidas* ruled, as if the *extraneus* had stipulated "Do you promise me that something be given to another?" and the other had answered "I promise". As a general rule such promises were considered to be void and ineffective. The *Partidas* subsequently mentioned exceptional cases where the third-party beneficiary could enforce what was promised, sometimes after the action had been assigned to him by the stipulator.[27] These are the same or comparable cases as are found in the *Corpus iuris*, viz. the promise to a son or slave, the promise to a magistrate or court clerk, the promise to a tutor or curator, the promise to the *personero* of administrative authorities (in Roman law the *actor municipum*).

In the *Corpus iuris* there were more of these specific cases where the third party has an action,[28] such as the pact to restore to a third party a dowry, or an object lent or deposited, and the giving of a gift conditional upon the transfer of such gift after a lapse of time to a second donee, the so-called *donatio sub modo*.[29] These were not adopted in the *Partidas*.

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[25] Cf. Part. 5.11.1.

[26] Part. 5.11.7: Vn ome non puede resçebir promission de otro en nome de terçera persona sso cuyo poder non fuesse. E sseria como si dixiesse el uno al otro "prometes me que des a fulan tal cosa" e el otro respondiesse "prometo". Ca por tal prometymiento, non fincarie obligado el que lo faze, nin la terçera persone, en cuyo nome fue fecha la promission, non puede apremiar, nin deue (…).

[27] The stipulator could not cede his right of action, but he could assign someone as a *procurator in rem suam*, an attorney who would bring the action of the stipulator (subject to any defences that could be raised against the latter) and keep what he recovered in the action.

[28] See the gloss *nihil agit* ad Inst. 3.19.4.

[29] Only in one respect the *Partidas* appear to be less restrictive than Roman law. In general terms the promise to the *personero* of a private citizen is considered to be effective (Part. 5.11.7–9). In Roman law this was only acknowledged for the exceptional case

Thus, the *Partidas* not only adopted the Roman formalities for the formation of contracts, but they seem to have been even more restrictive with regard to the *stipulatio alteri*. The Roman *stipulatio alteri* created an obligation between the promisor and the stipulator when the latter had an interest, whereas the *Partidas* did not acknowledge such a promise to be binding. These circumstances must have been adverse to commercial intercourse, especially since the Roman law rulings had not infrequently to be applied by persons who were not fully versed in the ancient formalities. This would result in the invalidity of many legal acts.[30]

These inconveniences were taken away when King Alphonse XI of Castile (1311–1350) by means of new legislation in 1348 declared the *Siete Partidas* thenceforth to be an additional source of law and banished all Roman formalities concerning stipulations and other contracts as found in the *Partidas*. The *ley 'Paresciendo'* of the *Ordenamiento de Alcalá* ruled that the one who intended to enter into an obligation, whether this was achieved by promise, contract or by any other means, would be obliged to fulfil the commitment he made.

> *Ordenamiento de Alcalá* (1348), *capitulo* 29
> If it appears that someone intends to bind himself to another through a promise, or through a contract, or in any other manner, he is obliged to perform what he promised to do, and he cannot bring as a defence, that no stipulation had taken place, i.e. no promise was made in conformity with the formalities of the law, or that the obligation was entered into or the contract was concluded between absent persons.

Thus it was possible to obligate oneself informally and even towards someone absent. Moreover, it excluded several kinds of defence, *viz*.

> that between absent persons (the promise) to give to the other,[31] was made to a public clerk or someone else, a private person, or that he had obligated himself to one person to give something to or to do something for another person.[32]

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where the principal was present at the moment the *procurator* stipulated something in his favour (D. 45.1.79) and for praetorian stipulations by his *procurator* (D. 46.5.5).

[30] At any rate according to Pérez Martín, p. 80, referring in note 100 to D. 2.14. 7.4–5.

[31] The *ley Paresciendo* speaks about a promise 'en nombre de otro'. The same phrasing is used in Part. 5.11.7. There, the words are meant to indicate that something will be given to the absent beneficicary. The same holds good for the *ley Paresciendo*.

[32] Ordenamiento de Alcalá, c. 29 (*Cortes de los antiguos reinos de Léon y de Castilla publicadas por la Real Academia de la Historia* I, ed. Madrid 1861, p. 514): Paresçiendo que se quiso alguno obligar aotro por promysion opor algun contracto oen otra manera,

At first sight 'the promise to give to the other' resembles the Roman *stipulatio alteri* but its requirements and effects are entirely different. According to the *ley 'Paresciendo'* the formalities of the Roman stipulation no longer have to be observed and it is no longer required that the stipulator have a financial interest in the fulfilment of the promise. Moreover, it is the absent beneficiary who becomes the creditor, although the text does not explain how he would acquire his claim, whether directly or by way of assignment by the stipulator.

It is difficult to find a comparable modern-day equivalent to the concept acknowledged in the *ley 'Paresciendo'*. In theory, the stipulator could be the beneficiary's *personero* who accepts a promise for his principal, i.e. a promise addressed to his principal. The text, however, simply speaks of promises made to a public clerk or a private person and of promises to one person to give to another. The *ley 'Paresciendo'* did not clearly differentiate between promises addressed to the absent beneficiary and promises addressed to the stipulator, between contracts concluded in the name of the principal (agency) and contracts entered into in one's own name (contracts in favour of a third party). The exact source of the obligation towards the absent beneficiary remains uncertain.

What conclusion can we draw from these developments in the indigenous law of Castile? The early introduction of Roman law made for a very formal law of contract with even fewer possibilities to promise effectively in favour of a third party or for the third party to acquire a right in comparison to Justinianic law. This state of affairs was undesirable and provoked an extreme reaction. In 1348, the *Ordenamiento de Alcalá* in one move set aside all Roman rules concerned with entering into obligations.

When we compare the developments in Canon law and those in Castile, there are striking similarities. Both systems of law struggled with the question whether it is possible to bind oneself towards an absent person by a promise made in the presence of someone else. The Roman law maxim *alteri stipulari nemo potest* was felt to be an obstacle to achieving this. In Castile an early reception of the rule took place even in a more restrictive sense than in Justinianic law, but the maxim

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sea tenudo aaquellos aquien se obligó et non pueda ser puesta excepçion que non fue fecha stipulaçion que quier dezir prometimiento con çierta solepnidat del derecho, e que fue fecha la obligaçion o el contrato entre absentes, oque fue fecha aescriuano publico oaotra persona priuada en nonbre de otro entre absentes, o que se obligó a vno de dar ode fazer alguna cosa aotro (…).

was entirely put aside by a provision of the *Ordenamiento de Alcalá* in 1348. Such an enactment cannot be found in the *Corpus iuris canonici*, though Gratian's Decree (1140/45) makes clear that from way back Canon law gave priority to the principle that one should stick to one's word. The early canonists had acknowledged that a promise made to an intermediary—called *mandatarius* in Hugucccio's summa—had the same effect as a promise made to an absent beneficiary, but circa 1200 the canonists adopted the majority view of the civilians that an agent (*procurator*) cannot accept on behalf of his principal. This was confirmed in canon 27 of the Council of Lyon (1274).[33] Since agency, viz. representation by an extraneous person, was not acknowledged in the law of obligations, absent persons could not acquire contractual rights.[34] The agreement between parties, however, viz. a contract or clause that something be given to a third party, constituted according to the canonists either an offer which could be accepted at a later stage (i.e. when the promise was addressed to the absentee as promisee) or a natural obligation towards the stipulator and probably also towards the third party (i.e. when the promise was addressed to the person present as promisee) that the Church would enforce, even when Roman law would provide no action at all because the promisee (stipulator) had no interest.

The underlying grounds for these developments are difficult to trace since the sources do not clearly pronounce upon them. The driving force in Castile was probably the social demand that trade intercourse should not to be too formal. We encounter similar provisions in mercantile law and in the statutes of the city-states in Northern Italy.[35] In Canon law the observance of the given word may have been the deciding factor.

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[33] Cf. VI 5.5.2. It denied a Christian burial to usurers unless they had restituted the interest gained, or had promised to do so. Such a promise should either be made to those who had paid them interest or to their sons (who could acquire for them). If none of those were present, the promise to make restitution should be made to the local bishop or to someone, whom the bishop had commissioned to accept the promise: his representative, the rector of the parish or a public notary.

[34] This was also the reason, why Nicolaus de Tudeschis rejected the idea, that the Church would compel someone through *denuntiatio evangelica* to keep a promise, which was not accepted by the promisee. In order to acquire an action the intermediary could assign (in the Roman sense of *procuratio in rem suam*) to his principal, two requirements had to be met. The promise that something be given to his principal, must be directed to him (the agent) and he must have a monetary interest in the performance. His interest was based upon his (contractual) liability towards his principal. Hence he must have a mandate.

[35] Literature: Fränkel, pp. 296–299; Müller, pp. 55–58.

Until the sixteenth century the Spanish writers did not discuss why the promisor is bound towards the absent third party as the *ley 'Paresciendo'* provided. In this respect there is striking difference with the medieval canonists who, from the twelfth century onwards in their quest to grant the absent person a remedy to enforce the promise, have always given legal arguments to substantiate their view.

2.4 *Developments in civilian legal scholarship*

Let us now turn to the civilian tradition. One of the exceptional cases in the *Corpus iuris* where someone could acquire a right through an intermediary was the case where the promise was accepted by a slave or a child under paternal control. In such cases the slave or son always acquired the benefit of the promise on behalf of his master or father, no matter whether the promise was directed to himself or to his master or father.[36] In spite of the fact that great parts of continental Europe were during the Middle Ages no longer familiar with slavery or paternal control in their Roman form, this Roman form of 'agency' obtained an analogous significance. It was used to justify already existing medieval legal institutions which were regarded as actually incompatible with the *alteri stipulari*-maxim. The fact that in Roman law a son under paternal control and a slave acquired the benefit of the promise on behalf of their father or master could be used to justify that in medieval times a monk would always acquire the benefit on behalf of his monastery or the superior of his monastery.[37] After the example of the *actor municipum*, many representatives of corporate bodies were considered to have a comparable position. In this way the steward (*oeconomus*) would acquire on behalf of the Church, the municipal authorities on behalf of the city, the head of an orphanage (*orphanotrophus*) on behalf of his college and the syndicus on behalf of the university.

Moreover, there were the promises made to a magistrate, or to a court clerk or to a *servus publicus* in his presence. In all these cases, the *stipulatio alteri* was effective. The Roman texts on the *servus publicus* served as a model for the public notary (*notarius, tabellio*), who in his instru-

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[36] In a similar way the municipality could acquire through its *actor municipum* (Cf. D. 13.5.5.9). Somehow comparable are also the curator and tutor who acquired for the persons under their care. The only difference is, that they were considered to have assigned their remedies to their ward or pupil.

[37] See the gloss *iuri* ad Inst. 3.19.4 and Part. 5.11.7.

ments could stipulate in favour of absent beneficiaries, even unborn children.[38] It was for some time disputed whether the absent person would acquire his right directly from the instrument or whether it was the notary who acquired an action which he subsequently had to assign to the beneficiary. This discussion indicates that in the formula of the instrument the promise was phrased as directed towards the notary. This is also confirmed by the examples given in the sources. A promise directed to the notary was phrased: "do you promise me who accepts in the name of Titius to…?" As regards the question whether the notary had to assign his remedy, later commentators followed existing legal practice. According to Bartolus de Saxoferrato Titius (the absent beneficiary for whom the notary had accepted) would have a remedy at his disposal without assignment.[39] Baldus de Ubaldis (1327–1400), a student of Bartolus, taught that the beneficiary had an *actio utilis sine cessione*, thereby referring to common custom.[40]

The glossators already saw a connection between certain institutions of Roman law, such as paternal control and slavery, and medieval forms of 'agency'. This indicates that the study of Roman law was not a mere academic and theoretical occupation. The rediscovery of such ancient institutions and their modelling in a medieval context implied that in medieval law there were also certain exceptional categories of persons capable of acquiring rights for another. Apart from these categories, though, there was still the Roman *alteri stipulari*-rule. As we have seen, although a *stipulatio alteri* was effective when the promisee had an interest, the third party could only bring an action when the stipulator appointed him as his *procurator in rem suam*. When we survey the developments in medieval legal doctrine as a whole, we see a continuous inclination to consider the *stipulatio alteri* as effective and enforceable by the third party. It may be noted here that this debate was not restricted to the stipulation in the sense of the specific verbal or written Roman contract. The maxim *alteri stipulari nemo potest* was taken to apply to all

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[38] The gloss *nihil agit* ad Inst. 3.19.4; the gloss *dari solet* ad D. 1.7.17.5; the gloss *seruo publico* ad D. 1.7.18; the gloss *seruus publicus* ad D. 27.8.1.15; Cf. Part. 5.11.7.

[39] Bartolus de Saxoferrato, ad D. 46.6.2 no. 3 (*Commentaria*, ed. Venice 1526; reprint Rome 1996, VI, fol. 115ra): (…) teneo indistincte quod per stipulationem notarii vel cuiuscumque alterius officialis publici possit nobis queri actio utilis. (…).

[40] Baldus Perusinus, ad D. 12.1.9.8 (*Commentaria in Digestum Vetus*, ed. Lyons 1562, fol. 322rb): (…) Sed communis practica et consuetudo simpliciter approbat quod si notarius pro alio recipit, queritur alteri sine cessione, quia est publica persona. Si autem stipularetur non tamquam publica persona idem in eo quod in priuata (…).

contracts and even some other legal acts and, as a consequence, the discussion concerning the significance and interpretation of the rule touched almost the entire law of obligations.

In medieval civilian legal scholarship we can distinguish two major periods: that of the glossators, which roughly covers the twelfth and the greater part of the thirteenth centuries, and that of the commentators, which covers the fourteenth and fifteenth centuries. During the era of the glossators the discussion was about 'all or nothing'. On the one hand there was the majority view which hardly deviated from the restrictive rules of the *Corpus iuris*, viz. that the *stipulatio alteri* is only effective if the stipulator has an interest and that the third-party beneficiary will acquire an enforceable right only in specific exceptional cases. On the other hand there was the minority view that the third-party beneficiary always acquires an enforceable right even if this was not in line with the literal purport of the Roman texts. During the era of the commentators, which covers roughly the fourteenth and fifteenth centuries, there was a more subtle approach, which gradually sought to achieve a similar goal without infringing on the original purport of too many Roman texts, viz. that parties to a contract may validly agree that something be given to a third party. As we will see below, this aim was eventually reached, albeit through a rather complicated way of legal reasoning.

Let us first have a look at the era of the glossators. From the earliest times onwards the glossators were inclined to enumerate the exceptional cases where the *alteri stipulari*-rule did not apply, in the sense that either the *stipulatio alteri* appeared to be effective between promisor and stipulator, or the third party acquired a right. From a present-day point of view these cases are comparable with various legal institutions: the genuine third-party benefit contract, the non-genuine third-party benefit contract and direct representation. These concepts were not yet known and the glossators made no such distinctions. There was always a reason for reciting exceptional cases. It could have a mere didactic purpose, viz. to teach the students where a rule did not apply. It could also be done in order to demonstrate that there were so many exceptions to a certain rule of law that it would be more appropriate to consider these exceptions as the general rule and the rule as the exception.[41] According to the *Casus Codicis* of William of Cabriano, a glossator who

[41] For the principle of analogy in the glossators see: Otte, pp. 203–204.

is presumed to reflect faithfully the teachings of his master Bulgarus († 1166), the *stipulatio alteri* is effective in cases where the stipulator had an interest. The notion of interest has a broader sense here than in Justinianic law. First, it covers the monetary interest which exists because of the person of the third-party beneficiary, viz. when the latter is the stipulator's creditor or *procurator*. Secondly, the stipulator's interest may exist on affective grounds (*propter affectionem*).[42] This is the case when the bride's father stipulates restitution of the dowry for his grandchildren, as in C. 5.14.7 and D. 24.3.45. Also in this case the *stipulatio alteri* is effective. However, in cases where the stipulator had a monetary interest, he himself has a remedy. In the dowry cases, where the stipulator had an affective interest, it is the third party who has an *actio utilis*. However, William de Cabriano highlighted three other texts from the *Corpus iuris* where, because of a very specific reason (*ratio singularis*), the third beneficiary has an action.[43] William subsequently referred to the prohibition contained in the Digest against thinking right through to their ultimate conclusion those elements which were introduced in contravention of the internal system of the law, the *ratio iuris*.[44] Apparently, the cases where the third party has an action are such elements in contravention of the *ratio iuris*, while this *ratio iuris* apparently prescribes that the *stipulatio alteri* has no effect or that a third party cannot derive rights from contracts between others. William maintained that if the prohibition in the Digest is not observed, the law will be violated.[45]

What was the reason that Bulgarus and his student William of Cabriano refused to ascribe further consequences to the texts in the *Corpus iuris* where the third party derived an action from a *stipulatio alteri*? Bulgarus was one of the so-called *Quattuor Doctores*, the four pupils of Irnerius († after 1125), who is said to be the founder of the Bolognese school of law. These four doctors carried on the work of their master but in the middle of the twelfth century many differences of opinion emerged as regards the interpretation of the Roman texts. On the one hand, there were Bulgarus and the vast majority (i.e. the mainstream glossators) who in the first place wanted to read the Roman texts in their Justinianic context. On the other hand, there was the dissenting

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[42] The words are derived from Ulp. D. 24.3.45.
[43] C. 3.42.8, D. 13.7.13*pr* and C. 8.54(55).3.
[44] Cf. D. 1.3.14 and D. 50.17.141*pr*.
[45] T. Wallinga (ed.), *The Casus codicis of Wilhelmus de Cabriano*, Frankfurt 2005, pp. 273–274.

minority view of Martinus († before 1166). Martinus was still very much affected by ideas of the previous century and held an obsolete view, which had been taught by the canonists and had been very much alive in the spheres of notaries and legislators at the end of the eleventh century, viz. that every justification must be based on *utraque lex*, both on Canon and on Roman law.[46] As regards many dogmatic questions, the view of Martinus conformed less with the literal purport of the Roman texts than Bulgarus' view. At the same time, Martinus' view was mostly more aligned with Canon law and existing legal practice than Bulgarus' view.

Two of the three texts where in case of a *stipulatio alteri* the third party acquired an action, which Bulgarus had characterised as in contravention of the *ratio iuris* and had refused to ascribe further consequences to constituted for Martinus the main materials to build upon a general rule of law. The first was the text dealing with the restitution of deposited objects to a third party (C. 3.42.8). The second dealt with the *donatio sub modo* (C. 8.54[55].3). The sources indicate that in the *Corpus iuris* Martinus traced many more cases where the third-party beneficiary was granted an action.[47] According to Martinus all these exceptions should constitute the new rule[48] and cases where the third-party beneficiary did not have a claim should be seen as the exception. Martinus therefore came to the basic rule that in the case of a *stipulatio alteri* (in the broad sense of any contract or any clause in favour of a third party) the beneficiary will always (*semper*) derive an *actio utilis* from another's pact (*pactum alienum*)[49] to his benefit.[50] If this was the rule, however, it had to be explained why this rule apparently did not apply in a large

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[46] Cortese, II, p. 80–81.

[47] Azo, *Summa Codicis* ad C. 4.27 no. 14 (ed. Venice 1581, column 360): (…) sed Marti[nus] respondet quod semper ex alieno pacto daretur a lege utilis, quia in plerisque casibus a lege statutum uidebat. (…); the gloss *quaecumque gerimus* ad D. 44.7.11: (…) licet Martinus semper dederit ex alterius stipulatione, quia hoc in multis casibus inueniebat, ut (…).

[48] The gloss *nihil agit* ad Inst. 3.19.4: (…) Sed Martinus dicebat hos casus facere regulam: at si quis casus esset contra illud, speciale esset at quod hic regulariter dicetur (…).

[49] The terminology of *pactum alienum* is derived from C. 5.12.19.

[50] Azo, *Summa Codicis*, ad C. 2.3 no. 28 (column 68): Martinus tamen semper ex alterius pacto dicebat dari utilem actionem, quod falsum est. Nam pecialia non sunt trahenda ad conseqentiam, ut (…); Azo, *Lectura super Codicem*, ad C. 3.42.8 (ed. Paris 1577; reprint Turin 1966, pp. 251–252): (…) Martinus tamen uoluit propter hoc dicere quod semper ex pacto alterius detur utilis actio, et sic dixit generale et non speciale; the gloss *utilis* ad C. 3.42.8; the gloss *nihil agit* ad Inst. 3.19.4.

number of texts in the *Corpus iuris*. Martinus' solution was quite simple. All of these texts only deny the existence of an *actio directa* and do not pronounce upon the *actio utilis*. They all reflect the application of strict law (*ius strictum*) that there is no action and do not mention that a claim exists in equity (*aequitas*).[51]

Martinus's opinion was rejected by the other three of the four doctors, Bulgarus, Hugo († before 1171) and Jacobus († 1178). They abided by the rule that it is impossible to derive an action from another's pact[52] as did the vast majority of later glossators, such as Johannes Bassianus († 1197), a pupil of Bulgarus.[53] At the beginning of the thirteenth century, the influential glossator Azo characterized the opinion of Martinus as wrong (*falsum*).[54] This judgement was followed by the authoritative Ordinary Gloss of Accursius, dating from the middle of the thirteenth century.[55] The rejection of Martinus' teachings was based upon two grounds. The mainstream glossators firstly maintained that, if the third beneficiary was granted an action in the *Corpus iuris*, this was exceptional (*speciale*) and not the standard solution.[56] As Bulgarus had taught, the exceptional cases (*specialia*) in the *Corpus iuris* were elements, introduced in contravention of the *ratio iuris*, the internal system of the law, and according to the Digest it was not allowed to think such

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[51] Azo, *Brocardica*, III (de pactis) no. 54 (ed. Venice 1581, column 19), (…) Martinus uero ex aequitate cordis sui dicebat dari utilem actionem ex alterius pacto; the gloss *nulla* ad C. 4.27.1: (…) de stricto iure, sed de aequitate sic secundum M[artinum] quod Io[hanni] non placet (…); the gloss *nihil agit* ad Inst. 3.19.4.

[52] *Dissensiones dominorum*, ed. Haenel 1834, *Hugolinus* § 256 (pp. 428–429): *An ex alieno pacto utilis actio ei detur, in cuius persona conceptum est?* Item dicit M. (Martinus), quod ex alieno pacto utilis actio datur ei, in cuius persona conceptum est, et hoc exemplo C. ad Exhib. (3,42) L. penult. C. de Donat., quae sub modo (8,55) L. Quotiens (3). Bul. (Bulgarus) vero et V. (Hugo) et Iac. (Iacobus) dicunt, non dari, nisi expressim dicit, quum iuris regula sit, ex alieno pacto actionem non dari.

[53] The gloss *utilis* ad C. 3.42.8: (…) sed Ioan[nes] dicit haec omnia specialia et alia plura, quae notantur plene (…); the gloss *nulla* ad C. 4.27.1: (…) de stricto iure, sed de aequitate sic secundum M[artinum] quod Io[hanni] non placet (…).

[54] Azo, *Summa Codicis* ad C. 2.3 no. 28 (column 68) and *Lectura super Codicem* ad C. 4.27.1 no. 5 (p. 306).

[55] See the gloss *potes* ad C. 4.50.6 and the gloss *nihil agit* ad Inst. 3.19.4. The gloss *plerumque* ad D. 2.14.25.2 speaks about an error (*error*).

[56] Azo, *Lectura super Codicem* ad C. 3.42.8 (pp. 251–252) and ad C. 5.14.4 no. 1 (p. 399); Odofredus, ad D. 13.7.13*pr* (*Lectura super Digesto veteri* II, ed. Lyons 1552; reprint Bologna 1968, fol. 57vb) and ad D. 16.3.26*pr* (fol. 80va); Odofredus, ad C. 5.14.4 (*Lectura super Codice*, ed. Lyon 1552; reprint Bologna 1968, I, fol. 279vb) and ad C. 5.14.7 (fol. 280ra); the gloss *aut in factum* ad D. 13.7.13*pr*; the gloss *ex stipulatu* ad D. 3.3.27.1; the gloss *admiserunt* ad C. 8.54(55).3.

elements through to their ultimate conclusion.[57] The mainstream glossators secondly rejected the reasoning that on the basis of equity an *actio utilis* should be granted to the third-party beneficiary. According to Azo, this equity, referred to by Martinus, was an instinctive equity, an *aequitas cordis*, which could not be used to substantiate any interpretation of the Roman texts.[58] Martinus followed the personal equity of his heart, an unpolished equity (*aequitas rudis*), not yet expressed in the text of the *Corpus iuris*.

It is questionable whether the mainstream glossators in every respect argued consistently in their rejection of Martinus' doctrine. In two exceptional cases concerning restitution of a dowry to a third party (C. 5.14.7 and D. 24.3.45), Bulgarus noticed one common element was that the stipulator had an affective interest, which apparently justified granting the third beneficiary an *actio utilis*. However, at least six texts in the *Corpus iuris* suggest or even explicitly state that the third-party beneficiary does not acquire an action to claim the dowry.[59] This would have been sufficient reason not to think the *specialia* through to their ultimate conclusion, one would say, but the outcome is quite different. It is striking that, as regards the agreement to restore the dowry to a third party, Azo did not follow Bulgarus' idea of an affective interest but used exactly the same line of reasoning as he and the other mainstream glossators rejected in the teachings of Martinus. Although Azo still considered it to be exceptional that the third party acquires a right, he nevertheless accepted that the third party will have an *actio utilis* to claim restitution of the dowry, even for the cases where the *Corpus iuris* explicitly stated that there was no action. Just as Martinus would argue, Azo maintained that such texts merely deny the existence of an *actio*

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[57] Azo, *Lectura super Codicem* ad C. 3.42.8 (pp. 251–252): (…) Martinus tamen uoluit propter hoc dicere quod semper ex pacto alterius detur utilis actio, et sic dixit generale et non speciale. Nostri uero doctores dixerunt contra: quia speciale non debet ultra extendi quam sit permissum, et ideo non trahenda ad consequentiam (…); Azo, *Lectura super Codicem* ad C. 4.27.1 no. 5 (p. 306): (…) unde propter hoc dixit multa M. quod ubique ex pacto alterius detur utilis actio, quod falsum est, quia specialia sunt illa et ita non sunt trahenda ad consequentiam; Azo, *Summa Codicis* ad C. 2.3 no. 28 (column 68): Martinus tamen semper ex alterius pacto dicebat dari utilem actionem, quod falsum est. Nam specialia non sunt trahenda ad conseqentiam, ut (…); the gloss *nihil agit* ad Inst. 3.19.4.

[58] Azo, *Brocardica*, rubrica IIII (De pactis), no. 54 (column 19): (…) Martinus uero ex aequitate cordis sui dicebat dari utilem actionem ex alterius pacto.

[59] D. 23.4.26.4; D. 24.3.45; C. 5.14.4; C. 8.38(39).3; C. 5.12.26; C. 5.12.19.

directa.[60] Accursius adopted this reasoning of Azo.[61] According to strict law there is no action here, but according to equity there is.[62] Thus, as regards the stipulation to restore the dowry to a third party, the mainstream glossators were prepared to generalize the solution given in D. 24.3.45 and C. 5.14.7 and always grant the third beneficiary an *actio utilis* to claim restitution of the dowry, also for the cases where this possibility is explicitly denied in the *Corpus iuris*.

The Accursian Gloss and other widely spread writings of the glossators, such as the *Summa Codicis* of Azo, had enormous authority during the Middle Ages. As regards the doctrine of Martinus they were very clear. It was a false doctrine. It was not allowed to interpret extensively the exceptional cases where the maxim *alteri stipulari nemo potest* did not apply. This was meant to be prohibited by the Digest itself. An enforceable *stipulatio alteri* was in contravention of the *ratio iuris* and for that reason one should ascribe no further consequences to these exceptions. At the same time, it was through these numerous occurrences, e.g. in the Gloss, where the doctrine of Martinus was rejected, that Martinus' views were kept very much alive.

In legal scholarship of the fourteenth and fifteenth centuries, we can trace again a tendency to acknowledge that parties can effectively agree that something be given to a third party, also for the case the stipulator is lacking an actionable interest.[63] Unlike the doctrine of Martinus, the

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[60] Azo *Lectura super Codicem* ad C. 5.14.4 (p. 399): *Quaerere non potuit*. Directo, sed utiliter, ut infra eo. Pater (C. 5.14.7). Poterunt ergo agere ex pacto matris, sicut faciunt ex pacto aui materni, ut ff. sol. matri. Gaius Seius (D. 24.3.45) et erit speciale quod ex pacto alterius detur actio ut nota alios casus supra ad exhibendum (C. 3.42).

[61] The gloss *actionem* ad C. 5.14.4: directam sed utilem sic ut infra e.l. Pater (C. 5.14.7) et ff. so. ma. l. Caius (D. 24.3.45). alii dicunt speciale in auo et nepote propter rationem que redditur in d.l. Caius (D. 24.3.45); the gloss *actio* ad C. 5.12.19: actio scilicet directa sic et infra ti. ii l. Quamuis (C. 5.14.3) et l. Pactum (C. 5.14.4) et supra si quis alteri uel sibi (C. 4.50). Multum utilis sic, si non esset testamentum, ut infra ti. ii Pater pro filia (C. 5.14.7) et infra de don. que sub mo. Quoti. (C. 8.54(55).3).

[62] The gloss *actionem* ad C. 5.12.26: actionem directam stricto iure, sed ex equitatem habet utilem, ut infra ti ii. l. Pactum (C. 5.14.4) et l. Pater (C. 5.14.7) et ff. sol. ma. Caius. (D. 24.3.45) uel dic quod nullam habet hic extraneus cum esset ratio que redditur in fi. illius l. Caius scilicet dotis et conuentionis, sed mulier habet ex l. sibi datam, ut infra ti. i. § Accedit et § Extraneum (C. 5.13.1.13 and 13c) que nascitur ex numeratione ut et alius ut ff. si cer. pe. l. Certi condi. § Si nummos (D. 12.1.9.8).

[63] Some commentators maintained that the third party would acquire an action when restitution to him of a certain object was stipulated at the moment this object was handed over (the *pactum appositum in rei traditione*), viz. if he owned the object or was entitled to it (opinion of Guillaume de Cunh († 1335) and Jean Faure († ca. 1350)) or if the stipulator was to remain owner of the object (opinion of Bartolus and Baldus).

new approach is more subtle, not aimed at deviating too much from the literal purport of numerous Roman texts and, moreover, this new approach was shared by the vast majority of civilians. Since Martinus' doctrine was rejected, the Roman rule that the *stipulatio alteri* is ineffective if the promisee has no actionable interest, was still effective. The *stipulatio alteri* out of generosity, i.e. in the mere interest of the beneficiary, would be ineffective unless a penalty clause was added. If one could only find arguments to consider such a stipulation effective, parties would have the possibility to validly agree that something be given to a third party. The fact that, according to Roman law, only the stipulator would acquire a right was no serious problem, since he could always assign his action to the third party.[64]

In theory there must have been many possibilities to interpret the notion 'interest' extensively or to presume that every promisee has an interest. As we have seen above, it was Bulgarus who interpreted this notion in a wider sense by stating that the promisee's interest in the *stipulatio alteri* may be an affective interest (*interesse propter affectionem*). However, according to Bulgarus' teachings, such an affective interest only existed in one specific case: the stipulation to restore the dowry to one's grandchildren. It did not result in an action for the stipulator, to be assigned to the absent beneficiary, but in an action for the third party himself. Bulgarus acknowledged no other cases of such affective interest. However, the stipulator may have an affective interest in all cases of a *stipulatio alteri* in the mere interest of the third party, and one could argue that also such an interest should suffice to make the *stipulatio alteri* effective.[65] It is hard to say why medieval scholarship has chosen not to adopt such an extensive interpretation of the notion of interest. It would surely have deprived the maxim *alteri stipulari nemo*

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[64] In Roman law, which was not familiar with cession in the present-day sense, this could be achieved through procedural representation, i.e. by appointing the third party to whom the claim should be transferred as *procurator in rem suam*. See D. 44.7.11.

[65] There were even Roman texts to substantiate this view. The Digest stated that man has an interest in the benefit conferred upon his fellow-man (D. 18.7.7) and that it would be a rank injustice (*nefas*) if man would menace his fellow-man (D. 1.1.3 in fine). These texts were referred to by Simon Groenewegen van der Made (1613–1652), who maintained that no one is so senseless (*demens*) to stipulate for another without having himself some kind of interest. However, for Groenewegen, the affective interest did not result in an action for the stipulator, but in an action for the absentee. See Simon Groenewegen *De legibus abrogatis*, ad Inst. 3.19.19 no. 3 (ed. et transl. Beinart, Johannesburg 1974, p. 76).

potest of so much of its practical significance that the rule rather would have been regarded as abrogated.

Within the boundaries of the *Corpus iuris* and whilst observing the maxim *alteri stipulari nemo potest*, medieval doctrine gradually reached the desired goal, viz. that parties can validly agree that something be given to a third party, even if the stipulator had no interest. What the lawgiver in Castile achieved with one stroke of the pen and what the canonists achieved through their special procedure of *denuntiatio evangelica*, took the civilians a few hundred years of legal scholarship. Through an extremely artificial way of reasoning and solely based on Roman texts, step by step the desired goal came into sight. However, as will become clear in the next chapter, this sophisticated doctrinal solution was granted only a short life and was not to be adopted in early modern legal scholarship.

If the promisee had no actionable interest, the first step would be to characterize the *stipulatio alteri* as a pact. This idea may go back to the time of the glossators. It was in any case further developed by Cynus de Pistorio (1270–1336) who, in his commentary on C. 2.3.26, maintained that a stipulation has a certain verbal form, although it may be void or without effect, such as in case of a *stipulatio alteri*, when the stipulator had no interest. Such an ineffective stipulation is nevertheless a pact and this in spite of the fact that it does not have the form of a pact.[66] The second step consisted in the argument that every pact results in a natural obligation. Thus, the *stipulatio alteri* would result in a natural obligation between promisor and stipulator, even if the latter had no actionable interest. This opinion could already be found in the Accursian Gloss.[67] The only requirement was that the *stipulatio alteri* was phrased as directed to the one present as promisee ("Do you promise me to give Titius?"). The third step consisted in transforming the natural obligation into a civil obligation. This could be achieved by confirming it by oath.[68] From this civil and thus enforceable obligation the stipulator derived an enforceable right. As a final step, the stipulator had to assign his action to the third-party beneficiary. This was no cession (assignment) in the modern sense, since according to

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[66] Cynus Pistoriensis, ad C. 2.3.26 no. 2 (ed. Frankfurt 1578; reprint Turin, 1964, I fol. 57ra).

[67] The gloss *nihil interest* ad D. 45.1.38.17: stipulantis scilicet cui naturalis est quesita obligatio, ut alii detur (…).

[68] Bartolus, ad D. 46.1.156 no. 12 (*Commentaria*, VI, fol. 84va).

Roman law the third party had to act as procedural representative of the stipulator (*procurator in rem suam*), but it had the same effect, viz. that the beneficiary could claim what was stipulated in his favour.

As we have seen in the previous chapter, according to Justinianic law the rule as expressed in the maxim *alteri stipulari nemo potest* also applied to contracts and agreements other than just the formal and verbal *stipulatio*, although, when the *Corpus iuris* speaks about a specific *stipulatio alteri*, it is always the Roman verbal contract of *stipulatio* which is meant. This may also be the case in medieval commentaries. For example, when the stipulator has no actionable interest, it is argued that his *stipulatio alteri* is no valid stipulation, but a pact. The medieval jurists still distinguish here between the various Roman categories of contract. However, when the medieval jurists are listing texts where the maxim *alteri stipulari nemo potest* does not apply, they not only give examples of cases where Roman stipulations in favour of a third party appear to be effective, but also mention all kinds of clauses in other contracts and agreements. The medieval jurists not only saw the differences between the various contracts and agreements of Justinianic law, but also the features these agreements have in common. As a result of this approach the boundaries between the various Roman *contractus*, as well as the boundaries between, on the one hand, the Roman enforceable *contractus* and, on the other, the unenforceable pacts, were vanishing. Terms such as *conventio* and *pactum* were developed into generic terms for contract in general.

2.5 *Conclusions*

The maxim *alteri stipulari nemo potest* was handed down into the medieval world from Roman Antiquity. In Justinianic law it prescribed that the *stipulatio alteri* is ineffective whenever the stipulator had no actionable interest in the performance towards the third-party beneficiary. In medieval doctrine it was also taken to express a basic rule of the law of contracts, viz. that a third-party beneficiary cannot derive rights from a contract he himself did not enter into. However, the exact scope and significance of the maxim was continuously under debate in the Middle Ages, from the earliest glossators until the end of the fifteenth century.

The acceptance of the modern contract in favour of a third party (third-party benefit contract) has held no sway in this discussion, neither

in Justinianic law, nor in its medieval interpretation. The idea that the maxim has something to do with our modern contract in favour of a third party, is probably a persistent Pandectist view, from which even modern writers cannot break away. However, when interpreting the texts of the *Corpus iuris*, we have seen a continuous, underlying desire to justify on the basis of Roman law the possibility for contracting parties to agree effectively and not in too a formal way that something be given to a third party, or to justify the possibility of becoming obligated towards an absentee through someone present. The formalities themselves of the Roman stipulation, the maxim *alteri stipulari nemo potest* and the maxim *per extraneam personam nihil adquiri posse* were seemingly considered undesirable obstacles. However, derogating from too many Roman texts would have made Roman law unreliable as a system of law.

Why was there this urge to adapt Roman law? This question is difficult to answer because the sources of learned law show no traces of the underlying motives. Civilians interpret the Roman texts in a certain way, but never elucidate the grounds why they do so. There are good reasons for this attitude. Every adaptation had to be presented not as an adaptation, but as the only correct interpretation of the Roman texts. If not presented as such, Roman law could lose its authority. For this reason all arguments in the civilians' legal reasoning are exclusively derived from the *Corpus iuris*.

In the Middle Ages Roman law was not interpreted in a legal vacuum. In continental Europe there was an existing legal and social order before the study of Roman law began to flourish. Canon law and the law of Castile revealed some basic elements of this reality, elements which apparently were not always compatible with the Roman formalities and Roman rules of law. We cannot exclude the possibility that, in Canon law, the ineffective *stipulatio alteri* was regarded as incompatible with the moral obligation to observe the given word. In Castile the early received Roman rules and formalities were held to be too obstructive for commercial relations. If Roman law wanted to have a chance to survive and to be accepted as living law in the medieval world, it should not be at odds with the demands of society or with established legal practice. The experience in Castile showed that, if Roman law was adopted into legal practice without at least some adaptations to the demands of the existing legal order, it was likely that major parts of the *Corpus iuris* would be considered as obsolete. And if Roman law did not want to lose its authority, whatever adaptation was accepted and whatever

new doctrine was developed by the civilians, these had always to be presented as the correct interpretation of Roman law, solely based on Roman arguments. An appreciation of this fact is fundamental to any understanding of the way the Roman *stipulatio alteri* was understood in medieval legal scholarship.

CHAPTER THREE

THE SEVENTEENTH AND EIGHTEENTH CENTURIES

3.1 *Introduction*

In the seventeenth and eighteenth centuries the *Corpus iuris* lost much of its authority. During the course of the fifteenth and sixteenth centuries in many parts of continental Europe Roman law had succeeded penetrating into legal practice and was gradually accepted as an additional source of law. However, just as in philosophy, the written authoritative texts handed down from Antiquity were no longer the guiding light, rather human reason took their place. The teaching of law at the universities changed accordingly, as the introduction of Natural law courses in the curriculum shows. The jurists regarded the *Corpus iuris* primarily as the legislation of the Roman people. They realised—inspiring as the texts of Antiquity may have been to them—that it was the law of another time and place. This is also visible in their works, which increasingly began to describe the private law of their region or country. The vast majority, however, still used the order of the *Corpus iuris* and the concepts of Roman law to describe the law of their time and many authors reported of each rule in the Justinianic codification whether it was applied in practice.

With regard to some rules found in the *Corpus iuris* it was disputed to what extent established legal practice was deviating. Inst. 3.19.19 *Alteri stipulari nemo potest* was one of them. As seen in the previous chapter, the principle had been under question for centuries, probably because it was adverse to commercial intercourse and conflicted with the principle that one must keep one's word. Canon law adhered to the *nemo alteri* rule in as far as it expressed the principle that the third party cannot bring an action to enforce the performance stipulated in his favour. Hence agents could not accept a promise addressed to their principal. The Roman maxim *alteri stipulari nemo potest* was, however, regarded to express various things, not only that a third party did not acquire an enforceable right, but also that the *stipulatio alteri* was ineffective when the stipulator had no monetary interest in the performance agreed upon. Roman law did not provide a remedy to enforce the *obligatio naturalis* that resulted from

such agreement,[1] but the Church would compel the promisor to fulfil his obligation by means of a *denuntiatio evangelica*.[2] Regarding the *alteri stipulari* principle Roman and Canon law were only to a certain extent aligned.[3] Was Roman law or Canon law to be followed?

The fact that a *stipulatio alteri* was regarded to have effect only between parties was strongly related to the fundamental principle that the persons who negotiate a contract, who stipulate and promise that something be given or done, represent themselves and acquire what is in their own interest. This principle is also reflected in the adage *Alteri stipulari nemo potest* and it was considered to be a serious obstacle not only to the acknowledgement of third-party rights, but also of direct representation. An absent person can appoint someone to manage his affairs (*procurator*), a friend may even decide to take care of his business without being appointed (*negotiorum gestor*), but the principal, i.e. the absent person, will not be entitled to enforce the contract the other entered into, except through assignment.

This all began to change in the sixteenth century when legal scholarship developed a general law of contract. It borrowed from Canon law the idea that a promise to give something to an absent person constitutes an offer the latter may accept later[4] and from Castilian law the idea that the absent beneficiary could enforce a promise made to an intermediary. On the basis of these elements, the jurists construed various ways to circumvent the *alteri stipulari*-rule. The *Corpus iuris* still played a certain role in this development, providing new arguments to grant the absent beneficiary an action, but the jurists also developed new doctrines based upon Natural law, as did for instance Hugo Grotius (1583–1645) and Christan Wolff (1679–1754).

The influence of the Canon law of contract, the Castilian *ley 'Pare-sciendo'*, and Natural law will be discussed first before we turn to the legal practice and doctrine of the seventeenth and eighteenth centuries with regard to the effects of the *stipulatio alteri*.

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[1] According to the commentators, only the complicated and artificial method of creating a civil obligation by taking an oath could make the promise enforceable. This solution was no longer adopted in legal scholarship in the seventeenth and eighteenth centuries.

[2] See p. 27.

[3] Some canonists even maintained that stipulations made out of mere generosity could be enforced by means of a *denuntiatio evangelica* by the absent beneficiary himself. See p. 29.

[4] See pp. 27 and 33.

3.2 *Influence of the Canon law of contract*

The Church has always taught that one has to keep one's word and that for God there is no difference between an oath and an informal promise. From a letter of Pope Gregory I (590–604) derived that this involved more than a moral obligation to be faithful to one's word. In this letter, written in reaction to complaints that the local mighty oppressed the poor and breached their promises, the Pope had instructed the Bishop of Cagliari on Sardinia to see to it that they fullfilled their promises.[5] The canonists did not infer from this text that unilateral promises were binding[6] but suggested several ways by which promises to an absent person could become enforceable in an ecclesiastical court. Confirming the promise by oath had been one of them.[7] Canon law did not require the presence of the beneficiary to make a sworn promise effective. God supplements the presence of the party, as Paulus Parisiensis († 1545) explained: *Deus supplet presentiam partis*.[8]

Another way to achieve that the beneficiary could enforce the promise made in his absence, consisted of enabling him to accept it. To this end, the absent promisee had to be informed by letter or messenger of the promisor's offer. In Roman law only contracts of sale, hire, partnership and mandate could be concluded by letter or messenger, but in Canon law every agreement (*contractus* and *pactum* in Roman law), because no more than the consent of both parties was required. As derived from the decretal *Antigonus* (X 1.35.1), Canon law acknowledged the obligatory force of bare agreements.

Because the oath brought the promise under ecclesiastical jurisdiction, laymen had often turned to the Church, requesting to enforce promises they could not enforce in a secular court. Also, the fact that a breach of contract is a sin would render the ecclesiastical court competent to hear the promisee's complaint if he could not turn to a secular court.

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[5] X 1.35.3: studiose agendum est ut ea quae promittuntur opere compleantur.

[6] In the civilian tradition the promise to someone absent was a unilateral promise (*pollicitatio*) because the promisee was absent. The canonists gave another reason: his consent failed.

[7] Canon law acknowledged the oath as a seperate source of obligation. In this respect Canon law deviated from Roman law because the commentators only recognized its confirmatory force. In other words: the addition of an oath rendered a *stipulatio alteri* made out of mere generosity enforceable. However, the phrasing of the *stipulatio alteri* had to be correct ("do you promise me…?"), otherwise there would be no natural obligation to confirm. See p. 43.

[8] Paulus Pariensis, *Consilia* I cons. 82 no. 1 (ed. Frankfurt 1590, fo. 149vb).

At the end of the Middle Ages, however, the need to turn to the Church lessened over time because indigenous law began to follow Canon law. As shown in the previous chapter, as early as 1348 King Alfonse XI in Castile had decreed in the *ley 'Paresciendo'* that a promisor could no longer bring the defence that the contract was concluded between absent persons. In France, in 1536, the Parlement de Paris acknowledged the validity of contracts concluded by letter. Three years later King François I (1494–1547) prohibited laymen from turning to ecclesiastical courts to enforce their agreements. Seventeenth-century writers in the Netherlands and German speaking countries generally acknowledged the obligatory force of bare agreements in legal practice.[9] In their days the promisee's consent was required instead of his presence.

As a consequence, the *stipulatio alteri*—combined with assignment of the stipulator's claim[10]—was no longer needed in the seventeenth century as substitute for contracts between absent persons. Every contract (*contracus* and *pactum* in Roman terminology) could be concluded through letter or messenger. The assistance of public notaries or other intermediaries was no longer compulsory. This did, however, not diminish the significance of the principle *Alteri stipulari nemo potest* because it still applied to contracts made by agents and to contractual terms in favour of a third party.

In the sixteenth century some authors began to discuss what effect the intermediary's acceptance had when the absent beneficiary could accept a promise at a later stage and, as a result thereof, acquire a claim. Their point of departure was not Canon law but the Castilian *ley 'Paresciendo'* of 1348.

3.3 *Third-party rights: the Castilian alternative*

The *ley 'Paresciendo'* (1348) had not only acknowledged that obligations and contracts could be concluded between absent persons by letter or messenger. Subsequently, the *ley* had excluded all defences based upon the Roman *stipulatio alteri* rule. The promisor could not argue "that between absent persons (the promise) to give to the other was made to a public clerk or a private person, or that he had obligated

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[9] Literature: Spies (p. 217ff.), Bart, Feenstra, and Birochi.

[10] On the meaning of '*cessio*' in the works of the 15th and 16th centuries writers, see Luig, p. 14ff.

himself towards one person to give something to or do something for another".[11] Apparently, the absent beneficiary could claim performance but in which way could this be justified?

The Spanish medieval commentaries had been silent upon the precise implications of the *ley 'Paresciendo'* for Castile but sixteenth century writers queried what effect the promise to a public clerk or private person had if it was promised to give something to an absent beneficiary. Their doctrine, still rooted in Roman law, influenced the Natural law writers in the seventeenth and eighteenth centuries.

According to Antonio Gómez (1501–1562/1572) one should distinguish between promises directed towards the absent beneficiary and promises addressed to the intermediary himself. This is a distinction he adopted from the later canonists.[12] Nicolaus de Tudeschis (Panormitanus, 1386–1445) had differentiated between promises directed to the absent beneficiary and those addressed to the intermediary, the stipulator. The intermediary (one's agent or an unauthorized manager of his affairs) could not accept a promise addressed to his principal. In Castile, however, the promisor would be bound by his promise. According to Gómez "the *ley* '*Paresciendo'* should be understood to apply when the words of the promise are directed to the absent person. It is quite different, however, when they are directed to an agent or an unauthorized manager of another's affairs because in such cases, if the engagement is broken, assignment is (still) necessary".[13]

The latter was in line with the civilian tradition. In the Middle Ages the civilians and canonists had taught that *procuratores* and *negotiorum gestores* could effectively stipulate a performance to their principal and acquired a claim that they must assign to them. Acting openly in their capacity as intermediary, by accepting the promise (addressed to them!) in his name, they could stipulate that something be done for a third party (their principal),[14] even when they had no pre-existing interest in

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[11] Ordenamiento de Alcalá, c. 29. For the text of the *ley 'Paresciendo'*, see above, p. 31.

[12] See p. 28.

[13] Antonius Gomezius, Variae resolutiones, II.11 no. 18, (*Opera omnia*, ed. Antwerp 1693, I, pp. 248–249): Item adde, quod praedicta lex Regia debet intelligi, quando verba promissionis diriguntur in tertium absentem; secus vero, si dirigantur in personam procuratoris, vel negotiorum gestoris, quia tunc credo quod requiritur cessio rupta conclusione.

[14] Cf. gloss *supra dictum est* ad Inst. 3.19.19:…promittis quod dabis mihi recipienti nomine eius? quo casu ualet utrunque et ego illi cedam cuius nomine stipulatus sum. ut ff. mandat. Si procur. § fin. (D. 17.1.8.10). See also Odofredus, ad C. 4.27.1. no. 4 (*Lectura super Codice*, Lyons 1552; reprint Bologna 1968, I., fo. 225ra):…promissionem

the performance to their principal.[15] Hence, in the civilian tradition a debtor could not bring as defence (when the principal brought the action assigned to him) that there was no claim to assign because one cannot stipulate for another (without a monetary interest). In this respect Roman law and Castilian legal practice were aligned. It was quite different, though, Gómez taught, when the promise was addressed to the principal himself because the *ley 'Paresciendo'* applied in this situation. The reason for this difference was probably that the *ley* locked out various defences based upon the *alteri stipulari* rule. One of them was the defence that "between absent persons a promise *en nombre de otro*[16] was made to a public clerk or to someone else, a private person".[17] It seems that according to Gómez these words refer to a promise addressed to the absent beneficiary. Such a promise would have no effect in Roman law. As seen in the previous chapter, one could not stipulate: "do you promise Titius?" nor could one accept a promise to someone else.[18]

Gómez did not explain why the absent beneficiary would acquire an enforceable right. It could result from the agreement between parties, *viz* the contract that was concluded when the absent person accepted the promise himself at a later date. The '*ley Paresciendo*' also ruled that parties no longer had to be present to enter into a contract. "If it appears that someone intends to bind himself to another through a promise, through a contract or in any other manner he is obliged to perform what he promised." Gómez, however, derived from the fact that the promise was mentioned separately, viz. apart from contract and other ways to oblige oneself, that Castilian statutory law not only

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et restitutionem concipiendo in sua persona nomine domini, uerbi gratia, promittis mihi recipienti nomine domini mei quod restitueres rem, dicit ille, promitto, ualet ista stipulatio: quia acquiret sibi actionem sed domino tenetur cedere.

[15] A pre-existing mandate constituted sufficient interest in the performance, stipulated in favour of a third party. It was disputed whether agents who overstepped the boundaries of their mandate and unauthorized managers of another's affairs had sufficient interest to acquire a claim. The commentators maintained that they acquired a claim, when they phrased the stipulation correctly, *viz.* as addressed to them in their capacity as agent. See Bartolus, ad D. 45.1.38.20 n. 2; Additio to the gloss *supra dictum est* ad Inst. 3.19.19 (ed. Lyons 1550, p. 169): Et hoc est uerum, siue sim procurator habens mandatum siue negotiorum gestor, siue saltem generalis, ut mihi acquiram et postea cedam, sicut procurator cum ratihabitione etc. ut l. fina. C. ad Macedonia. (C. 4.28.7) et l. Si ego ff. de nego. gest. (D. 3.5.23(24)) ut per Ioan. Fab. et Angelum hic.

[16] The same phrase is used in Part. 5.11.7 where it is compared to the stipulation where the *verba executoria* contain the name of the third: "do you promise me to give something to a third party?". See n. 31.

[17] For the text of the *ley 'Paresciendo'*, see above p. 31.

[18] See above pp. 28 and 43.

acknowledged the obligatory force of agreements, but also of unilateral promises: "Note well, that nowadays in Castile a unilateral promise will give rise to an action deriving from the *ley Paresciendo*".[19] The situation in which one makes a promise in the presence of the agent of the absent beneficiary could well be an example of this.

In Roman law unilateral promises were only enforceable in exceptional situations, for instance a promise to build a public building or donate something to a city (D. 50.12.1.pr. and D. 50.12.7). Canon law had not extended these exceptions, but according to Gómez the *ley 'Paresciendo'* had done so in situations where it was apparent that the promisor intended to obligate himself.

Antonio Gómez was not the only Spanish writer who tried to explain why the *ley 'Paresciendo'* granted the absent beneficiary a claim. He upheld the Roman law principle that one cannot acquire contractual rights through an extraneous person (*viz*. through an outsider, not one's slave or son under paternal control), arguing that Castilian statute deviated from Roman law with regard to unilateral promises. Another line of reasoning, that of the Salamanca law professor Diego Covarrubias y Leyva (1512–1577), who later became bishop of Segovia, was, however, more influential. The reason was probable, that his reasoning was in line with Roman and Canon law. Covarruvias argued that one could not derive from the *ley 'Paresciendo'* that unilateral promises were enforceable, nor promises accepted by a public notary or one's agent. The power to bring an action did not depend on assignment, but on the beneficiary's consent. The beneficiary had to accept the promise—Covarruvias did not state to whom the promise was addressed—himself in order to acquire a right of action. In this view "if this had not yet taken place, the obligation is not considered suitable for bringing an action without assignment, although it cannot be revoked; in particular, where a contract or donation is accepted in the name of the absent person by a notary, an official or a private person, who according to the *ius commune* or statute has the competence to do so".[20] Their acceptance (made in the

[19] Antonius Gomezius, Variae resolutiones, II.11 no. 18 (p. 248): sed etiam quando simpliciter et nuda pollicitatione quis promittit absenti, ita aperte disponit praedicta lex (sc. Paresciendo) ex qua bene nota, quod hodie in nostro regno ex nuda pollicitatione oritur actio et corrigitur totus titulus de pollicitationibus.

[20] Didacus Covarruvias, Variorum resolutionum I.14 no. 13 (*Opera omnia* ed. Antwerp 1638, II. p. 73): Id enim intelligendum est, etiam sine cessione (actionem queri), dum tamen ratihabitio aut acceptatio secuta fuerit; ea etenim nondum secuta, nec actio queratur nec illa obligatio firma ad agendi sine cessione censetur ex premissis,

name of the absent beneficiary!) did not render the promise enforceable, but had a different purpose. As Covarruvias inferred from the civilian teaching on the *donatio sub modo*,[21] it made the promise irrevocable.

The underlying idea was that the consent between promisor and beneficiary results in a civil obligation, not the unilateral promise itself. As a consequence, the question whether the intermediary has a monetary interest became irrelevant. This line of reasoning was in conformity with the Canon law principle that offer and acceptance (*consensus*) constitute an obligatory contract. Canon law and indigenous law acknowledged that all promises can be accepted at a later stage.[22]

This line of reasoning, distinguishing between various effects of an acceptance, was subsequently taken up by the Natural law writers.

3.4 *Natural law*

In discussing the role of Natural law we have to remember that for the seventeenth-century writers the adage *Alteri stipulari nemo potest* also implied that one cannot acquire rights through an extraneous person, hence the rule also prescribed that parties must be present to conclude a contract. The *Corpus iuris* provided several exceptions to this principle: it sufficed that a member of the promisee's household (a son or slave) was present, and consensual contracts like sale and hire could be concluded by letter or messenger. Following the example of Canon law, indigenous law acknowledged that all contracts could be entered into by letter or messenger but the number of persons capable of stipulating for an absent person was not extended.[23] This changed in the seventeenth

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tametsi reuocari non possit, presertim ubi notarius publica uel priuata persona, que iure communi uel speciale possit id agere, nomine absentis contractum uel donationem acceptauerit.

[21] He compared the acceptance of a promise (in Castile) with the acceptance of a condition (*mode*) of a gift (in the civilian tradition). If a notary had drawn up a public instrument of a *donatio sub modo* (a gift under the condition that the donee gave something to a third party) the donor could no longer revoke this condition if the notary had accepted it for the absent third party. See Dondorp & Hallebeek, Grotius doctrine, p. 230. Regarding the acquisition of a right there is no analogy between the acceptance of a promise in Castile and the *donatio sub modo*. In C. 8.54(55).3 the consent of the third party, in whose favour the condition is made, was not required.

[22] Didacus Covarruvias, Variarum resolutionum. I.14. no. 13.

[23] Andreas Alciatus used the fiction that the agent did not consent himself but informed the promisor of his principal's consent.

century under influence of Hugo Grotius' (1583–1645) teaching on the effect of a promise in Natural law.

Hugo Grotius taught that promises addressed to absent beneficiaries—in his *De iure belli ac pacis* he spoke of promises directed to the person the promisor will perform to—will bind the promisor if it is apparent that he intends to keep his word.[24] A sufficient sign of such intent seems to consist in the fact that the promise (directed to the absent beneficiary) was made in the presence of someone else. If we disregard positive law, Grotius wrote, such a promise is binding, but not enforceable. That the promise becomes enforceable, *viz* confers a right on the promisee, is expressed in a different way.[25] As in the transfer of property, in order to confer a right[26] it is required that the promisee himself, or someone who has a mandate to accept for him, consents.[27] Hugo Grotius presumed, that in the latter case the absent promisee endorsed the decision of the agent he had appointed; in other words, he consented through his agent. This construction comes very close[28] to direct representation in the modern sense.

With regard to the acceptance of promises to give something to an absent beneficiary—*stipulationes alteri* in the terminology of Roman law, though Grotius did not use the concepts of Roman law to describe this topic—Grotius distinguished three situations. First, there is the situation discussed above where a promise addressed to the absent beneficiary himself is accepted by his mandatory. Secondly, the situation where someone without a mandate accepts such a promise. The third situation Grotius described resembles the formula of the *stipulatio alteri* as prescribed in the civilian tradition: someone accepts a promise directed to him, that something be given to an absent beneficiary.

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[24] He required a sign (*signum*) that sufficiently indicated that the promisor could no longer turn back upon his promise. Cf. Grotius, *De iure belli ac pacis* II.11 § 3.

[25] On the enforceability of promises, see Gordley, p. 376ff.

[26] See Hugo Grotius, *De iure belli ac pacis*, II.11 § 14 (ed. De Kanter-Hettinga Tromp, Leiden 1939, repr. Aalen 1993, pp. 335–336): Ut autem promissio ius transferat, acceptatio hic non minus quam in dominii translatione requiritur.

[27] Hugo Grotius, *De iure belli ac pacis*, II.11§ 18 [2] (p. 338): Quod si promissio in nomen eius collata est cui danda est res, distinguendum est an qui acceptat, aut speciale mandatum habeat acceptandi, aut ita generale ut talis acceptatio ei inclusa censeri debeat, an uero non habeat.

[28] See Müller, p. 131. It does not, however, follow from the wording of the text that the 'intermediary' accepted "im fremden Namen" (*nomine alteri*), as Müller, at p. 130, and Bayer, at p. 38, maintain.

Grotius taught that the first kind of acceptance makes the promise enforceable—as mentioned above. Subsequently Grotius dealt with the effects of an acceptance of a promise (also addressed to the absent beneficiary) by someone who has no mandate. This acceptance has a different effect. It does not make the promise enforceable but renders it irrevocable. The promisor, if he turns back upon his promise, acts contrary to good faith. Grotius gave no examples of persons without mandate, but what is meant is probably a *procurator* who overstepped his mandate or a *negotiorum gestor*.[29]

The third category Grotius discussed was the acceptance of a promise, addressed to the person who accepts the promise, that something be given to an absent beneficiary. Grotius maintained that this agreement between parties is not aimed at granting the stipulator a right to claim performance, but is meant to secure that the promisor will abide by his word.[30] The person who accepts a promise addressed to him that something be given to a third party,[31] Grotius wrote, "without considering whether he has any interest in it, acquires the right to bring about that the third party obtains a right, if the latter also consents, so that in the meantime the promisor cannot revoke his promise, but the promisee can release him thereof".[32]

It is difficult to establish what Grotius meant with the right to bring it about that the third party obtains a right. Because Grotius here also referred to a passage of Covarruvias (*Relectio super VI 1.18.2* II. §.4 no. 13), it has been suggested that he meant that the promisee acquired the right to claim performance to the third party beneficiary,[33] for this is what Covarruvias taught at the end of the passage referred to: "According to Canon law one can stipulate for another when the promise is addressed to the person present…such a stipulation is valid and after the absent person has accepted and consented, the stipulator who is present must cede his claim to him".[34] In this line of thought,

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[29] It may well be that they accepted the promise 'in the name of the absent promisee' (*nomine alterius*), but such a requirement is not mentioned.

[30] See Hugo Grotius, *De iure belli ac pacis*, II.11 § 18 [2] (p. 338).

[31] As if he had stipulated: "Do you promise *me* to perform to Titius".

[32] See his *De iure belli ac pacis*, II.11 § 18 [1] (p. 337)…naturaliter uidetur mihi acceptanti ius dari efficiendi, ut ad alterum ius perueniat, si et is acceptet: ita ut medio tempore a promissore promissio reuocari non possit; sed ego cui facta est promissio eam possim remittere.

[33] Cf. Ankum, De voorouders, p. 29, Müller, p. 128, Bayer, p. 38.

[34] Cf. Didacus Covarruvias, Relectio super VI 1.18.2 II § 4 no. 13 (*Opera omnia* ed. Lyon 1661, p. 294): Ipse opinor iure pontificis alteri per alterum posse stipulati uerbis

the absent beneficiary seems to consent to what is stipulated in his favour—or to accept the stipulator's offer to cede his claim as Christian Wolff maintained.[35] But one may question whether this is also what Grotius meant. The corresponding fragment in Grotius' *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, which was composed a few years earlier, points in a different direction, namely that the third party accepts the promisor's offer. Apparently, the agreement implies an offer to the third party to perform as the parties present had agreed upon.[36] This was also the view of Samuel Pufendorf (1632–1694), who compared this agreement with the promise phrased as "I will give to the third party, if you so desire". Hence it lay with the stipulator to pass the offer on to the third party so that he may accept.[37]

These three kinds of acceptance, discussed by Grotius, have in common that it is the promisor who intends to give something to an absent person and uses an 'intermediary' to obligate himself towards the other. He concludes a contract with him (the absent person) through the latter's agent, or makes him an irrevocable[38] offer, which he (the absent person) may accept later. Because of the involvement of the 'intermediary', the consent between promisor and 'intermediary' resembles a *stipulatio alteri*, but in Grotius' line of thought this is not an obligatory contract.[39] The purport of their agreement is a different one. It is not aimed at creating an obligation between them, but to ascertain that the promisor does not turn back upon his promise before it is accepted by the beneficiary.

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promissionis in praesentiam directis… hec stipulatio erit iure pontificis admittenda in hoc sensu ut ualida sit et secuta absentis acceptationem eiusque prestito consensu, teneatur presens stipulator ei actionem cedere. The same holds true for Castile, according to Covarruvias. The difference between his line of thought in the Variorum resolutionum (see p. 53) could lay in the different way public notaries and agents accepted a promise (addressed to them), *viz.* in the name of the beneficiary.

[35] Cf. Christian Wolff, *Institutiones iuris naturae ac gentium*, § 433 (see note 66).

[36] Hugo Grotius, *Inleidinge* III.3 § 38 (ed. Dovring-Fischer-Meijers, Leiden 1952, p. 213).

[37] Cf. Samuel Pufendorf, *De jure naturae et gentium libri octo*, III.9. no. 5.

[38] Pufendorf differed of opinion with Grotius with regard to the effect of an acceptance without mandate (of a promise directed towards the absent promisee). In his view it had no effect.

[39] Bayer wrongly characterises the agreement as an "unechter Vertrag zugunsten Dritter" (p. 40), of which only the stipulator may claim performance to the third. (p. 48) The views of Grotius and Pufendorf strongly influenced many *Usus modernus* writers, who applied the concepts of Natural law instead of the *Alteri stipulari* rule of Roman law.

Grotius did not pronounce on the question whether a third party may derive a right from a contractual term. He did discuss clauses in favour of a third party, viz. a promise under the condition that something be given to a third party, but he restricted himself to the question, as to whether such a condition could be revoked or not.[40]

3.5 *Legal practice*

At the beginning of the seventeenth century local statutes and legal practice often acknowledged other exceptions to the *alteri stipulari*-rule than the medieval writers had summed up in their glosses and commentaries. Although one might argue, like Hugo Doneau (1527–1599), that the glossators and commentators had already 'found' too many exceptions in Justinian's codification which granted the third party a right,[41] indigenous law went even further. In Castile, the *ley 'Paresciendo'* (1348) excluded all defences based upon Inst. 3.19.19 *Nemo alteri stipulari potest*, when it was apparent that the promisor intended to obligate himself towards the absent beneficiary. In France, principals in Paris could enforce contracts concluded by their agents; in Brittany third-party beneficiaries could even enforce some agreements merely made in their favour, namely when someone (the stipulator) had alienated property, because the acquirer (the promisor) had agreed to give something to a third party.[42]

Roman law still provided arguments for these exceptions. As Andreas Alciatus (1492–1550) pointed out, in all contracts except *stipulationes*, agents were supposed to have acted as messenger informing the other party of their principal's consent when they concluded the contract

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[40] Hugo Grotius maintained that a promisor could add a condition (*modus*) in favour of a third party until the other accepted his promise. The promisor could revoke this condition again until it was accepted by the third party. See his *De iure belli ac pacis*, II.9.19 (p. 338). In a note Hugo Grotius referred to the *donatio sub modo* and Bartolus' teaching on its revocability. Grotius did not deal with the question whether the third party had an action (against the other) to enforce compliance of the modus. In later times it was argued, that the consent of the other, who agreed to the *modus*, implied an irrevocable offer to the third party, of which the promisor could relieve him. This explanation may be in agreement with Grotius' line of reasoning but Grotius restricted himself to the problem whether or not the *modus* could be revoked.

[41] Hugo Doneau, ad D. 45.1.38.17 (*Opera omnia* ed. Florence 1840–1847, XI, col. 838).

[42] Cf. M. Planiol (ed), *La très ancienne coutume de Bretagne*, Rennes 1896 repr. Paris 1984, p. 301, § 327.

in the other's name. The principal acquired a right himself, as if he entered into the contract through a messenger (*organo nuntii*).[43] This interpretation, which originated within the context of the consensual contracts, became of great importance in seventeenth century France, when the obligatory force of bare agreements was acknowledged. The *coutumes de Paris* and the *somme rural* did not contain provisions on contracts concluded by agents, but it was undisputed that the principal's power to sue did not depend upon assignment.[44] With regard to contracts concluded by agents it was even considered a Roman subtlety to distinguish between contracts concluded in one's own name and contracts in one's principal's name.[45] Parties could enter into contracts, as Jean Domat (1625–1696) described, by letter or by an intermediary, a tutor, curator or *procureur*.[46] Even Robert Joseph Pothier (1699–1772), who distinguished between contracts concluded in one's own name and contracts in the name of another,[47] maintained that the principal became a party to the contract when the agent acted upon mandate, irrespective in whose name the contract was entered into.[48]

In C. 8.54(55).3 Roman law also provided an argument that a third-party beneficiary could enforce a contractual clause in his favour, when property was alienated under the condition that the acquirer gave something to a third party. This constitution from Diocletian dealt with a case in which an object was donated under the condition that after a lapse of time it would be passed over to someone else. It ruled that the latter could bring an *actio utilis* against the (first) donee.[49] Because it contained an exception to the *alteri stipulari* rule, medieval civilians had

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[43] See Müller, p. 83.

[44] See Dondorp, The reception of Institutes 3.19.19, p. 63.

[45] Charles Dumoulin, Commentarii in consuetudines Parisiensis, I.33.2 no. 23 (*Opera omnia*, ed. Paris 1612, I, col. 865): prout etiam apud nos observatur quod dominus ex contractu sui procuratoris vel gestoris, sicut alias ex contractu nuncii recta et sine cessione agit, omisso circuitu non attenta praefata subtiliate iuris Romani.

[46] See Jean Domat, *Les loix civiles*, I.I.16 and I.II.4 (ed. Paris 1756, fo. 20v and 21).

[47] See Robert Joseph Pothier, *Traité des obligations* I.1.5 § 4 no. 74 (ed. Paris 1777, p. 77): s'entend en se sens que nous le pouvons, lorsque nous contractons en notre nom, mais nous pouvons prêter notre ministère à une autre pour contracter pour elle, stipuler et promettre pour elle…

[48] See Pothier, *Traité des obligations* I.1.5 § 4 no. 82 (p. 81): Nous sommes aussi censés contracter par le ministère d'un autre, quoiqu'il contracte lui même en son nomme, lorsqu'il contracte pour des affaires auxquelles nous l'avons préposé.

[49] The text is one of the few examples in Roman law where the third party acquires an enforceable right when something is stipulated in his favour. See p. 19.

interpreted this text restrictively:[50] they did not extend C. 8.54(55).3 to anything other than gratuitous transfers of property. The works of Covaruvias (1512–1577) and Louis Charondas le Caron (1534–1613) indicate that another interpretation became accepted in the sixteenth century which provided Roman law arguments for the fact, that legal practice acknowledged third-party rights in alienations under the condition that the acquirer passed the object on to someone else. In their view C. 8.54(55).3 dealt with an example of an innominate contract (*do ut des*) because the donee had agreed to pass the object on to another.[51] Hence the ruling of C. 8.54(55)3 could be extended to other alienations where the acquirer agreed to pass the object on to someone else.[52] This new interpretation made it possible to apply the ruling of C. 8.53(54).3 to analogous cases, as Charondas did in his *Responses et decicions de droict francais*.[53]

Although it was clear that indigenous law in the seventeenth century knew more exceptions to the *alteri stipulari* rule than the medieval glossators and commentators had acknowledged, it is difficult to describe to what extent law in their days differed from Roman law. Not only did the differences vary from region to region but the interpretation of indigenous law could also vary from author to author.

To what extent was the *nemo alteri* rule of Inst. 3.19.19 received in Dutch legal practice? Though one cannot equate Holland with the other provinces of the Dutch Republic, in this case legal practice seems to

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[50] Baldus de Ubaldis (1327–1400), for instance, had taught that the provision of this constitution only applied in the case the Emperor had decided, *viz*. where the donee had promised to pass the object on to the third beneficiary. The constitution did not apply to other performances.

[51] Didacus Covarruvias, Variorum resolutionum I.II. 14 no. 2 (*Opera omnia* II. p. 73): …tametsi ubi donatio inicpit a rei traditione ratione contractus qui re contrahuntur alteri per alterum obligatio acquiritur; Louis Charondas le Caron, *Responses et decisions du droict François*, 10 reponse 46 (ed. Paris 1612, p. 397): specie benigna iuris interpretatione divi principes utilem actionem competere admiserunt et utilem quedam ex graecis interpretibus praescriptis verbis actionem interpretatur.

[52] Several medieval civilians taught that the third party acquired an action '*si pactum apponitur in traditione rei*' but they had other situations in mind than the one this text discussed. In a *donatio sub modo* the third party is not the owner of the object handed over (as Guillelm de Cunh and Jean Favre required), nor does the donor remain owner (as Bartolus and Baldus required).

[53] See Philippe Antoine Merlin, *Recueil alphabétique de questions de droit* XIV, Brussel 1829, p. 371: De là vient que jamais on n'a douté, parmi nous, que les indications de paiement faites par un contrat de vente au profit des créanciers du vendeur, ne donnassent action à ces créanciers du vendeur contre l'acquéreur qui s'était obligé de les payer. See also Scholten, p. 275.

have been similar.[54] Hugo Grotius wrote in his *Inleidinge tot de Hollandsche rechts-geleerdheid* (1619–1621) that the (learned) law allowed one's children to accept promises for him, but if someone else merely stipulated or accepted something for a third person, this had no effect, "unless it is made in God's service or for the poor, or unless the accipient himself has an interest in the performance or a penalty is annexed which the promisor will incur if he fails to perform".[55] The first exception—the promise to give something to a charitable fund—goes back to Baldus de Ubaldis, the second to the *Corpus iuris* itself. The effect of the *stipulatio alteri* in both cases varied. The first is an example of a situation in which the 'third party'[56] acquires a right; the second covers all situations in which the stipulator acquires a right. Grotius subsequently points out: "However, since with us [in Holland] more attention is paid to equity than to legal subtlety, even apart from these exceptions a third party may accept a promise, and thereby acquire a right, unless the promisor has revoked his promise before the third party has accepted it".[57]

Grotius' *Inleidinge* does not indicate that the concept of agency, which he had developed in his *De iure belli ac pacis*, was used in legal practice in the Dutch province Holland.[58] The concept of representation was not unknown, but Roman law did not acknowledge agency in contracts nor, apparently, did Dutch legal practice.[59] Representation was limited to one's children, curators, tutors, and representatives of public bodies. However, as Grotius points out, the absent beneficiary (apparently

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[54] See Dondorp & Hallebeek, Het derdenbeding, pp. 54–56

[55] Hugo Grotius, *Inleidinge* III.3 § 38 (ed. p. 213): . . . ten zij zulcks geschiede ten dienste Gods ofte voor den armen, ofte dat den aennemer zelve daer aen zy gelegen: ofte dat daer een straffe by gestelt zy, die den toezegger zal moeten dragen zoo hy zulcks niet en deede.

[56] The promise could be directed to the poor (as promisee). Cf. Baldus, ad C. 1.2.19 no. 3 (*Opera Omnia*, ed. Lyons 1585, III, fo. 32va): Ego addo unum quod piis locus et pauperibus possit quilibet stipulari etiam uerbis directis ipsius absentibus.

[57] Hugo Grotius, *Inleidinge* III.3 § 38 (ed., p. 213): Maer alzoo by ons meer werd gezien op de billyckheid als op scherpheid van rechten, zoude oock buiten deze uitzonderingen een derde de toezegging moghen aennemen, ende alzoo recht bekoomen, ten waer den toezegger voor de aenneming van de derde zulcks hadde wederroepen.

[58] In his *De iure belli ac pacis* (see note 36) the acceptance by an agent (with a mandate) of a promise directed to the absent promisee is a separate category which differs from the others in the fact that the principal acquires a right at that moment. His *Inleidinge* indicates that the principal has to accept in person (or through one of his children).

[59] Grotius (*Inleidinge* III.1.38) described that merchants could sue their agents (*bewinthebbers*) to transfer their claims. A cession was feigned if they did not comply.

irrespective of whether the stipulator acted as agent) may accept the promise and thereby acquire a right.[60]

Around 1600 it was discussed extensively why Inst. 3.19.19 stated that one cannot stipulate to give or to do something for a third party. Was it wrong—as Bayer ascribes to Conrad Ritterhausen (1560–1613)[61]—to meddle in another's affairs? The Roman-Dutch writers of the seventeenth century were of another opinion. They generally acknowledged that a *stipulatio alteri* made out of generosity should have effect. As Simon Groenewegen van der Made (1613–1652) wrote, the sole fact that the *stipulator*'s interest (in the performance to the third party) merely existed on affective grounds, was no reason to deny the agreement all effect.[62] What the effect should be, was, however, disputed. There was no settled doctrine on this problem.

This was not only true for the Province of Holland. When French, German and Dutch writers of the seventeenth and eighteenth centuries said that in their days the *alteri stipulari*-rule no longer applied, some meant that a party may enter into a contract through an agent, as in France, others that a party may stipulate and enforce a performance in which he has no financial interest, as some German writers maintained.[63] Some meant, like Grotius, that the third party may accept the promisor's offer to give him something. In the next paragraph we will discuss these doctrines, taking as a starting point Roman-Dutch law.

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[60] It was disputed, whether or not agents met the interest-requirement. The French humanists had derived from the Corpus iuris that the performance agreed upon must benefit the promisee. Cf. Duarenus, ad D. 45.1.38.17; Cujaz, ad D. 45.1.38.17, and Doneau, Commentarius de iure civili XII.17 no. 3–6 (*Opera omnia* III., col. 577). According to Doneau this is the case in three situations: a father stipulates to give something to his *filius familias* or slave; a debtor stipulates to perform to his creditor in his place; someone stipulates to give something to a third party, who is obligated to pass the object through to him. The procurator must stipulate to give the object to himself.

[61] See Cunradus Rittershusius, ad Inst. 2.9.5 (*Commentarius in IV ll. Institutionum Justiniani*, ed. Strasbourg 1618, p. 224):…quia culpae est, inmiscere se rebus alienis. Bayer, p. 78, erroneously refers to Ritterhusius, ad Inst. 3.19.4 (*reg.* the promise that another person will do something).

[62] See Simon Groenewegen, *De legibus abrogatis*, Inst. 3.20.19 no. 3 (ed. & transl. Beinart, Johannesburg 1974, I, p. 76).

[63] For the Usus modernus, see Müller, pp. 111–122, Bayer, pp. 45–56. It cannot always be established from the works of the Usus modernus whether the third party acquires a right the moment the contract is concluded by his agent (as in Pufendorf's draft of the Code of Hannover, 1772) or at later date, when he ratifies the stipulation made for him (as in a *Gutachten* of the Law Faculty of Wittenberg, 1689) or when he accepts an (implied) offer of the promisor.

3.6 'Ius hodiernum' *and legal scholarship*

In his *Observationes tumultuariae*, Cornelis van Bijnckershoek (1673–1743) recorded a discussion in the chambers of the High Court of Holland and Zeeland concerning a case which was eventually decided on October 27 1733. Someone paid an annual sum to his three sisters, because he had promised his brother to do so as part of a settlement. When he stopped the payments after his brother's death and the sisters demanded continuation, the High Court found for the plaintiffs. In chambers some judges had dissented, as Bijnckershoek's report shows.[64] They agreed with the other judges that the Roman principle *alteri stipulari nemo potest* no longer applied in Holland, but in their view this only meant that a party may stipulate and enforce a performance, in which he has no interest. In other words: the brother's heirs could bring an action to enforce the agreement in favour of a third party, but the sisters could not (unless the heirs had ceded their claim to them).

This 'dissenting opinion' was not based upon the authority of the Roman-Dutch writers. It resembled the teachings of the contemporaneous German legal philosopher Christian Wolff (1679–1754).[65] He maintained that a contract which is merely to the benefit of a third party creates an obligation between the parties, even though the stipulator has no monetary interest. Their agreement results in a right for the stipulator to compel the promisor to perform to the third party, if the latter assents. The stipulator has the right to do so, but he is allowed to release the promisor of his obligation prior to the acceptance by the third party. At the moment he informs the beneficiary of the parties' agreement (to do something in his favour), according to Wolff, the stipulator tacitly makes an offer to the third beneficiary to bring it about that the promise will be performed. In Wolff's line of thought, at the moment the third party accepts, the stipulator is obliged either

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[64] Cornelis van Bijnckershoek, *Observationes tumultuariae*, 3 (ed. Meijers e.a., Haarlem 1946), p. 569 (no. 2792).

[65] With regard to the binding force of promises to an absent person, Wolff distinguished the same three categories as Grotius. He agreed with Grotius that a mandate authorized the agent to accept a promise directed towards another, viz. his principal. With regard to the acceptance without a mandate, he disputed Grotius' doctrine, that it was aimed at making the promise irrevocable. Wolff maintained, that the acceptance of a promise directed to the other had no effect at all. If he accepted an offer directed to himself, he himself acquired a right, even though he had no monetary interest.

to claim performance himself or to assign his claim to the third party.[66] This was certainly not the majority view in Holland or in the other provinces of the Dutch Republic.[67] Most writers taught that the third party's power to bring an action does not depend on assignment. He could bring an action himself, as the Court of Holland and Zeeland acknowledged in their verdict in the case under dispute. Thus, the claim of the three sisters was awarded.

The Roman-Dutch writers of the seventeenth and eighteenth centuries produced various legal reasoning to substantiate that the beneficiary can bring an action. At the end of the eighteenth century the Leiden professor Dyonisius van der Keessel (1738–1816) stated as follows: "From a promise made to a third person—*or rather the intermediary*—to which he has consented without mandate, the person interested acquires a right if he subsequently accepts the promise or if such third person—*the intermediary*—who has consented without mandate is a public person, such as a notary. But apart from these two cases the person interested acquires no right, as Grotius rightly maintains. This is the consequence not of any technicality of the civil law but of the nature of things, which in the absence of a contrary custom cannot be overruled by the authority of Groenewegen, Voet and others who take a different view from mine".[68]

In this passage Van der Keessel discussed the effect of promises to give something to an absent beneficiary when the promise is accepted by an intermediary without mandate, *viz*. an agent who overstepped the boundaries of his mandate, an unauthorized manager of another's affairs, a public notary or some other person. Van der Keessel terms the person to whom the promisor must perform '*is cuius interest*', the person who has an interest in the performance agreed upon. In the perspective

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[66] Christian Wolff, *Institutiones iuris naturae et gentium*, § 433 (ed. Halle 1750; repr. Hildesheim 1969): Cumque velim, ut valeat promissio, quando tibi eam significo tacite saltem tibi promitto, ut si acceptes, ego efficere velim, ut promissio adimpleatur, consequenter acceptatione tua tibi obligor ad efficiendum ut promissio impleatur, aut ius meum promissorem compellendi, ut impleat, tibi cedendum.

[67] See Dondorp & Hallebeek, Het derdenbeding, p. 55–56

[68] Cf. D.G. van der Keessel, *Theses selectae iuris Hollandici et Zelandici* (ed. Amsterdam 1680), no. 510: Ex promissione tertio facta, in quam tertius ille sine mandato consensit, is cuius interest ius quidem acquirit, si deinceps promissionem acceptat, aut tertius ille, qui sine mandato consensit, sit persona publica, veluti notarius. Sed extra hos casus, ei cuius interest non acquiri ius, recte Grotius docet, non ex iuris civilis subtilitate, sed ex ipsa rei natura, quam deficiente consuetudine vincere non potest Groenewegen et Voetii ad titulo dicto de verb. obl. (D. 45.1) no. 3 aliorumque dissentium auctoritas.

of the Roman law of obligations he is a *tertius*, but Van der Keessel's perspective derives from Natural law. Hence, the stipulator is termed '*tertius*', the other person who is present and consents. Apparently, the effect of his acceptance varies, depending upon whether he is an agent acting upon mandate, a public notary or someone else.

Let us first have a closer look at the agent who acts upon mandate. Van der Keessel stated elsewhere that according to Dutch legal practice at the end of the eighteenth century absent persons could enter into a contract with each other through an agent (*procurator*). In order to acquire a right it was in such cases no longer necessary that the principal subsequently accepted the promise himself as had been required in the times of Grotius (or at least in his description of the legal practice of Holland). Neither was it necessary that the agent assigned his claim to his principal. The latter already acquired the power to bring an action at the moment his agent consented. Van der Keessel did not state that the promise was addressed to the principal himself, as Grotius maintained in his *De iure belli ac pacis*,[69] nor that the agent accepted in the name of his principal. Apparently, the principal acquired a right irrespective to whom the promise was addressed. It is, therefore, difficult to explain Dutch legal practice in terms of both Natural and Roman law.

Van der Keesssel ascribed the same effect to the acceptance by a public notary or a public clerk—who had the power to accept for an absent beneficiary even without mandate. The absent beneficiary could enforce a promise laid down in the notarial instrument. In order to acquire a right, it was not required that he accepted in person. Notarial instruments had been used for centuries to make promises to absent persons enforceable. The medieval civilians and canonists had construed a Roman law basis for the notaries' power to stipulate for another, by arguing an analogy between the Roman *servus publicus* and the medieval notary; later writers based it upon local customary or statutory law.[70] However, the notary's competence to achieve that the promisor was obligated through the instrument towards a third-party beneficiary was sometimes restricted. In France, for instance, public notaries could not accept for an absent donee. Statute required that the absent donee subsequently accepted in person.[71]

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[69] See note 30 and 32.

[70] Cf. Lange, p. 279ff., at p. 284.

[71] Ordonnances of 1539, 1549 and 1731 decreed that donations were invalid unless the donee accepted in person. Notaries could not accept for them. According to

But apart from these two cases—*viz.* promises accepted by agents or public notaries—the absent beneficiary acquires no right at the moment an agreement is made in his favour. Van der Keessel adopted the view of Grotius, that the power to bring an action resulted from one's own consent: the absent beneficiary had to accept the promise himself. "This is the consequence not of any technicality of civil law, but of the nature of things". In this line of thought—characterized by Wesenberg[72] as a surrogate for the modern third-party benefit contract—the *stipulatio alteri* itself does not result in an enforceable right for the third-party beneficiary. Though influenced by Grotius' Natural law, this alternative is still in accordance with the civilian tradition because the *stipulatio alteri* has no effect. Apparently, the promise to perform to an absent beneficiary is interpreted as an offer he may accept at a later stage.

Van der Keessel in so many words rejected the opinion of Simon Groenewegen (1613–1652), Johannes Voet (1647–1713) and others that a *stipulatio alteri* by itself resulted in a right for the third party. Simon Groenewegen and Johannes Voet not only taught that one could enforce stipulations made by his agent,[73] they also maintained that every *stipulatio alteri* resulted in an actionable right for the third party. In his 'Treatise on the laws abrogated and no longer in use in Holland and neighbouring regions' Simon Groenewegen asserted that the provision of C. 4.27.1 *Per extraneum acquiri non possumus* had fallen into disuse for "according to our legal practice a person can stipulate for another, as I have stated ad Inst. 3.19.19".[74] There Groenewegen explained, that the reason why the *stipulatio alteri* has no effect did not lie in the fact (as the explanation given in Inst. 3.19.19 read) that it is of no interest to us that something is given to another. It had no effect because it is not the purport of the transaction that the stipulator acquires a right to the performance, and because there is no *stipulatio* between the promisor and the *tertius*, the beneficiary.[75] "Consequently with regard to the *tertius*

Dumoulin the French king thus confirmed the opinion of Philippus Decius (1454–1536) that an absent person does not acquire through the *stipulatio alteri* of a notary. Cf. Charles Dumoulin, *Notae in Philippum Decium*, ad reg. 23 s.v. Ratificatione (*Opera omnia*, ed. Paris 1612, III, col. 542). See also P. Scholten, p. 275.

[72] See Wesenberg, Verträge.

[73] Cf. Simon Groenewegen, *De legibus abrogatis*, ad Inst. 3.19.19; Johannes Voet, ad D. 45.1 no. 3.

[74] See Simon Groenewegen, *De legibus abrogatis*, ad C. 4.27.1 (ed. et transl. Beinart and Hewett, Johannesburg 1984, p. 184).

[75] See Simon Groenewegen, *De legibus abrogatis*, ad Inst. 3.19.19 no. 4 (p. 77).

the said promise was really only a nude pact",[76] Groenewegen wrote, "from which, as is well known, no action arose in the civil law. But as there is nothing more consonant with trust among men than that they should abide by what they have between themselves agreed upon and as it is a serious matter to break faith, our forefathers considered that nothing was of greater moment, nothing better established, than to keep one's given word.… Hence in present day customs an action is competent to a nude pact, as I state ad C. 2.3.10, and hence too by stipulating for another an obligation is created, as it is commonplace among merchants to stipulate not only for themselves in written documents, but also for another, for instance the bearer of the note; in which case…he also has an action, if he is the holder in good faith".[77] Johannes Voet (1647–1713) also argued, that if someone promised to give something to me (the stipulator) and/or to Titius (the third party), nowadays Titius acquires a right, as the frequent use of bills of exchange among merchants shows.[78]

3.7 *Conclusions*

Although with regard to contracts between absent persons, contracts of agents, and contracts to perform to a third party, private law and legal scholarship in the seventeenth and eighteenth centuries were strongly influenced by the concepts of Canon law and the teachings of the Natural law writers, the lawyers were reluctant to set aside the Roman law principle *alteri stipulari nemo potest*.

Some, like Christian Wolff, sacrificed a pawn (*viz*. the principle that the stipulator must have a monetary interest in the performance agreed

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[76] His line of thought is not concludent. The beginning resembles that of Grotius, who taught that the acceptance by someone other than the beneficiary made the promise irrevocable. Grotius argued from the Natural law perspective, Groenewegen in the civil law tradition. He—erroneously—considered the offer without acceptance to be an example of an agreement (*nudum pactum*). The comparison between a promise and a pactum was not unknown (*e.g.* Dumoulin spoke of a *pactum improprium*), but they were not equated.

[77] Simon Groenewegen, *De legibus abrogatis*, ad Inst. 3.19.19 no. 6 (p. 77).

[78] See Johannes Voet, ad D. 45.1 no. 3 (ed. *Commentarius ad pandectas*, 3, ed. Napels 1833, pp. 222–223):…Hodie tamen in hisce Titio adjecto non modo recte solvitur sed et actio in solidum quaesita est, aut pro parte si quis sibi et Titio stipulationem fecerit, nihilque inter mercatores frequentius esse quam ut non modo sibi set et alteri veluti syngraphae aut literarum combialium latori solvi stipulentur; autor est post alios Groenewegen ad dicto § 19 Inst. de inutil. stip. (Inst. 3.19.19)…

upon in order to acquire a claim he can assign to the third beneficiary) to save the rule that a third party does not acquire a right from an agreement between the promisor and promisee. Many, like Grotius, circumvented this obstacle through a different interpretation of the agreement to give something to a third party. Since the performance agreed upon does not benefit the accipient (stipulator), he argued, its purpose cannot be to create an obligation between the promisor and the accipient, but it is made to ensure that the promisor does not recall his promise to give to another. To become enforceable this promise still has to be accepted by the proper person, i.e. the other.

Nevertheless two leads for the origin of the modern third-party benefit contract are visible in the seventeenth and eighteenth centuries. First, in the broad concept of 'agency' in French and later also in Dutch law, where one could enforce promises one had accepted through one's agent (*procurator*) even when the agent had concluded the contract in his own name. It was considered too subtle to distinguish between contracts concluded in the name of the principal (representation) and those concluded in one's own name (indirect representation). In other words: all agreements between a promisor and a *procurator* to perform to the latter's principal resulted in an obligation of the promisor towards the principal, and in that respect they resembled the third-party benefit contract.

The other lead lies in commercial law, where in bills of exchange the beneficiary could bring an action against the drawee (*promisor*). It was commonplace among merchants, as Simon Groenewegen described, to stipulate not only for themselves in written documents, but also for another, for instance for the bearer of the note, in which case the latter has an action, if he is the holder of the note in good faith. Simon Groenewegen and Johannes Voet derived from this that third-party rights were acknowledged in Holland.[79]

[79] See p. 67.

CHAPTER FOUR

THE NINETEENTH CENTURY

4.1 *Introduction*

At the beginning of the nineteenth century, private law was codified in many parts of continental Europe. This was mainly due to the campaigns of Napoleon, who introduced the French *Code civil* (1804) in the territories he conquered. When the occupation came to an end, the French legislation remained in force in many regions until a domestic code of civil law was established. This was the case in the Netherlands (including Belgium), in some German territories (amongst others Rheinland) and parts of Poland and Italy. The French civil code was also influential for another reason, for it served as an example for the draft of many European codes of civil law, such as those of Sicily (1819), Parma (1820/1824) and Piedmont (1837), those of the French speaking cantons in Switzerland, the Netherlands (1838), Saxony (1865), Italy (1865), Portugal (1865) and Spain (1889).

It may be noted, though, that the *Code civil* was not the only codification of private law which came into existence around 1800. Since 1756 the kingdom of Bavaria had its own codification, Prussia since 1794 and Austria since 1812. All this, however, did not imply that the part of the learned law was played. Roman law retained its validity as a secondary source of law until a codification was promulgated in Spain and Portugal, in parts of Italy (Tuscany) and in some German territories, amongst others Hessen, Würtemberg, Thüringen and Hannover.

Together with the French *Code civil*, French legal scholarship gained influence in nineteenth century Europe. In all countries where the French *Code civil* was in force or where the codification of private law was modelled on it, legal practitioners used to consult French commentaries. In these areas, legal scholarship no longer focussed on the *Corpus iuris civilis*, but on the *Code civil*, and especially on the legal-historic and systematic interpretation of its provisions. In the German countries by contrast, even in Prussia and Bavaria, the *Corpus iuris civilis* was still in the centre of accademic attention. With the rise of the *Historische Rechtsschule*, Roman law—*viz*. the works of the Roman jurists—again

served as a leading light, as Natural Law had done in the eighteenth century.

4.2 Alteri stipulari; *the nineteenth century approach in general*

In the civilian tradition the maxim *Alteri stipulari nemo potest* expressed two basic principles of private law: parties who enter into a contract acquire what is in their own interest and they represent themselves. In other words: the agreement that something be given to a third person did not result in an obligation between parties, and the third party could not derive a right therefrom. The stipulator could not bring an action, unless he had a monetary interest in the performance; neither could the third party, unless the stipulator had ceded his claim by appointing him as his *procurator in rem suam.* Roman law thus locked out both contracts merely in favour of a third party—because the stipulator had no monetary interest—and direct representation. Canon law only partly adhered to the *alteri stipulari* rule, because the Church would enforce a performance to a third party, even though the stipulator had no monetary interest in it. As seen in the previous chapter, in many countries in Europe, established legal practice also deviated from the *alteri stipulari* rule, since one could enforce contracts concluded by an intermediary. In the first half of the nineteenth century, however, French and German writers maintained that the *alteri stipulari* rule was adopted in the *Code civil* and in German legal practice.

On the one hand, in as far as the maxim *alteri stipulari nemo potest* expressed that parties stipulate and acquire what is in their own interest, the French *Code civil* followed the civilian tradition. It rules in art. 1119 that "a man cannot, in general, bind himself or stipulate in his own name, except for himself". The German speaking countries, however, deviated from Roman law: it was generally acknowledged that one could stipulate a performance to a third party out of mere generosity. German authors considered it incompatible with the freedom of contract that the stipulator must have a monetary interest in the performance agreed upon.[1] This idea was also codified in the Prussian *Algemeines*

[1] The nineteenth-century German authors like Bucher, Förster, Unger and Gareis subdivided agreements in favour of a third party into genuine (*eigentliche*), which were stipulated for affective reasons, and non-genuine (*uneigentliche*), in which the stipulator had a monetary interest. This distinction differs from the modern distinction, as described at p. 2.

Landrecht (1794): "The benefits for a third party can also be the object of an agreement".[2]

On the other hand, in as far as the maxim *alteri stipulari nemo potest* locked out direct representation, the German speaking countries still adhered to the *alteri stipulari* rule.[3] In France, however, the *Code civil* acknowledged the concept of direct representation. When one stipulates in the other's name the *alteri stipulari* rule did not apply. Agents (*procureurs*) and unauthorized managers of another's affairs would not be a party to the contract; rather their principal would be. As a consequence of this difference, the German *Vertrag zugunsten Dritter* encompassed all agreements and contractual clauses in favour of a third party, irrespective of the question in whose name they were stipulated. The *stipulation au profit d'un tiers* in France only covered stipulations in favour of a third party made in the stipulator's name.

At the end of the nineteenth century this began to change because the courts in France and Germany tended to acknowledge the concept of third-party rights in life insurance cases. Legal writers followed suit, giving several explanations why the third beneficiary could enforce such contracts or contractual clauses. The German legislator was one of the first to acknowledge the modern concept of *Verträge zugunsten Dritten* or third-party benefit contracts.[4]

For this reason we will first examine the concept of the *stipulatio alteri* as it was interpreted by the French and German writers in the first half of the nineteenth century. By doing so, we will also see that in Germanic legal practice the stipulator was supposed to have ceded his claim to the third beneficiary unless the stipulation was made out of mere generosity towards the third party. Subsequently, we will pay attention to the exceptional cases in which third-party contract rights were acknowledged in France and Germany and the doctrinal explanations thereof—given before the modern concept of the contract in favour of

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[2] ALR I.5 § 74: Auch die Vorteile eines Dritten können der Gegenstand eines Vertrages sein.

[3] Even though at the end of the nineteenth century the concept of direct representation was widely acknowledged under influence of Savigny's interpretation of D. 41.1.53. See F.C. von Savigny, *Das Obligationenrecht als Theil des heutigen Rechts* 2, Berlin 1853, p. 19–20, 61–62, 71–72. The compilers of the BGB followed Savigny.

[4] The German legislator followed the Swiss one, who in 1881 for the first time acknowledged that the third party can derive his right from the contract he is no party to. Cf. J. Haberstich, *Handbuch des Schweizerischen Obligationenrechts* I, Zürich 1884, 210 and Dölle, p. 26.

a third party (third-party benefit contract) was developed. Finally, we will describe the transformation in the concept of the contract in favour of a third party, viz. from a contract which obliged to a performance to a third beneficiary (to give or do something for him) into a contract that results in a third-party right.

4.3 *Renewed influence of Roman law in Germany*

Legal scholarship in nineteenth-century Germany returned to the Roman law principle that one cannot stipulate for a third party, thus locking out both direct representation and third-party rights.[5] At the turn of the previous century legal practice in Germany had been described by Glück in a similar way to that used by Grotius in respect of Holland.[6] He maintained, that the Roman law principle that one cannot acquire rights through an extraneous person had not been adopted in Germanic legal practice. The courts did not apply Inst. 3.19.19 *alteri stipulari nemo potest* because the absent beneficiary could accept the promise that something be given to him and thereby acquire a right.[7] However, as Mühlenbruch wrote in his 1835 revision of Glücks commentary, this was in his days no longer considered true. "Nowadays, agreements give rise to obligations between parties and third beneficiaries cannot derive rights therefrom."[8] This 'new' doctrine, which was in

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[5] Some writers acknowledged direct representation. Cf. F. Mackeldey, *Lehrbuch des heutigen römischen Rechts*, Giessen 1833, p. 213: Durch den Vertrag werden in der Regel nur die Paciscenten und deren Erben, nicht auch dritte Personen berechtigt und verpflichtet. Dieser Grundsatz seidet indes… wenn der Vertrag in seinen Namen und für ihn geschlossen worden ist.

[6] A similar concept can be found in the Dutch drafts for a civil code (1816 and 1820) by Johann Melchior Kemper (1776–1824). Cf. artt. 2313–2315 of the 1820 draft.

[7] Cf. C.F. von Glück, *Ausführliche Erlauterungen der Pandecten nach Hellfeld* 4.2, Erlangen 1797, p. 564: Da jedoch das Hauptprincipium… dass man nämlich durch einen freyen Menschen kein Recht erwerben könne… in Teutschland nie angenommen worden ist, so lässt sich von den vorgetragenen Grundsätzen des Römischen Rechts (sc. Nemo alteri stipulari potest *ed*) in unseren Gerichten kein Gebrauch machen. Es wird daher heutigen Tages weder eine formliche Cession, noch das Rechtsmittel der sogenannten nützlichen Klage erfordert, um dem Dritten, zu dessen Besten ein Vertrag geschlossen worden, daraus ein Recht zu verschaffen, sondern es genügt, wenn er nur die zu seinem Besten geschehenen Zusage acceptirt hat, ehe die eigentlichen Paciscenten, welches ihnen ohne Zweifel zusteht davon zurückgetreten sind.

[8] C.F. Mühlenbruch, *Ausführliche Erläuterungen der Pandekten nach Hellfeld nach des Verfassers Tode fortgesetzt von C.F. Mühlenbruch*, 38 Erlangen 1835, p. 68: Regel ist heut zu Tage, dass Dritten mit paciscirenden Personen durch Verträge kein Recht erworben werden kann.

fact a return to the Roman law principle that one cannot acquire rights through an extraneous person, did not alter dramatically the position of the third-party beneficiary in legal practice. This was not so much the result of dogmatic developments related to contracts in favour of a third party, but of a more extensive application of the concept of assignment of remedies.

This has to be explained more fully. In Roman law there were situations where a creditor, instead of suing his debtor for damages, could demand that the debtor assigned to him the claim he acquired against someone else. In the case of unauthorised administration, for example, the manager, when carrying out the administration with the required care, would not be liable for damages, but if he, in his capacity of manager of the principal's affairs, acquired, for example, a contractual claim against a third party, the principal could enforce assignment of this claim. In a few specific situations the Roman sources considered such an assignment to be redundant. Even without assignment, the creditor or 'principal' will have the other's remedy at his disposal in the form of an *actio utilis*. The buyer of a contractual claim, for example, can enforce the claim as an *actio utilis* without any assignment between seller and buyer. Similarly, the pupil may bring as *actio utilis* the claim his tutor acquired, without any assigment between tutor and pupil. According to medieval doctrine in such cases, assignment had to be presumed.

In the German *Historische Schule* of the nineteenth century these specific cases were developed into a general rule of law. In all cases where a creditor or 'principal' has an interest in the claim acquired by his debtor, agent or manager, and where according to Roman law he would be entitled to claim assignment of such a claim, this assignment was presumed to have taken place.[9] The principal could bring the action his agent acquired, also if the mandate had been executed properly. In case of an unauthorized management of his affairs (*negotiorum gestio*), the principal could do the same after he had ratified the contract.[10] In such and similar cases, the debtor, agent or manager was, according to the

[9] Thus Mühlenbruch (1835), Rosshirt (1840), Sintenis (1847), Buchka (1854), Puchta (1854), Gerber (1855), and Vangerow (1867).

[10] Cf. C.F.F. Sintenis, *Das practische gemeine Civilrecht*, Leipzig 1847, 2, p. 359: [Die Genehmigung] genügt vielmehr zu dem hier besprochenen Zweck, auch wenn gar kein Auftrag vorangegangen ist. Die Stellvertretung bei Abbschluss des Geschäftes selbst kann sowohl so geschehen dass der Vertrag geradezu auf den Namen des Geschäftsherrn gestellt wird, als umgekehrt auf den des Beauftragten.

Historische Schule, presumed to have appointed his creditor or principal as his *procurator in rem suam.*[11] As a consequence, the creditor or pincipal had acquired an *actio utilis*.

These cases, where someone acquired a contractual right in which a third party had a monetary interest, also encompassed the situation where someone stipulated a right for a third beneficiary. Thus, unless the contract in favour of a third party was made out of mere generosity, it was presumed that the stipulator had assigned his claim to the third beneficiary.[12] In this line of thought contracts themselves did not result in third-party rights, not even when it was the parties' intention that the third beneficiary could claim the performance agreed upon. Contracts in favour of a third party were effective between parties only. The third party's power to bring an action depended on whether there was an obligation between him and the stipulator which entitled him (the third beneficiary) to claim assignment of the stipulator's remedies. This type of the *stipulatio alteri*—where there was an existing obligation between the stipulator and the third party—was termed *uneigentlicher Vertrag zugunsten Dritter* (non-genuine contract in favour of a third party). A sharp distinction was drawn between this type of contract and the *eigentlicher Vertrag zugunsten Dritter* (genuine contract in favour of a third party), which was made out of mere generosity for the third party. Because one cannot enforce donations, a third party cannot enforce the contract merely made in his favour.

4.4 *Renewed influence of Roman law in France*

It follows from Inst. 3.19.19 that parties acquire what is in their own interest. In the civilian tradition the maxim was understood also to

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[11] Roman law was not familiar with cession in the modern sense. The latter was codified in Prussia (ALR I.11 § 393), but German legal practice (*das gemeine Recht*) still adhered to the Roman concept of a *cessio*. The stipulator did not transfer his right, but enabled the third party to sue the promisor in his name. Both the stipulator (assignor) and third party (assignee) were able to bring an action and the stipulator could still discharge the debtor, until the assignee notified him that the claim had been assigned to him (C. 8.41.3).

[12] Mühlenbruch, *Pandekten* 38, p. 69:…Immer aber setzt dies ein obligatorisches Verhältniss zwischen dem Geschäftsführer und dem Dritten voraus, in Folge dessen dieser möglicherweise wider Jenen auf Abtretung des erworbenen Forderungsrechts klagen könnte.

express another principle, *viz.* that the stipulator represents himself. The same derived from Inst. 2.9.5: one cannot acquire rights through an extraneous person, through someone outside one's household. This also meant that agents could not consent for their principals.

With regard to contracts concluded by agents, medieval Roman and Canon law had been in accordance. The agent's principal could only bring an action against the promisor when the agent had assigned to him the claim he acquired. Representation was not unknown in medieval doctrine, but the law of obligations restricted representation to one's children and representatives of public bodies—of cities, universities, monasteries, etc. Nevertheless, as seen in the previous chapter, in many countries at the end the eighteenth century one could enforce contracts concluded by an intermediary and assignment was considered superfluous. At the end of the *Ancien Régime* Rober-Joseph Pothier (1699–1772) had harmonised Roman law and legal practice by restricting the *alteri stipulari* rule to contracts concluded in one's own name.[13] As a consequence it was no longer seen as an obstacle to agency. In 1804 the *Code civil* also acknowledged the concept of direct representation.

The *Code civil* adopted the Roman law principle that one cannot stipulate for a third party because one has no interest in the fact that something is given to or done for him. In general, according to French authors, third parties cannot enforce agreements made in their favour, as follows from article 1165 of the *Code civil*, nor can the stipulator, since article 1119 rules that parties can only obligate and stipulate for themselves. This article displays a general rule of law, encompassing more than the Roman maxim *alteri stipulari nemo potest*. Someone can only promise something which he will himself perform, or stipulate something which will be performed towards him. Two exceptions are formulated in the following articles, regarding the promise of a performance by someone else and the stipulation in favour of a third party.

[13] However, if an agent acted upon mandate but concluded the contract in his own name, he was supposed to have represented his principal. See Robert Joseph Pothier, *Traité des obligations* I.1.5 § 4 no. 82 (ed. Paris 1777, p. 81): Nous sommes aussi censés contracter par le ministère d'un autre, quoiqu'il contracte lui même en son nomme, lorsqu'il contracte pour des affaires auxquelles nous l'avons préposé.

> *Code civil*, article 1119–1121[14]
> A man cannot, in general, bind himself or stipulate in his own name, except for himself. Nevertheless one may vouch for a third person, by guaranteeing the deed of the latter. […] Likewise one may stipulate in favour of a third party when such is the condition of a *stipulation* that one makes for oneself or of a donation which one makes to another. He who has made such stipulation can no longer revoke it, if the third party has declared his readiness to profit by it.

The text of the *Code civil* does not clarify when exactly someone stipulates for himself, as article 1119 requires, and when exactly he stipulates in favour of a third party. These notions were to be further interpreted in literature. This was done with the help of the *Traité des obligations* of Pothier, published in 1761.

Many contracts are only seemingly made in favour of a third party, as Pothier had pointed out, they were in reality stipulated for oneself. This is not only the case when the parties agree to give something to a third person who will take delivery of the object for the stipulator.[15] Even a performance which profits the third party, may still have been stipulated for oneself, namely if the stipulator has a financial interest in the performance. A contractor, for instance, because of his contractual liability towards his principal, for whom he renovates a house, may validly contract in his own name with the carpenter to install new windows. Even without a contract the stipulator may have a financial interest in the performance because of his liability towards the third person, for instance as *negotiorum gestor*, an unauthorized manager of another's affairs, who from the moment he begins to act for the other will be liable towards his principal because he has a duty to carry on properly the administration of the other's affairs.[16] In this line of thought, only in situations where the stipulator had a non-monetary

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[14] Cc. 1119: On ne peut, en général, s'engager ni stipuler en son propre nom que pour soi-même. (1120) Néanmoins on peut se porter fort pour un tiers en promettant de celui-ci, (1121) On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour so-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut la révoquer, si le tiers a déclaré vouloir en profiter.

[15] This example, which derived from Pothier, *Traité des obligations* I.1.5 § 2 no. 57 (p. 60) is given by Delvincourt, Toullier, and Duranton; the example of the contractor derived from Pothier, *Traité des obligations* I.1.5 § 2 no. 58 (p. 61).

[16] Cf. Pothier, *Traité des obligations* I.1.5 § 2 no. 59 (p. 61).

interest in the performance to the third party he had truly stipulated in favour of a third party.[17]

In order to prevent that contracts in favour of a third party—made out of affection towards the beneficiary—remained without effect, the French authors strived at expanding the notion of 'stipulations for oneself' in article 1119. They did not interpret extensively the provision of art. 1121, phrased as an exception to the general principle of art. 1119. It was only at the end of the nineteenth century that the French courts interpreted the requirement of art. 1119 (*pour soi-même*) as encompassing a non-monetary interest. Until that time, the French authors adhered to the Roman law rule, that one cannot stipulate for a third party without a monetary interest in the performance agreed upon. They did, however, attempt to construe artficially a monetary interest for the stipulator. Two ways to meet the requirements of art. 1119 were proposed, *viz.* the addition of a penalty-clause and expanding the notion of *negotiorum gestio*.

The idea that a penalty-clause constituted an interest had its roots in Roman Law.[18] In the civilian tradition, however, the addition of a penalty clause did not result in an obligation to perform towards the third party, but a duty to pay the contractual fine if the performance towards the third party failed to occur. In other words: the addition of a penalty-clause did not render the agreement in favour of a third party valid. In France Toullier, Duranton, and Larombière still adhered to this view.[19] According to the advocate Victor Marcadé (1810–1854) and later authors the penalty clause had another effect. They taught that by agreeing on a certain fine for the unhoped case of non-performance, the parties fixed in advance the amount of compensation owed for damages. Parties could also fix this amount if the stipulator had a non-monetary interest in the performance. In their view, by adding a penalty-clause, the stipulator stipulated a performance, in which he had a monetary interest. He had stipulated 'for himself' and acquired

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[17] Cf. Pothier, *Traité des obligations* I.1.5 § 2 no. 60 (p. 62): c'est en ce cas vraiment stipuler pour un autre. The same distinction was made in the German 19th-century commentaries. *Eigentliche Verträge zugunsten Dritter* were made on affective grounds.

[18] Pap. D. 45.1.118.2.

[19] They regarded the stipulation to give something to a third person secured with a penalty clause to be a stipulation to give something to the stipulator, *viz.* the fine, under a suspensive condition, *viz.* that something was *not* given to a third person. See also note 28.

a right to the performance (towards the third party). According to Marcadé the stipulator could claim specific performance.[20]

The example Pothier had given of a *negotiorum gestor*, who could stipulate for a third party (his principal), indicated that everyone who stipulated in favour of a third party, might be considered an unauthorized manager of another's affairs. Duranton thought this to be untenable, since it would render the *alteri stipulari* rule illusory. He argued that the stipulator's interest cannot be based upon his liability as *negotiorum gestor* when through the stipulation in favour of a third party he begins his management of the other's affairs and thus creates his liability as manager of another's affairs.[21] Jean Claude Demolombe (1804–1888), professor on the *Code civil* at Paris, refuted this argument, because neither legal scholarship in the *Ancien Régime* nor the *Code civil* required a pre-existing interest.[22] The promisee's interest may be created by the contract—of which the addition of a penalty clause is another example.

As a result of this reasoning the one who stipulated could practically always be considered as having a monetary interest, and for this reason to be entitled to enforce the agreement. There were only few cases left where the stipulation in favour of a third party remained without effect. One of these was described by Demolombe. Out of kindness someone bought a house for an absent acquaintance and guaranteed that the selling price would be paid. Such a contract would, according to Demolombe, not result in a liability towards the absent acquaintance, and, as a consequence, the stipulator would have no financial interest. This situation could also not be charactarized as *prévu par art. 1121*, in which case the third party would have a claim.

Edmont Louis Colmet de Santerre (1821–1903) and Demolombe considered this unequitable because the contract would not have been

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[20] Cf. V. Marcadé, *Cours elémentaire du droit civil francais ou explication théorique et pratique du Code civil*, IV, Paris 1855, p. 385: Ainsi vous vous obligez envers moi à faire telle ou telle chose pour Pierre, mais nous conuenons que, si vous ne la faites pas, vous me payerez 1500 francs de dommages intérêts.… En cas de refus, (je pourrai) me faire autoriser par la justice à faire exécuter par d'autres à vos frais, si la nature de la chose se permet.

[21] Duranton referred to Vinnius, ad Inst. 3.26.3 in his *Cours de droit Français suivant le Code civil*, Luik 1830–1836, 6, p. 79: L'opinion de cet auteur (Pothier), sur ce point, n'est donc pas admissible. Autre chose serait, si gerant déjà les affairs de Paul, je faisais une stipulation relative à ces mêmes affaires.…

[22] Cf. C. Demolombe, *Cours de Code Napoléon* 24 (Traité des contrats I), Paris 1668, no. 238 bis.

without effect if it had been made in the other's name, *i.e.* if had been apparent that the stipulator had acted as a manager of another's affairs. The stipulator could have mentioned this explicitly, but it could also be derived from the circumstances. According to Santerre and Demolombe it is apparent that one who stipulates merely to the benefit of a third party, must be presumed to have acted in the name of the other.[23] Since the characterization as *stipulatio alteri* would render the transaction without effect, it must be understood in such a way that it may have some effect (1157 Cc).[24] They opted for the presumption of representation in order to render a contract entered into by someone in his own name enforceable, even if this would imply that the provision of article 1119 would become a dead letter.[25]

4.5 *Influence of indigenous legal practice in France and Germany*

In the *Code civil* article 1121 is phrased as an exception to two principles of law, *viz.* "Parties can only promise and stipulate for themselves" (Cc 1119) and "Agreements neither profit or prejudice third parties" (Cc 1165).[26]

In French law an agreement could not result in an obligation between parties if the stipulator had no monetary interest in the performance agreed upon. A *stipulatio alteri* made in his interest was assumed to be stipulated for himself, as article 1119 required. Third parties cannot derive rights from the contract they have not entered into, and for that reason cannot enforce the performance stipulated in their favour, unless the stipulator has ceded his claim. Parties were not capable of creating an obligation which will merely benefit a third party because the stipulator has no interest in such performance. However, as appears from

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[23] Cf. *Cours analytique de Code Civil par A.M. Demante, continuée depuis article. 980 par E. Colmet de Santerre* 5 (1869), no. 33bis iii.; Demolombe, *Cours de Code Napoleon* 24, no. 240.

[24] Cc. 1157 (transl.): When a clause is susceptible of two meanings, it must rather be understood in that according to which it may have some effect, than in that whereby it cannot produce any.

[25] Cf. Colmet de Santerre, *Cours analitique* 5, no. 33 bis iii.: Les deux décisions de l'article 1119 doivent être considerées comme les règles abtraites, dégénerées de l'importance qu'elles avaient en droit romain, et devenues sans utilité pratique, sous l'influence des règles un peu larges du droit francais en matière d'interpretation de conuentions.

[26] Les conventions n'ont d'effet qu'entre les parties contractanctes, elle ne nuisent point au tiers et ne lui profitent que dans le cas prévu par l'article 1121.

article 1121 Cc, the stipulator is surely capable of making a condition in favour of a third party. He can, for instance, donate or sell something under the condition that the other party gives something to a third party. In such a case, the party who stipulated the condition cannot enforce the performance because one cannot sue for the fulfillment of a condition. The third party himself, though, can bring action against the promisor, as derives from art. 1165 *Code civil* "in the case provided for in article 1121".

It was disputed what case should be considered as such. Article 1121 prescribes that one can stipulate in favour of a third party, "when such is the condition of a *stipulation* that one makes for oneself or of donation which one makes to another"[27] But what was meant exactly? The word 'condition' in article 1121, as the French authors argued, does not refer to the suspensive condition in the strict sense, but should be understood as 'burden' (*mode, charge*), because it derives from article 1165 that the third beneficiary can enforce the performance.

The interpretation of the required *condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre* (in art. 1121 Cc) varied. Some authors argued that what was meant with 'condition of a stipulation for oneself' were stipulations in favour of a third party secured with a penalty-clause,[28] and with 'condition of a donation which one makes to another', not only the *donatio sub modo*—as in Roman Law (C. 8.54(55).3)—but all 'alienations under burden', transfers of property through a sale, an exchange etc. Others argued that the performance to the third party must be stipulated as the condition of a contract (*condition d'un stipulation pour soi-même*)—for example contracts of sale, in which the vendor stipulates that the price be paid to a third party—or donation.[29]

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[27] See note 14.

[28] Cf. C.E. Delvincourt, *Cours de Code Napoleon* 2, Paris 1813, p. 11: On le peut également (sc. stipuler en son nom pour un autre), lorsque tell est la condition d'une stipulation que l'on fait pour soi même. He explains in a footnote, that a stipulation with a penalty clause is meant. This interpretation was rejected by Toullier, Duranton and Larombière, who taught that it was only the stipulator who acquired a claim. Around 1870 Colmet de Santerre and Demolombe followed Delvincourt's interpretation.

[29] Viz. Toullier, Duranton and Larombière. They did not discuss whether one had to stipulate both a performance in favour of a third party (as *mode*) and a performance for oneself. Bayer wrongly assumes that the latter was required. Cf. Bayer, p. 61: Einigkeit Bestand allerdings darin, dass die Drittbegünstigung nach dem Wortlaut des Gesetzes nur als Nebenbestimmung zu einer vom Promittenten gegenüber dem Promissar eingegangenen Verbindlichkeit vereinbart werden kann. The Dutch courts thus required between 1914 and 1992. Such an interpretation was for the first time

'Alienations under burden' were not a typical French phenomenon. Clauses in favour of a third party in take-over purchases of farms were also common in England, as in Dutton vs. Pool (1679), where a promise had been made by an expectant heir to his father for the benefit of his siblings.[30] The German *bauerliche Gutsabfindungen* and *Erbverträge* contained similar provisions for the benefit of the other children, when one of them acquired the family-farm. According to Bernard Windscheid (1817–1892) it was beyond doubt, that the beneficiary acquired a claim because German legal practice had extended the provision of C. 8.54(55).3 to take-over purchases and heredital agreements. Problems arose in Prussia because the *Algemeine Landrecht* (1794) required that parties made a separate offer to the beneficiary, which he had to accept in order to acquire a claim (ALR I.5 § 75). *Bauerliche Gutsabfindungen* were not excepted. In theory, parties could make such a separate offer to the beneficiaries, but in practice they usually failed to do so in the take-over purchases of farms. Hence, in order to enforce the promise, the Prussian *Obertribunal* ruled in 1846 that the beneficiaries were supposed to have accepted the promise through the alienator, who was presumed to have acted as unauthorized manager of their affairs (*negotiorum gestor*). Hence, they could claim enforcement of the clause for their benefit.

These contractual clauses in France, England and Germany concerned agreements which were considered to be merely to the benefit of the third party. In these situations there is no pre-existing obligation to give something to the third party, which the stipulator intends to fulfil by stipulating a performance to his creditor. In other words: these agreements were genuine contracts in favour of a third party. In Germany, all agreements merely to the benefit of the third party could be enforced by the stipulator,[31] in France none. German and French writers maintained, that only in specific cases the third party did acquire an action himself.

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defended in 1905 by the Eduard Maurits Meijers (1880–1954), but one will in vain search for such an interpretation of art. 1121 in the French and Dutch commentaries of the nineteenth century. See Cf. E.M. Meijers, Het collectieve arbeidscontract en de algemene rechtsbeginselen, *Themis* 96 (1905), pp. 432–436.

[30] See p. 106.

[31] The third party could not enforce assignment of the stipulator's claim. Hence, it was not presumed that assignment had taken place. In some exceptional cases the third party acquired a claim without assignment. Many German writers considered *Erbverträge* and *Gutsabfindungen* an example thereof.

Although article 1121 of the French Code civil was not clear in this respect, Duranton considered generosity—usually being the underlying motive for stipulating such a condition—a requirement for the third beneficiary to acquire a claim against the promisor. In his view, many agreements in favour of a third party are in reality made for oneself, because the stipulator has a monetary interest in the performance. Performances the third party could enforce himself were merely in his favour.[32] The majority of the French authors left this question—is the third party's claim restricted to cases where the condition was stipulated for him out of generosity?—aside, but Larombière also pointed out that one should distinguish between two situations. First, when someone stipulates that something be given to a third party, this may be done to fulfil a pre-existing obligation through an intermediary. Hence, this is stipulated 'pour soi même'. Secondly, when the stipulation is (merely) in favour of a third party, the third party could claim performance or damages when the requirements of art. 1121 Cc are met.[33]

4.6 *Dogmatic explanations*

In order to explain why third parties could enforce the performance stipulated in their favour, both Roman Law and Natural Law provided a point of reference, but for the most part legal scholars used the concepts of Roman Law.

The *Corpus iuris* provided arguments for various ways of legal reasoning. First, one could argue, like the German writers, that the third beneficiary acquired an action through assignment. Secondly, that the *Corpus iuris* acknowledged several exceptions to the *alteri stipulari* rule, in which the third party acquired a right without assignment. These exceptions were usually justified with an appeal to equity, as for example in C. 8.54(55).3.[34] This constitution granted the beneficiary of a *donatio sub modo* a remedy. In France, this provision had served as an argument

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[32] Cf. Duranton, *Cours* 6, no. 232: Si j'étais déjà tenu a livrer le passage à Paul ou à lui constituer la rente, lorsque j'ai faite fait la conventions avec vous, alors on rentrerait dans l'exemple du premier cas, où la stipulation est dans mon intérêt, non dans celui du tiers.

[33] Cf. L.V.L.J. Larombière, *Théorie et pratique des obligations ou commentaire des titres I & IV, livre III du Code Napoléon*, Paris 1857, I, ad art. 1121, no. 4.

[34] According to Müller, p. 154, however, this provision results from the fact that Roman Law acknowledged that the *stipulatio alteri* in the interest of the stipulator had effect. (D. 45.1.38.17).

to justify why the absent beneficiary could enforce the clause in a contract of sale which was made to his benefit. In 1804 it was adopted in the *Code civil* as one of the exceptions to the principle codified in art. 1165, that third parties cannot acquire contractual rights.

Some French authors had also justified article 1121 is referring to equity. According to Charles Bonaventure Marie Toullier (1752–1835), professor of the Law School at Rennes, there is no dogmatic justification for the fact that the third party can enforce the mode in his favour. The remedy simply resulted from equity. Duranton added that both Roman and French law displayed examples where equity required that the third party derived a right from the contract. He referred amongst other texts to D. 45.1.126.2 and article 1994 Cc.[35]

The German authors were familiar with the *donatio sub modo* as an exception to the rule that the third party cannot derive a right from the agreement between others. Some authors referred to the fact that legal practice seemed to acknowledge various other exceptions to the principle that a third party cannot acquire rights through an agreement. *Erbverträge* and *Gutsabfindungen* were an example thereof.

An entirely different way of reasoning can be found in Georg Beseler (1809–1888), professor at the Humboldt University in Berlin from 1859, the Roman *alteri stipulari* rule was never received in German legal practice. Hence these contracts (*Gutsabfindungen* etc.) cannot be characterized as exceptions to a general rule of law that one cannot stipulate in favour of a third party. In this respect, legal practice in the German-speaking countries had always deviated from the Roman law principle. He argued, like Glück had done in 1797, that parties in agreeing upon a performance in favour of a third party made him an offer he could accept at a later stage.[36] His line of thought is not rooted in Roman law, but influenced by Hugo Grotius, for his dogmatic interpretation of legal practice in nineteenth century Germany

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[35] Cf. Toullier, *Le droit civil Français suivant l'ordre du code, ouvrage dans lequel on a taché de réunir la théorie à la pratique* 6, Brussel 1824, no. 150 n. 2, and Duranton, *Cours* 6, no. 235.

[36] G. Beseler, *System des gemeinen deutschen Privatrechts* 2, Leipzig 1853, p. 293: Was die Stellung des Dritten bei einem solchen Vertrage betrifft, so wird auch ihm ein selbständiges Recht erworben. Er muss aber die fremde Willenserklärung die ihm zu Gute kommen soll, sich aneignen…was in der Regel sich als Beitritt zu dem abgeschlossenen Geschäfte darstellen wird. See also G. Beseler, *Die Lehre von den Erbverträgen* 2,1 Göttingen 1837, pp. 75–76.

resembled that of Grotius' *Inleidinge tot de hollandsche rechtsgeleerdheid*.[37] To enforce performance, the beneficiary did not bring the stipulator's claim (assigned to him), as the writers of the *Historische Schule* argued, but his own. In accepting what had been stipulated for him, he did not ratify what the stipulator had done (as if the latter was an unauthorized manager of his affairs), as they taught, but accepted the offer to give or to do something for him.

A similar way of reasoning can be found in the works of the French writer Larombière, who seems to be the only author who was willing to grant third parties a claim in situations in which the stipulation was not merely in their favour. Commenting upon article 1119 Cc, he noticed that whenever someone has an interest in the performance to the third party (directly or indirectly), this performance is actually stipulated 'for himself', which in view of article 1119 Cc renders the stipulation perfectly valid. As a consequence, the stipulator would have a claim against the promisor. For example, in case a supplier had stipulated that the recipient would pay the transporter, this supplier (the stipulator) could compel the recipient to act in conformity with his promise. According to Larombière, even the transporter, the third party, could do so.[38] In his view, the contract or contractual clause in favour of a third party constituted an offer he could accept at a later stage by declaring that he wanted to take advantage of it.[39]

4.7 *Life insurance and the stipulation in favour of a third party*

In the course of the nineteenth century life insurances gained increasing importance in legal practice. After the industrial revolution had taken place, there were large sections of the population, whose income did

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[37] Cf. Hugo Grotius, *Inleidinge* III.3 § 38 (transl): . . . even apart from these exceptions a third party may accept a promise and thereby acquire a right, unless the promisor has revoked his promise before the third party has accepted it.

[38] Cf. Larombière, *Théorie* I, ad art. 1119 no. 8: je pourrai donc containdre le promettant à l'exécuter et le tiers déclarant vouloir en profiter pourra l'y containdre aussi.

[39] Cf. Larombière, *Théorie* I, ad 1121 no. 7: Cette stipulation n'est en effet, jusque'à son acceptation, que le premier terme, la proposition d'un contrat en expectative, que se réalise et s'achève entre le promettant et le tiers comme tout autre contrat par l'acceptation déclarée de celui ci. Colmet de Santerre, *Cours*, ad 1121 no. 33 bis, gave a similar explanation: l'offre implicite contenue dans la convention dont pare l'article 1121 peut donner naissance à un droit, quand la volunté du tiers s'est unie à la volunté de celui qui a fait l'offre.

no longer came from own farming land, their own means of production, or own patrimony, but from a labour contract. In such cases, the law of succession was often insufficient to guarantee the well-being of surviving relatives. Other means had to be developed for this purpose, such as life insurance, but although this contract was primarily aimed at making certain arrangements for the maintenance of one's widow and children, the policy could also designate others as beneficiary. The insurance could, for example, serve as security for one's creditor.

Within a relatively short period, life insurance developed into a distinct category of contracts in favour of a third party of great social importance. However, the fact that the parties intended that the third party could enforce the performance himself did not imply that the beneficiary could always bring a claim against the promisor. In Germany, parties were beyond any doubt free to arrange that the sum insured would be paid out to the third beneficiary. However, when, after the policyholder's decease, the beneficiary claimed the sum he was entitled to, this was often disputed. The insurance contract raised many questions in legal practice. Were the policyholder's heirs in a position to revoke the clause in favour of the beneficiary? Did the latter have an independent right at his disposal towards the insurer, or did this right derive from the stipulator? Was the claim part of the assets of the deceased in case of bankruptcy? Should the beneficiary have joined the contract? In France, the requirement of article 1119 Cc was also relevant. Was it necessary to have a financial interest in the performance?

The latter question was brought before the *Cour de Cassation* in the following case. In 1868 a baker took a life insurance policy in which he stipulated a certain sum of money to be paid to his wife and children (his heirs). Being short of money, he received a loan from a miller. The latter demanded, as security for his claim, the life insurance and thus the policy was adjusted. After the baker went bankrupt, the question as to who was entitled to the payment was brought before the court: the curator, because the insurance was part of the bankrupt's assets, or the miller, since he was the beneficiary. The court of first instance granted the curator a claim and argued that the performance stipulated in favour of the miller was ineffective because the baker had not stipulated 'for himself' as required by article 1119 Cc. The *Cour de cassation* came to the clear verdict that this contention was untenable, but the reasoning it adopted to reach this conclusion was not very clear. The court maintained that the baker had stipulated something 'for himself', because

he obligated himself to pay the premium, because the sum would be paid to his heirs in case the miller would not accept the performance, and because the insurer had allowed him to benefit someone of his own choice.[40] Apparently, it was no longer required that the stipulator had a financial interest in the performance towards the third party: a non monetary interest (*profit moral*) could suffice.

In the Netherlands, legal doctrine concerning stipulations in favour of a third party was strongly influenced by the 1876 dissertation of Jacob Pieter Moltzer (1850–1907), who later became professor of civil law at the University of Amsterdam.[41] He pleaded for a more flexible interpretation of the requirements which, according the Dutch *Burgerlijk Wetboek* (civil code), had to be met for the contract in favour of a third party to be effective. In order to achieve this, he defended a new interpretation of articles 1351 and 1353 of the *Burgerlijk Wetboek* (BW), which until that moment were always explained in a way similar to articles 1119 and 1121 of the *Code civil* were interpreted in France.

Article 1351 BW (identical to article 1119 Cc) read: *In het algemeen kan niemand zich op zijnen naam verbinden of iets bedingen dan voor zichzelven* (in general, one can neither obligate oneself, nor stipulate in his own name, but for oneself). The *Code civil* was until now always considered to have adopted the Roman maxim *alteri stipulari nemo potest*. The expression 'to stipulate for himself' was explained as 'to stipulate a performance in which the stipulator himself has a financial interest'. However, according to Moltzer, this is not what the French legislator actually had intended. The article only ruled, as a general principle, that parties to a contract cannot stipulate *a right* for a third party. The words 'to stipulate for himself' must be understood in the sense of 'to stipulate a right for himself'. With such a way of reasoning Dutch law was brought into conformity with German law.[42]

Moltzer specifically aimed at improving the position of the third party and for this reason he also defended a more extensive interpretation of article 1353 BW (= article 1121 Cc). According to article 1376 BW (= article 1165 Cc), the third party would have a claim *in het geval voorzien bij artikel 1353* (in the case provided for in article 1353

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[40] *Cour de cassation* 16 1 1888 D.P. 1888, 1,177.

[41] J.P. Moltzer, *De overeenkomst ten behoeve van derden*, Dissertation Leiden, Amsterdam 1876.

[42] This explanation became the prevailing doctrine in the Netherlands.

BW). If this article 1353 BW could be interpreted more extensively than was usually done, the number of situations in which the third party was entitled to an action would increase. In article 1353 BW the same phrasing was used as in article 1121 of the *Code civil*: the clause in favour of the third party is the condition of a stipulation one makes for oneself or a donation.[43] It was clear that the third beneficiary has a claim on the basis of the 'burden' (*mode*) in a donation, because this was already the case in Roman law. However, according to Moltzer the *beding voor zichzelven* (stipulation for oneself) of article 1353 BW was not a penalty clause, not even a performance one stipulates for oneself. The historic developments in the process of legislation of article 1121 Cc make clear that the words *stipulation pour soi-même* (stipulation for oneself) must have the simple meaning of a promise (*promesse*) and nothing else. As a consequence, the words a *beding dat men voor zichzelven maakt* (a clause one makes for oneself) of article 1353 BW must have a similar significance.

In such an interpretation, article 1353 BW only requires that the stipulator of the clause in favour of a third party promises a counter-performance in return for the performance to the third party.[44] This explanation was followed by many of Moltzer's contemporaries, although it remained controversial.[45] The *Hoge Raad* (High Court) of the Netherlands came eventually in 1914 to a different view, viz. that the words *beding, hetwelk men voor zichzelven maakt* (a clause one makes for oneself) of article 1353 BW refer to a certain performance one stipulates for oneself.[46]

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[43] Art. 1353 BW: Men kan ook ten behoeve van een derde iets bedingen, wanneer een beding hetwelk men voor zich zelven maakt, of eene gift die men aan een ander doet, zulk eene voorwaarde bevat.

[44] Cf. Moltzer, *De overeenkomst*, p. 318. He does not refer to Marcadé, *Cours elémentaire*, no. 234.

[45] It was rejected by Diephuis (1886), Meijers (1905) and De Savornin Lohman (1907). In 1879 Opzoomer presented a somewhat modified version of this explanation. From the debate concerning the rights of the beneficiary of life insurance policies, it appears that also Boas (1887), Levy (1888), Eyssell (1905) and Scholten (1916) accepted the teachings of Moltzer. Cf. L.S. Boas, De rechthebbende bij de levensverzekering, *Themis* 47 (1886), p. 219; A.P.Th. Eijssell, *Themis* 96 (1905), p. 99.

[46] HR 26 June 1914, W. 9713 NJ 1914, 1028; see also § 2.1.

4.8 *From the contractual clause in the benefit of a third party to the modern third-party benefit contract*

Moltzer maintained that the right of the third party was based on a unilateral expression of the promisor's will to give him something. The promise was directed towards the third party, although it was expressed towards the stipulator. According to Moltzer, obligations not only result from contract and delict, but also from unilateral expressions of the will with the intention to bind oneself (*pollicitatio*). He thought the day had come to acknowledge that modern private law in this respect deviated from Roman law. Warrants, bearer papers, and the purchase for an undisclosed principal were all considered to be examples in which the unilateral promise was acknowledged to be a source of obligation:[47] *de enkele belofte, ook al is zij niet aangenomen, (is) reeds voldoende om eene verbintenis te doen ontstaan voor hem, die haar deed, en een recht voor dengene tot wie zij was gericht* (the mere promise, even if it is not accepted, suffices to create an obligation for the one who made it and a right for the one the promise was directed to).[48]

Moltzer's explanation, why the third party acquired a right, is again an alternative (substitute) for the modern third-party benefit contract. He stuck to the idea that the contract does not create a claim for the third party, but from the act of the parties he derived that the promisor committed himself towards the third party. He did not qualify such a promise as an offer, as did Larombière, but considered it to be binding by itself.[49] In the Netherlands Moltzer did not succeed in convincing his contemporaries of this idea. They persisted in their opinion that the promisor made an offer towards the third party. As soon as the third party accepted it, he acquired a claim and this right was based on the contract he entered into. These authors derived from the insurance policy that the insurer made an offer towards the beneficiary to pay out the sum insured after the policy holder deceased.

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[47] Moltzer, *De overeenkomst*, p. 361ff. Also the irrevocable offer is mentioned as an example. Moltzer derived German examples from H. Siegel, *Das Versprechen als Verpflichtungsgrund im heutigen Recht: eine germanistische Studie*, Berlin 1873.

[48] Moltzer, *De overeenkomst*, p. 360.

[49] There were only very few authors who explained the third-party's right in this way, for instance Worms in France and Land in the Netherlands. See R. Worms, *De la volonté unilatérale comme source d'obligation* (Paris 1891); N.K.F. Land, *Verklaring van het Burgerlijk Wetboek* II.2, Haarlem 1891, pp. 199–200.

The French authors display rather divergent explanations of the judicial decisions related to life insurances in the favour of a third party. Apparently, the beneficiary could claim payment from the insurer, but why? Did he derive his right from a *pollicitatio*, the unilateral promise of the insurer, as maintained by Worms (1891)? Or could he in his capacity as creditor of the stipulator, the policy holder, sue the insurer in the stipulator's name, as maintained by Laurent (1878)? Did the insurer make him an offer after the policy holder deceased, which he accepted, as maintained by Thaller (1888)? Or was the beneficiary not a third party, but party to the contract, since the policy holder was presumed to have indicated to act as manager of his affairs, as maintained by Labbé.[50] Each explanation had its own shortcomings and a consequent application to legal practice would run the risk of resulting in many an unfair outcome. Labbé applied the *théorie de gestion d'affaires* (theory of management of affairs) of Colmet de Santerre to life insurances. This theory was invented in order to grant the third party an action in case the agreement between parties that something be performed towards a third party would be ineffective in view of article 1119 Cc or because the agreement could not be qualified as the exceptional case of article 1121 Cc. Apparently, the life insurance contract was an example of such ineffective agreements. In order to grant the third party a claim anyway, Colmet de Santerre presumed that the stipulator had indicated to act as manager of the third party's affairs. This enabled the 'third party' (the principal) to ratify the acts of his manager afterwards. As a consequence, he became party to the contract himself and could enforce what was agreed upon. However, this presumption of agency could not be generally applied to all life insurances, but only in those cases where it was irreversibly laid down in the policy who the beneficiary was, and such a thing was quite unusual.

All these authors abided with the principle that a contract only results in rights for the parties to the contract. The stipulator cannot stipulate a right for a third party. Even if this was the intention of the parties, the third party cannot derive a claim from the agreement he is not a party to. For this reason, the obligation between promisor and third

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[50] Derived from E. Lambert, *La stipulation pour autrui: de la nature du droit conféré au bénéficiaire contre le promettant* (Paris 1893), p. 11ff.; J. Sosset, *La stipulation pour autrui: Structure juridique; Bénéficiaires déterminés, indéterminés et futurs; Applications modernes; Droit comparé* (Mons 1908), p. 21ff.; Brockmann, pp. 64–74, seems to describe later variations on the *théorie de l'offre* (theory of the offer) of Laurent and the *théorie de gestion d'affaires* (theory of management of affairs) of Demolombe.

party had to be based on a different ground, viz. on a commitment of the promisor or on a contract between promisor and 'third' party.

A totally different way of protecting the third party was adopted by Windscheid in the fifth edition of his *Lehrbuch des Pandektenrechts* (1879).[51] He noticed that German legal practice and doctrine acknowledged many more exceptions than Roman Law to the rule that the third party cannot derive rights from the contract he did not enter into. German customary law was, however, insufficiently equivocal to assume that the third party always had a claim at his disposal, when a performance was stipulated to his benefit and parties intended that he would be capable to enforce it. However, beyond any doubt, the third party had a claim, when in case of a *Vermögenszuwendung* (alienation), it was promised as a counterperformance that something be given to him or done for him. As examples of such alienations Windscheid referred to *bauerliche Gutsübergaben* (delivery of agricultural goods), *Erbverträge* (hereditary agreements), *Lebensversicherungen zu Gunsten Dritter* (life insurances to the benefit of a third party), and *Schuldübernahme bei Verkauf von Immobilien und bei Geschäftsabtretungen* (the taking over of debts in case of sale of immoveable tenements and transfer of business).

In earlier editions, Windscheid had still defended that in such cases the third party was entitled to a claim after the example of the Roman *donatio sub modo*,[52] but in 1879 he came up with a new explanation: the promisor expressed his will towards the stipulator to give something to or do something for a third party. This will was *festgehalten* (held), in view of the fact that the stipulator had accepted it. As a consequence, the promisor was no longer capable of changing his will. At which moment the third party acquired a right, depended on the intention of parties: it could be achieved right away or after a certain lapse of time, etc.[53]

As Windscheid noticed in 1879, it was not clear at that time whether also beyond 'alienations under burden', mentioned above, the third party would acquire a claim. The decisions of the courts varied too much. However, from the first draft of the *Bürgerliches Gesetzbuch* (civil code)

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[51] B. Windscheid, *Lehrbuch des Pandektenrechts* 2, Stuttgart 1879, p. 216ff.

[52] Cf. B. Windscheid, *Lehrbuch des Pandektenrechts* 2.1, Düsseldorf 1865, p. 190, where he mentioned two cases in which the third party as a right, viz. (i) if in an alienation a mode was stipulated to his benefit, and (ii) if from the stipulation could be derived that the promisor had made an offer to the third party, and the third party accepted this offer. See also B. Windscheid, *Lehrbuch des Pandektenrechts* 2, Düsseldorf 1870, p. 196.

[53] See B. Windscheid, *Lehrbuch des Pandektenrechts* 2, Stuttgart 1879, p. 219.

onwards, the legislator granted the third party a remedy in general terms and not restricted to *Vermögenszuwendungen* (alienations), at least as far as the contents of the contract showed that a right for the third party was intended by the parties.[54]

Because this right of the third party was directly based on the contract between stipulator and promisor, it seems that for the first time in the development of legal doctrine, related to third-party contract rights, the third-party benefit contract, as we know it today, became apparent.[55]

[54] Erster Entwurf § 412: Wird in einem Vertrage von einem der Vertragschließenden eine Leistung an einen Dritten versprochen, so wird der Dritte hierdurch unmittelbar berechtigt, von dem Versprechenden die Leistung zu fordern, sofern aus dem Inhalte des Vertrages sich ergibt, daß diese Berechtigung des Dritten gewollt ist.

[55] A similar concept was already known in the seventeenth and eighteenth centuries (e.g. in the writings of Groenewegen, van Leeuwen and Johannes Voet, and in Stair's *Institutions of the Law of Scotland*): the third party appears to acquire the right which was stipulated in a contract between others; it was not yet stated, though, explicitly that this right was derived inmediately from this contract.

CHAPTER FIVE

ENGLISH LAW BEFORE 1900

5.1 *Introduction*

Although English law was not affected hugely by the civilian tradition, it was familiar with a rule comparable to the *alteri stipulari*-rule on the continent, viz. privity of contract or the parties only-rule. This principle, i.e. that only a party to the contract can obtain any enforceable rights under it, was predominantly present in the English law of the nineteenth and the first half of the twentieth centuries. It is a startling fact that there was no monograph on the history of privity of contract in English law, until the appearance of Vernon Palmer's *The Paths to Privity* in 1992. The topic was passed over in silence in the sixteen-volume *History of English Law* by Sir William Holdsworth (1871–1944), ignored in the standard work on English legal history from the middle of the twentieth century by Theodore Plucknett (1897–1965),[1] and appeared in the standard modern work on the subject by Sir John Baker only in its fourth edition in 2002.[2] Apart from a few passing remarks in articles whose primary concern was with contemporary law,[3] and occasional reference in works concerned specifically with the history of contract law,[4] the subject might as well not have existed. More attention has been given to the topic since the appearance of *The Paths to Privity*,[5] but it is still very scant by comparison with that found in almost any other country in Europe.

There is a good reason for this lack of regard. Legal historians are, inevitably, dependent on their sources, and through most of its history

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[1] Plucknett, A Concise History of the Common Law.

[2] Baker, Introduction, pp. 353–355.

[3] Note in particular, A.L. Corbin, Contracts for the Benefit of Third Persons, *Law Quaterly Review* 46 (1930), pp. 17–25; Finlay, pp. 12–31; Flannigan, pp. 564–572.

[4] Simpson, History of the Common Law of Contract, pp. 153–160, 475–485. The section Wesenberg devoted to English and American law (pp. 160–176) is a near-heroic attempt to make up for the lack of native materials, but is of little historical value.

[5] Jones, Uses, p. 175; Ibbetson, Historical Introduction, pp. 76–80, 207–208, 241–242; Baker, Introduction, pp. 353–355; Treitel, Some Landmarks, pp. 47–105. See too the essays in Schrage.

it would seem that English law has more or less ignored the problem of third-party contract rights. Or, to put it another way, for most of the history of English law third-party contract rights have not created any obvious problem. The purpose of this and the next chapter is therefore twofold: to trace, on the basis of the modern research, such development of the rules as the sources allow us to see; and to attempt to explain why a question which caused such difficulties in continental Europe appears to have been so relatively insignificant in England.

Before embarking on the history of third-party benefits, we should make four preliminary points. These provide the essential framework within which the English law has to be understood.

Law in theory and law in practice

It is a central feature of English legal history that there is practically no self-consciously reflective legal literature between the *Treatise on the Laws and Customs of England* attributed to Henry de Bracton (saec. XIII), which was composed in the second quarter of the thirteenth century, and the *Commentaries on the Laws of England* written by William Blackstone (1723–1780) in the eighteenth. The Common law in this 500 year period was developed by legal practitioners rather than by legal theorists, in part through the growth of a professional legal culture and in part through the recognition of the authority of decided cases.[6] This is not to say that it was nothing but an unstructured mass of separate rules, but rather that such theoretical structure as it possessed flowed from responses to practical problems and not from the abstract consideration of hypothetical issues. Professor Milsom (St John's College Cambridge) has argued convincingly that the principal force behind legal change in this period was the attempts by lawyers, especially plaintiffs' lawyers, to frame legal questions in the ways that maximised their clients' chance of succeeding; and the consequence of this manoeuvring for advantage in individual cases was that the larger system could be an unruly mess.[7] Milsom has suggested too that the procedural rules dictating the way in which issues had to be framed, the rules of pleading, meant that there were many questions which could simply not be asked and answered in the legal domain:[8] there was no

[6] Baker, The Law's Two Bodies, pp. 59–90.
[7] Milsom, A Natural History of the Common Law, pp. 1–23.
[8] Ibid., 16–17.

mechanism which allowed the generation of rules at a greater level of specificity than was allowed by the legal process.

This emphasis on practical law shifted rapidly after the publication of Blackstone's *Commentaries*.[9] From the late eighteenth century there began to appear legal textbooks, which brought together the rules on some particular area (say, for example, the law of contract), and imposed on those rules a structure through their organisation into chapters and sub-chapters. The individual rules themselves might have been derived from courts' decisions, but the structures imposed on them commonly were not. So far as the law of contract is concerned, it has been shown that the principal source of the legal framework was the *Traité des Obligations* by Robert-Joseph Pothier (1699–1772), which had appeared in England in translation in 1806 and was, as we have seen in the previous chapter, also determinative for the formation of the French Civil Code of 1804.[10] As new cases came to be decided, they were fitted into the structure of the textbooks, thereby serving to reinforce the abstract ideas lying behind them.

Legal procedure and legal substance

Until the second half of the eighteenth century, English law was primarily a law of actions. Common law claims[11] were framed within writs, and legal rules were associated with writs rather than with abstract categories. While we can talk with some confidence about the rules of the writ of debt,[12] for example, we cannot talk about the law of contract with any degree of certainty. We might identify certain common patterns in actions arising out of contracts, but if we call these patterns "rules" of the "law of contract" we must be aware that we are going further than the lawyers would have done before the intellectual shift of the late eighteenth century. It is this, in particular, which makes the history of third-party contract rights so difficult to discern. The law before the eighteenth century was not really concerned with contract rights at all, let alone the contract rights of third parties.

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[9] Milsom, The Nature of Blackstone's Achievement; Simpson, The Rise and Fall, p. 632.

[10] Simpson, Innovation, p. 247; Ibbetson, Historical Introduction, pp. 220–236.

[11] Common Law was the body of law developed by the Royal Courts, principally the Courts of Common Pleas & King's Bench.

[12] A writ of debt is used by a plaintiff claiming recovery of a debt.

The nature of the Common law has a second important dimension. Until about 1850 most contractual actions at Common law were determined by juries, and sometimes the issue left to the jury could be very wide. It is impossible to go behind this and try to give the law greater precision. More to the point, we have to allow for the possibility the jury would give what was thought to be the sensible answer to a question, whatever the legal niceties would in theory have demanded. If a non-party were to bring an action on a contract claiming to be a party, for example, a jury might give a verdict in his favour and there would be no way for us—or the judges at the time—to know that he was not in fact a party.

Thirdly, from the end of the fourteenth century the Common law was complemented by the Court of Chancery. Even apparently rigid Common-law rules could be subverted in practice by the Chancery; indeed, it is easy to suspect that it was sometimes the existence of the Chancery jurisdiction that in practice allowed the rigid Common-law rule to survive. Chancery was not constrained by forms of action and did not use juries, so as well as being more flexible than the Common law the factors which limit the legal historian's understanding of the Common law were not present there. The one significant drawback is that it was only in the late seventeenth century that the Chancery began to operate in terms of rules—the Rules of Equity—and even after that time there remained a greater measure of discretion than at Common law.

Contract and property

Lawyers schooled in the Roman law tradition, tend to think in terms of a solid barrier between questions of property and questions of contract. Modern Common lawyers do too, but the further back we move in the history of English law the more porous that barrier appears to be. It follows that some questions which might have been formulated in terms of third-party contract rights could equally well be re-formulated in proprietary terms. An early situation will illustrate the point. If A gave a book to B and B agreed with him that he would hand it over to C, C would have an action against B. The form of action would be the writ of detinue, which could be justified by saying that C was now the owner of the book. The same result would be reached if it was not a book which A had given to B, but a sum of money. Here the remedy would be a writ of account, which assumed that ownership in the money had remained with B. None the less, C's claim against B for

the money could still be thought of in near-proprietary terms. From the point of view of the legal scientist this is not wholly satisfactory, but from the point of view of the practical lawyer such conceptual looseness would have been irrelevant: all that mattered was that the remedy was available. By re-analysing such issues in proprietary terms the question whether a third party could get rights under a contract would cease to be a problem, although doing so might of course generate entirely different problems of its own.

Of far greater significance in practice was the institution of the trust.[13] From as early as the thirteenth century, one person (A) might transfer property to another (B), trusting him to pass it on to a third (C). So far as the Common law was concerned, B was the owner and C had no rights at all; but the ecclesiastical courts, and later the Court of Chancery, could require B to do that which he had been trusted to do. In the fifteenth century the enforcement of these trusts—or uses, as they were generally known before the seventeenth century—became a primary function of the Chancery. C's rights might perhaps be seen as purely personal against B, but increasingly after 1600 they were treated as proprietary. It followed that B might be treated as owner of the property at Common law, but C treated by the Court of Chancery as owner in Equity. If this had remained simply a conceptual disagreement between the courts it would have been confusing enough, but it went further: B, it came to be said, had Common-law ownership, while C had Equitable ownership. And to make matters yet more confusing, from the middle of the eighteenth century the object of the trust need not itself have been an object of property; a promisee at Common law might be treated in Equity as trustee of the promise for its intended beneficiary.

Formal and informal contracts

Finally, and fundamentally, English law has always recognised a sharp distinction between formal and informal contracts; and while informal contracts were based on the bilateral agreement of the parties, formal contracts depended principally on their written form and might appear very much like unilateral grants of property. At first the difference between them was seen in terms of different modes of proof, but by the fourteenth century they were substantively different; and they remained

[13] Baker, Introduction, pp. 248–258.

wholly distinct until the nineteenth century, when the emergent "law of contract" reintegrated these two bodies of law, albeit with different rules applicable to them.

5.2 *Formal contracts and third-party rights*

From the thirteenth century, and probably earlier, it was a rule that a formal agreement under seal affected only the parties to it. Very clearly, it was impossible to bind third parties, so much so that a lecturer around 1300 described it as "inane" to draft a document which purported to impose an obligation on one's heir, since this was *res inter alios acta*.[14] Probably no less clearly it was impossible to create rights which could be enforced by non-parties. All of this was straightforwardly the law in the Middle Ages, and still the law in the nineteenth century. The difficulty is to see what it meant in practice. Who was a party to the deed? Could he enforce the contract for a non-party?

The parties to the deed

Sealed deeds came in two basic types: bilateral and unilateral. The former would commonly take the form of an indenture: the document was written out twice and then divided into two parts by a wavy cut; the fact that the two parts, which would be kept by different people, fitted together guaranteed their genuineness. By contrast the latter would commonly take the form of a deed poll, where the document was written out once only and was straight-edged. In legal terms, though, the physical form was irrelevant. What was important was whether it was bilateral or unilateral.

Bilateral deeds: Bilateral deeds took the form of agreements between two parties. These agreements might be reciprocal, with each party promising to do something for the other, or the obligation might have lain on only one of them. In the former case the document would have to be sealed by both parties; in the latter it would normally be sealed by both, but the only requirement was that it be sealed by the promisor (usually called the obligee). A person could be bound only if he had sealed the document, but he could take the benefit of it without this, so long as

[14] Cambridge University Library, MS Dd 7.6(2) f. 13.

he was a party to the deed; and all that was necessary for him to be a party was that he should have been named as such. If A wanted to make a binding promise to give a horse to B, therefore, he need write simply that he had agreed with B[15] to give him a horse, and put his seal on the deed. The deed had to be delivered to B, but beyond this he need play no part. It follows from this that his "agreement" might be little more than nominal. In particular, unlike in the Roman law contract made by a *stipulatio*, there was no requirement at all that he should have been present when it was made. It followed from this that it was a matter of the utmost simplicity to make any intended beneficiary, except perhaps an unborn child, a party to the deed with full power to enforce it. An intended beneficiary could be named alone as a party, or jointly with another. As early as 1232, for example, we can find a person being added as a party for the purpose of being able to sue on it: an agreement between the Abbot of Saint Nicholas and the Prior of Spalding, said to have been made with the consent of the Earl of Lincoln, was enforced by the heir of the Earl after his death.[16] Given this degree of flexibility, the rule that an action could only be brought by a party to the document was of almost no practical significance. It would come into play only if the draftsman of the deed had failed to name the intended beneficiary as a party.

Unilateral deeds: As well as the bilateral deed, the law knew also the unilateral deed (commonly a deed poll), in which the promisor/obligee simply undertook some duty: Know all men present and future that I John have obliged myself by my oath to pay to the Church of Acornebury . . . the sum of ten shilings per year in perpetuity.[17]

The promisor would, of course, be named, and would have to seal the document, but in formal terms he was the only party to it. There needed therefore to be some other way to determine who (if anybody) had the right to enforce this obligation. The solution reached, at least by the sixteenth century, was to treat the beneficiary of the obligation as a party to the deed, with the consequential power to enforce it.[18] Unlike in the civilian law of contracts, there was no problem, therefore,

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[15] A literal translation of the Latin 'convenit cum eo'.

[16] *Curia Regis Rolls*, XVII.767; W. Dugdale, *Monasticon Anglicanum* (1693), 3.220.

[17] T. Madox, *Formulare Anglicanum* (1702), no. 628.

[18] *Scudamore* v. *Vandenstene* (1587) 2 Co Inst 673, Cro El 56; *Cooker* v. *Child* (1673) 2 Lev 74, 3 Keb 115.

of a third-party beneficiary: anybody who was a beneficiary was by definition a party. Deeds poll proved their utility in one context in particular, the life insurance contract, whereas on the continent the emergence of such a type of contract in the nineteenth century evoked many legal questions. A person could take out insurance on his own life for the benefit of another, the insurance being effected by deed poll in favour of the beneficiary. The Insurance Company would oblige itself to pay to the beneficiary a certain sum of money after the death of the insured; the beneficiary would be treated as a party and hence have the right to sue for the sum, and equally importantly the insured would not have been a party so neither he nor his heirs would be able to bring any action.

Enforcement for the benefit of non-parties

Given that a non-party could not bring a direct action to enforce a contract under seal, the question arises whether indirect enforcement might be possible. Could any action be brought by a person who was a party to the contract? Suppose A agreed with B that he would build a house for C. C clearly would have no remedy since he was not a party, but in principle there was no reason why B should not be able to bring an action, an action of covenant. In practice though there might have been a difficulty. The action lay to compensate for loss suffered by the non-performance of the covenant and where the contract was for the benefit of C it might have been impossible for B to show that he had suffered any loss. The evidence does not allow us to say for certain whether this was a genuine difficulty: the rule that one could only recover for one's own loss may have been controversial,[19] and since the assessment of damages was a matter for the jury it was so not easily susceptible to judicial control. In any event, the situation was transformed by a change in contractual practice which occurred in the fourteenth century, the development of the conditional bond.[20] Instead of undertaking directly to do something, a promisor would undertake to pay a monetary penalty should he not do it, to some extent comparable to the penalty clause in the civilian tradition. No longer would A agree

[19] *Dean of Hereford* v. *Maudeleyne* (1317) Y.B. Hil. 10 Edw. II (54 Selden Soc.), p. 4, pl. 2. The point is later discussed in the context of the third party suing for his own benefit but in the name of the promisee; here it is generally assumed that substantial damages would be recoverable.

[20] Simpson, History of the Common Law of Contract, pp. 88–135.

with B that he would build a house for C; rather, he would agree with B to pay B a certain sum of money if he did not build a house for C. Now, if the house was not built, B's remedy against A would not be an action of covenant to receive compensation for his loss but an action of debt for the sum which had been promised to him; and in the action of debt it was utterly irrelevant whether any loss had been suffered. It followed that provided a conditional bond was used, indirect enforcement was straightforwardly possible.

Enforcement by non-parties

Axiomatically, a person who was not a party to the deed (as defined above) could not bring an action in his own name to enforce it. There were one or two practical exceptions to this where the law recognised property rights in the non-party beneficiary,[21] but these were technically not cases where the action was brought to enforce the deed and they did nothing to undermine the firmness of the rule itself. The question arises therefore whether any mechanisms existed to allow the third-party beneficiary to assert for himself the claim of a person who was a party. To take the example in the previous paragraph, if A agreed with B that he would pay a sum of money to B if he did not build a house for C, was it ever possible for C to assert B's claim against A? To answer this it is necessary to look separately at Common law and at the Equitable jurisdiction of the Court of Chancery.

Common law: The orthodox rule of the Common law, only changed by legislation in 1873,[22] was that rights of action could not ordinarily be assigned (in Roman terms, there could be no *cessio*). The creditor could not transfer his rights to the intended beneficiary in such a way that the beneficiary might sue in his own name. There might have been more flexibility in the law in the twelfth and thirteenth centuries, when there emerged situations which came to be seen as exceptions to this rule. Where a feudal lord granted land to a man and his 'heirs or assigns', for example, the assignee of the land—i.e. a person to whom the grantee had transferred it—could assert his rights to it as against

[21] Below, p. 109.

[22] Judicature Act 1873, s.25(6); some inroads had been made by the Policies of Assurance Act 1867.

the lord;[23] but while these rights might be seen in essentially contractual terms in their purely feudal context, once property rights became freely transferable (in 1290) any contractual dimension they once had disappeared. A lessee of land for a term of years might assign his rights in the land to another in such a way that the assignee could enforce covenants made by the original lessor to the original lessee (and, it might be noted, in such a way that the original covenants could be enforced against him); but this situation came to be seen as anomalous, explained away in terms of there being 'privity of estate' between the lessor and the sub-lessee.[24] No attempt was made to generalise a rule allowing assignment of rights from these cases.

On the other hand, from a very early date it was possible to appoint a person as attorney, or representative, to bring an action on one's behalf, equivalent to the Romans' *procuratio*. Attorneys, in general, simply conducted litigation for their principals, but it was possible to constitute an attorney who would sue in the name of the principal without any obligation to account for anything recovered in the action (i.e., in Roman terms a *procurator in rem suam*). Documents creating attorneys of this sort are found by the beginning of the fourteenth century,[25] and there is reason to suppose that they were being used to achieve what amounted to the assignment of commercial debts by about this time. This method of assignment was not completely straightforward, though. It was an offence—known as maintenance—to interfere with another person's lawsuit without good reason,[26] and in the fifteenth century we see it being held that this could be raised as a defence when an attorney was bringing an action for his own benefit except where the assignment had been made to him in satisfaction of a debt owed to him by the assignor.[27] In some cases, therefore, this mechanism could be used to enable the third-party beneficiary of a contract to bring an action in the name of the original party (and therefore subject to any defences which could have been raised against the original party), but in many cases it could not; and even where it might be used it required the active participation of the original party to assign the claim.

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[23] Milsom, The Legal Framework, pp. 107–109.
[24] Simpson, A History of the Land Law, pp. 116–118.
[25] Marshall, p. 67.
[26] Winfield, pp. 131–160.
[27] Y.B. Mich. 34 Hen VI f. 30 pl. 15.

Equity: From the end of the fourteenth century the Chancery began to exercise a jurisdiction complementary to the Common law, and by the middle of the fifteenth century there is clear evidence that the Chancery was willing to order the obligor of a deed to bring an action against the obligee/promisor. In 1462 it was said by Moile J. that, "where F is obliged to the use of G, then G can have a subpoena [i.e., G might bring an action in Chancery] against the obligor to force him to sue the obligee;"[28] the surviving records of the Chancery provide evidence of actions being brought in such circumstances, though the records are not sufficiently detailed to enable us to tell whether there was any pre-existing relationship between the beneficiary and either of the parties to the deed.[29] The Chancery might order the obligor to sue, or it might require him to assign his claim so that the beneficiary might sue in his name. In either event, the effect was the same: the action at law would be brought in the name of the obligor and be subject to any defences pleadable against him.

5.3 *Informal contracts and third-party rights*

Informal contracts were treated rather differently from contracts under seal, and we cannot simply assume that the parties-only rule applied to them in the same way. The evidence, though, suggests that it did.

Common law: Most contractual claims were for money, for which the appropriate action was the action of debt, and we may treat these as typical.[30] Here it was required that there should have been a relationship of exchange[31]—in the language of the time, in the absence of a sealed deed a debt would arise only if there had been *quid pro quo*—and it would therefore have been difficult for a third-party beneficiary to have satisfied this requirement. The question was discussed expressly in

[28] Y.B. Pas. 2 Edw IV f. 2 pl. 6.

[29] Ibbetson, Historical Introduction, p. 80 note 59.

[30] Other types of contract were probably governed by similar rules, though the rules are less clearly identifiable.

[31] It would commonly also have been the case that a party could bring an action only when he had actually performed his side of the agreement, but, unlike the innominate contracts of Roman law, there was a binding contract from the moment of agreement: Ibbetson, Historical Introduction, pp. 74–76.

these terms in 1433.[32] A man bought goods worth £20 from another, who was himself indebted in the sum of £20 to a third. The first went to the third and said that he would pay the £20 to him if he would release the debt owed to him by the second. All three parties agreed to this arrangement, but it was said by all the judges that the third would not be able to sue the first on the agreement. This was a simple *nudum pactum*[33]—there was no exchange between the two of them—and no action could therefore be brought to enforce it. Clearly, if no action would lie when the third-party beneficiary was brought in to the agreement, a fortiori no action would lie when he was a pure stranger.

The requirement of exchange masks the separate question of third-party rights. These were touched on in passing in a case in 1405.[34] A delivered money to B, and B agreed with him to deliver it to C. It was said that C could not bring a writ of debt against B, on the grounds that there was no contract between them. Although the justification given is that the plaintiff was not a party to the agreement, we should perhaps not put too much weight on it; as in the case of 1433 discussed above, it could equally have been said that it was *nudum pactum*.[35] There was, however, one situation in which the requirement of *quid pro quo* was muted, where there was an agreement to pay money on a marriage. This was a situation in which in reality the agreement would normally have been made between the two fathers for the benefit of the couple. The father of the bride agreed with the father of his future son-in-law to pay the latter a certain amount. It therefore provides a test, independent of the normal requirement of exchange, for the existence of a principle that third-party beneficiaries could not derive enforceable rights. As one would expect, the action would usually be brought by the beneficiary's father, and this would be unproblematic. Sometimes

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[32] Y.B. Pas. 11 Hen VI f. 35 pl. 30, at f. 38. The case discussed was a hypothetical, raised in the course of argument.

[33] In this context *nudum pactum* is the agreement lacking a counter-performance (*quid pro quo*), not the agreement lacking enforceability through an action as in Roman Law, or the agreement lacking a cause (*causa*) as in medieval doctrine.

[34] Y.B. Hil. 6 Hen IV f. 7 pl. 33, at f.8. The same point had been made, if less neatly, in Y.B. Hil. 41 Edw III f. 10 pl. 5. See also Y.B. Mich. 10 Hen VI f. 11 pl. 38, Y.B. Mich. 21 Hen VI f. 1 pl. 1.

[35] It should be noted, though, that an action of account would (presumably) have been available here.

though we find cases in which it was the son who sued.[36] It may be that these were situations where the promise had genuinely been made to the son himself, but they might equally be situations where the promise had been made to the father. Whichever was the case, the pleadings always alleged that the defendant had made a promise to him (i.e. the son): the significant feature is that there is no hint on the pleadings that the action was being brought by anyone other than the recipient of the promise. We do not find actions by children based explicitly on agreements made for their benefit by their parents.

The one qualification to the principle that one could not derive enforceable rights out of a contract made by another was that the law did in some circumstances recognise that a person might enter into contracts as agent for another. It is difficult to know how wide the principle of agency was at this time. The main cases involved servants acting on behalf of their masters, monks acting for their religious houses, and wives acting for their husbands.[37] These were clearly established situations, some of them comparable to slaves and children in Roman law who always acquired for their master or father, and there were no doubt others; but there does not seem to have been any generalised statement that one person might act as agent for another until rather later.

From the sixteenth century a different form of action began to be used to enforce informal contracts, the action of assumpsit. The claim in assumpsit was based on the breach of a unilateral promise, and it it was arguable that any person who had suffered loss as a result of the breach of promise should be able to bring the action. Normally the person who had suffered loss would have been the promisee, so no difficulty would have arisen, but there were three common situations in which this might not have been the case.

Particularly problematic were cases involving promises to pay money on marriage, for, as in the Middle Ages, these would have stemmed from agreements which would typically have been made between the fathers of the couple for the benefit of their children. It was most unclear whether the action for non-payment should be brought by the father, to whom the promise was made, or by the son, the beneficiary (his wife,

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[36] Ibbetson, Historical Introduction, p. 81 note 67. There was an added difficulty in these cases that the context of marriage might have meant that ecclesiastical courts were the appropriate forum.

[37] Simpson, History of the Common Law of Contract, pp. 552–557.

as a *feme covert* (married woman), would not be able to sue on her own behalf); some decisions in the late sixteenth century say it should be the father, some the son, and some that it could be either.[38]

A second difficult situation was where an expectant heir (typically an eldest son who in case of intestate succession would be the only heir) promised that he would make provision for his siblings if his father did not make a will and allowed property to descend to him. Here the promise might as a matter of fact have been made to the father; but since it was only after his death that the issue would arise there was no question of his bringing an action, and since the person who would normally bring the action after the death of the promisee (the executor) is likely to have been the heir himself this route to redress was obviously unavailable. If the heir did not carry out his promise, any action would in practice have to be brought by the intended beneficiary. It might be possible to allege that the promise was made to him, as occurred in *Rookwood* v. *Rookwood* in 1589,[39] though this might run into difficulties of evidence if the intended beneficiary had been absent when the promise was made; those evidentiary difficulties could have been avoided if it had been possible to allege explicitly that the promise had been made to the deceased for the benefit of the sibling, but whether this was legally acceptable was not clear.[40]

The third situation arose where a promise was made to one person to pay money to another person to whom the first owed money. Again, it was not certain whether the third-party beneficiary could bring an action; decisions are found saying both that he could and that he could not.[41] Although the position was very unclear, it is safe to say that in all these cases there was less reluctance to give an action to a third party within the family (as in the marriage money and inheritance cases) than to a complete stranger. The trend in the seventeenth century was more expansive, and in the leading case of *Disborne* v. *Donnaby* in 1649 it was held that an action could be brought by a creditor-beneficiary even though no promise had been made to her.[42] Still, though, it could be said that the law implied a promise even though there was no promise

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[38] Baker, Privity.
[39] *Rookwood* v. *Rookwood* (1589) Cro. Eliz. 164.
[40] *Dutton* v. *Poole* (1679) 3 Keb 786, 3 Keb 814, 3 Keb 830, 3 Keb 836, 1 Freem 471, 1 Vent 318, 1 Vent 332, 2 Lev 210, T. Jones 102, T. Raym 302.
[41] Baker, Privity.
[42] Ibid. The only printed report of the decision is in Rolle Abr., i. 30–1.

in fact, with the result that the decision would be formally consistent with a rule that the action should be brought by the person to whom the promise was made. The position therefore remained unclear and controversial.[43]

Alongside the uncertain principle that the action had to be brought by the promisee there was a second rule which proved to be more resilient. By the 1570s it was settled that a promise was unenforceable unless it had been made for good consideration: the promise must have been given in exchange for some benefit received by the promisor or some detriment suffered by the promisee.[44] In 1575 it was said that the appropriate person to bring an action of assumpsit was the person from whom the consideration had moved.[45] A might promise B that he would pay £10 to C if C built a house for him (A); the building of the house was the consideration, so it was C rather than B who was entitled to bring the action. Through the seventeenth century this became an alternative to the rule (or to the formulation of the rule) that the action had to be brought by the promisee. From the end of the seventeenth century until the middle of the nineteenth this was the dominant form, completely eclipsing the rule that the action should be brought by the promisee.[46] By the end of the eighteenth century, in fact, some judges went so far as completely to deny the old rule: "Independent of the rules which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it".[47]

The consideration rule had one great advantage over its rival: the question to whom the promise was made did not admit of any definitive answer, whereas the question who had provided the consideration was a matter of fact which could be investigated by the jury.

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[43] See *Starky* v. *Milne* (1651) Style 296; *Delabar and Delavall* v. *Gould* (1661) 1 Keb. 44, 63, 121; *Bourne* v. *Mason* (1670) 1 Vent. 6; 2 Keb. 454, 457, 527; *Pine* v. *Norish* (1671) T. Jones 103, 3 Keb. 786, 815, 830, 836, 1 Vent. 318, 2 Lev. 211; *Dutton* v. *Poole* (1679) 3 Keb 786, 3 Keb 814, 3 Keb 830, 3 Keb 836, 1 Freem 471, 1 Vent 318, 1 Vent 332, 2 Lev 210, T. Jones 102, T. Raym 302.

[44] Ibbetson, Historical Introduction, pp. 141–145, with further references.

[45] *Anon* (1575) 110 Selden Soc. 457, no. 203.

[46] *Crow* v. *Rogers* (1724) 1 Stra 592. Ibbetson & Swain.

[47] *Marchington* v. *Vernon* (1787) 1 B & P 101 note c, per Buller J. See too *Martyn* v. *Hind* (1779) 1 Doug 142, 146, 2 Cowp 437, 443, per Lord Mansfield C.J.; *Pigott* v. *Thompson* (1802) 3 B & P 147, 148, per Lord Alvanley C.J.

Equity: As with claims based on formal contracts, the Court of Chancery had a part to play in the enforcement of informal contracts.[48] It could, no doubt, use the same mechanisms as it did with sealed deeds and order a party to a contract to sue at law or to assign his claim by making a warrant of attorney allowing a third-party beneficiary to bring the action. In addition, though, it might itself hear a claim by the non-party beneficiary. Most such claims fit into one of two categories: promises of marriage gifts and promises by expectant heirs to make provision for siblings. As described above, these were two of the main situations where the Common law dabbled with the enforcement of the third party's rights; the big difference between Common law and Chancery was that the Chancery shared none of the Common law's doubts about whether the intended beneficiary should have an action. The point is never mentioned in the cases. What was important was that the defendant's conscience was affected by his having made a promise, and it did not matter to whom the promise had been made. It is, in fact, quite possible that the Chancery did not see itself as enforcing third-party contractual rights at all, since it is commonly alleged simply that the promisor had been "trusted" to act in a particular way and this "trusting" was sufficient justification for the Chancery's intervention. By the time we reach the eighteenth century it would probably have been the dominant interpretation of both the marriage and inheritance cases that it was not merely that he had been trusted—with the result that his conscience was affected—but that there was a full-blown trust of property, in the sense that the beneficiary would have been treated by the Court of Chancery as if he was owner of that which had been promised.[49] In the former cases (promises of marriage gifts) it could be said that the promisor had expressly declared himself a trustee of money or other property, in the latter (promises by expectant heirs) that he had received property from the deceased subject to a trust for the intended beneficiaries. These two types of case were therefore redefined in proprietary terms and so taken outside the law relating to the enforcement of contracts. There is, though, evidence that the Chancery remained willing to enforce contracts at the suit of third-party beneficiaries. This occurred in *Tomlinson* v. *Gill* in 1756,[50] where

[48] Jones, Aspects.

[49] Well into the eighteenth century the trust occupied an ambiguous position between property and contract: Macnair, p. 234.

[50] *Tomlinson* v. *Gill* (1756) Ambler 330.

a man promised a woman that he would pay in full all the debts of her deceased husband if she agreed to his becoming administrator of the husband's estate. Here it was held by Lord Chancellor Hardwicke that the creditors of the husband could bring an action against the promisor: "his Lordship doth declare That the Creditors of the said John Gill the Intestate are intitled in this Court to have the benefitt of the Contract entred into by the defendant Robert Gill with the other defendant Catherine Gill the widow before the taking out administracion to the said John Gill by the said defendants".[51] Even in this case, though, the report prefers to use the language of trust: "He could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them".[52]

If we ask what the widow was trustee of, the answer can only be that it was the promise. As the jurisdiction of the Court of Chancery began to be seen more and more in terms of trusts in the nineteenth century, this formulation began to be used more frequently.[53] No more was there any need to speak of the Chancery enforcing third-party contract rights.

5.4 *Property rights*

The question of third-party rights in contract can be by-passed completely if the interest of the beneficiary can be expressed in proprietary terms. The issue then is whether the property right has been properly created, not whether a third-party beneficiary can sue. From the Middle Ages English law recognised a number of situations in which such property rights could come into existence. These were not generalised into any single rule, but each within its own sphere had the effect that there was no need for the third party to try to bring a claim on a contract. Examples of this can be found in the context of land, moveable property, and money.

So far as land is concerned, mention has already been made of the rules of 'privity of estate', which allowed the enforcement of leasehold

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[51] The quotation is from the record of the case in the National Archives: C 33/408 at f. 79v.

[52] Ambler 330, 331.

[53] E.g. *Fletcher* v. *Fletcher* (1844) 4 Hare 67.

covenants by and against assignees,[54] and more generally the institution of the trust in the Court of Chancery. Another example is the creation of interests in remainder. A landholder would grant land to one person, typically his son or daughter, and their children, with a proviso that should they die without children the land would pass to somebody else. By the early fourteenth century it was settled that the third party could claim the land, by a writ of formedon in the remainder. It was not clear how the property right had vested in him, but that it had done so was unquestioned.[55] Slightly different was the situation where a feudal tenant granted land to another, who undertook to perform the services due from the land to the grantor's lord. There was no legal relationship between the lord and the sub-tenant, and he could not bring any action at law against the sub-tenant to enforce his right to services. He could and would, though, use the self-help remedy of distraint, taking property found on the land and holding it as security for the performance of the services. If the distrained property belonged to the sub-tenant, the only way in which he could get it back was to perform the service due.

Turning to moveable property, we find in the Middle Ages situations in which A delivered goods to B, for him to pass on to C. It was held that C could claim the goods by a writ of detinue, not because he had any contractual right, but because the property had passed to him by delivery to B.[56] It is less clear whether more complex situations could have been brought within detinue, as where the goods were delivered to B for his own benefit, but with an obligation to hand them on to C on the occurrence of some condition, for instance if A gave his horse to B with a proviso that it should be given to C if B were to fail to feed it properly. Ownership of moveable property at Common law, it was said, was indivisible.[57] But the Court of Chancery had no such scruples, and once its jurisdiction had been established it was easy to create a trust for the benefit of C should the condition occur.

Money was, paradoxically, the hardest and the easiest case. Where money was paid to one person for the benefit of another, there was little doubt that the ownership of the coins vested in the person in whose possession they were. Around the start of the fourteenth century the writ

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[54] Above, p. 102.
[55] Milsom, Novae Narrationes, pp. cxxvi–cxxvii.
[56] YB 12 & 13 Edw III (RS) 245.
[57] Brooke Abr., *Done et Remainder*, 57.

of account, which had originally lain only between a lord and his bailiff, was extended to this situation, giving the third party a right against the second. This was justified by straightforwardly proprietary reasoning: although he was not the owner of the coins, the third was given a right against the second as if he were.[58] Later on, after the sixteenth century, the action of assumpsit began to be used for this purpose. The receiver of the money was said to have 'had and received' it to the use of the third party, who could bring an action against him to enforce its payment.[59] Alternatively, the Court of Chancery might treat him as a trustee of it, allowing the third party a claim in Equity.

In none of these situations was there any concern that the third party was bringing an action on a contract between others; but the effect of these proprietary and quasi-proprietary remedies was that he need not do so.

5.5 *Privity of contract in the nineteenth century*

At the beginning of the nineteenth century English law had a firm parties-only principle applicable to contracts under seal, though with a generous interpretation of who was a party. The main rule applicable to informal contracts was that the consideration must have moved from the plaintiff, and in so far as reference was made to a rule that only a party could bring the action it was to say that the modern approach was to deny that any such rule existed. In the course of the next half-century the parties-only rule revived.[60] It became fixed in place after the decision in *Tweddle* v. *Atkinson* in 1861,[61] but the shift was well under way by the time of the decision in *Price* v. *Easton* in 1833,[62] where the two rules are treated alongside one other, rather as if they were seen as different ways of formulating one and the same rule.

The first reason for this revival, probably, was the tendency to assimilate English contract law to the model described by Pothier in his *Traité des Obligations*. The most obvious manifestation of this was the way in which the law was analysed in terms of bilateral contracts, expressed in terms of a requirement of offer and acceptance, rather

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[58] Stoljar, pp. 209–211.
[59] Ibbetson, Historical Introduction, pp. 271–273.
[60] See Ibbetson & Swain.
[61] (1861) 1 B & S 393, 30 LJQB 265, 4 LT 468, 9 WR 781.
[62] (1833) 4 B & Ad 433, 1 N & M 303.

than in terms of the more unilateral promissory form of the action of assumpsit. 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; although there is no suggestion that English lawyers were aware of it, this was the line of argument which could be traced back through Pothier to Grotius and the Spanish neo-scholastics before him. More to the point for English lawyers, Pothier had propounded it as a fundamental rule that only a party to a contract could bring an action: "If I stipulate something for you in favour of a third person, the agreement is void". For by this obligation you contract no obligation to that third person nor to me. It is obvious that you contract none to the third person. For it is a principle that agreements can have no effect except between the contracting parties: "consequently they cannot acquire any right to a third person who is not a party".[63] One of the earliest English writers to formulate the rule unequivocally in these terms, Henry Colebrooke (1765–1837), was quite explicit in his derivation of the principle from Pothier,[64] and given the very heavy reliance on Pothier at the time it is likely that others were no less dependent on him.

A second reason, clearly visible in the treatises on the law of contract written in the first half of the century, was the running together of the rules relating to formal and informal contracts. The *Treatise on the Law of Contracts and Liabilities ex Contractu* by Charles Greenstreet Addison († 1866) first published in 1847, provides a good example. Its chapter "Of the plaintiffs in actions ex contractu",[65] begins with an analysis of the rule that only a party to a sealed deed may bring an action and follows up with a rather briefer analysis of the rules applicable to informal contracts. In the first four editions of the work Addison contrasts the rule of informal contracts that the consideration must move from the plaintiff with the parties-only rule applied to formal contracts, but from the fifth edition (1862) there is a shift of emphasis; the consideration rule is now given relatively little weight, though it continued to exist, with the parties-only rule more obviously dominant alongside it.

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[63] Robert-Joseph Pothier, *Traité des Obligations*, I.1.5 § 1 no. 54 (ed. Paris 1777, p. 56): "et qu'elles ne peuvent pas par consequent acquérir aucun droit a un tiers qui n'y étoit pas partie…".

[64] H. Colebrooke, *Treatise on Obligations and Contracts*, London 1818, p. 21.

[65] C.G. Addison, *A Treatise on the Law of Contracts and Liabilities ex Contractu*, London 1847, p. 238ff.

The pivotal decision bringing about the change, and the introduction into English law of a strict rule that only a party to a contract could bring an action, was *Tweddle* v. *Atkinson*, decided the year before Addison's fifth edition was published.[66] This involved an agreement between two fathers that one should pay a sum of money to the son of the other on his marriage, with an express term that the son should be able to bring an action for the money if it was unpaid. He did so, but the Court of Queen's Bench held that, notwithstanding that it had been expressly agreed that an action should be brought by him, he could not succeed. Careful reading of the reports of the case reveals that there was considerable confusion whether the reason for their refusal of his claim was that he was not a party to the contract or that he had not provided any consideration,[67] but it was in the former sense that it was immediately interpreted. It provided the authority for the parties-only rule in the first new treatise on contract to be written after 1861, that of Stephen Martin Leake (1826–1893);[68] more importantly it was cited as the source of the rule in the two major works on the law of contract of the 1870s, those of Sir Frederick Pollock (1845–1937) and Sir William Anson (1843–1914).[69] These, in their repeated re-editions, were to be the most influential works on the law of contract through the first half of the twentieth century, and their inclusion of the rule ensured that it would receive and maintain canonical status as a rule of English law.

[66] (1861) 1 B & S 393, 30 LJQB 265, 4 LT 468, 9 WR 781.

[67] The Supreme Court of New York had, two years earlier, decided in *Lawrence* v. *Fox* (1859) 20 NY 268 that an action could be brought by a third party, but this seems to have passed unnoticed in England.

[68] S.M. Leake, *The Elements of the Law of Contracts*, London 1867, p. 221.

[69] F. Pollock, *Principles of Contract at Law and in Equity*, London 1876, pp. 190–191; W.R. Anson, *Principles of the English Law of Contract*, Oxford 1879, p. 200.

CHAPTER SIX

ENGLISH LAW: TWENTIETH CENTURY

6.1 *Introduction*

By the end of the nineteenth century the rule derived from *Tweddle* v. *Atkinson*, that a third party to a contract could bring no action on it, represented the orthodox understanding of the Common law. The position was stated clearly by Bowen L.J. in *Gandy* v. *Gandy* in 1885: "At law the rule in general is, no doubt, that a contract between two parties that one should do something for the benefit of a stranger, cannot be enforced by the stranger, except in certain exceptional cases".[1] This view was reinforced by the leading decision of the House of Lords in 1915, *Dunlop Pneumatic Tyre Co Ltd.* v. *Selfridge* & *Co Ltd.*, where the canonical principle was described by the Lord Chancellor, Viscount Haldane (1856–1928):

> [I]n the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognized in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.[2]

Here are recognised the two restrictive principles with which the Common law had been toying since the sixteenth century: the rule that only a party to a contract could bring an action, and the rule that the

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[1] *Gandy* v. *Gandy* (1885) 30 Ch D 57, 69 (Bowen L.J.).
[2] [1915] AC 847, 853.

action could only be brought by a person who had given consideration (in effect, the person who had given something in exchange for the defendant's promise). Agency was a recognised exception to this, but Viscount Haldane's remark that the contracting party must 'really' have been the agent of the beneficiary reveals that this was not seen as too substantial a qualification to the restrictions.

The rule that consideration must move from the promisee was not, in fact, a significant restriction, given the willingness of courts to recognise nominal consideration as sufficient and to infer the existence of consideration on relatively flimsy evidence.[3] Though the rule remains in place today, it can largely be ignored. More important was the parties-only rule. Despite academic and judicial criticism, particularly by Denning L.J. (1899–1999),[4] it remained as a firm statement of English law until the enactment of the Contracts (Rights of Third Parties) Act in 1999. Its doctrinal strength is visible in the firmness with which it continued to be stated right up to 1999 not merely in conservative texts,[5] but also in texts taking a consciously critical standpoint[6] and those deliberately setting out to describe the law in practice and not simply the received tradition.[7]

Twentieth-century law was problematic in two ways. First was that it failed adequately to match the realities of complex commercial transactions. The paradigm of contract as a single transaction between two individuals, in terms of which the restrictive rule might have made sense, was a long way from the practice in, for example, the construction industry, where there would typically be a main contractor with responsibility for overseeing the work and a range of sub-contractors responsible for particular aspects of it. Similarly, sales of goods commonly involved a chain of contracts beginning with the manufacturer, going through distributors and wholesalers and ending with the retail seller and the individual consumer. Each of these contracts was distinct, but they were so closely related that there might have been good commercial reasons for the parties to one transaction to enter into terms affecting other parties. Secondly, in the second half of the nineteenth

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[3] Ibbetson, Historical Introduction, pp. 236–241.

[4] *Smith & Snipes Hall* v. *River Douglas Catchment Board* [1949] 2 KB 500; *Drive Yourself Hire Co (London) Ltd* v. *Strutt* [1954] 1 QB 250.

[5] E.g. G.H. Treitel, *The Law of Contract*, London 1995[9], pp. 540–541.

[6] E.g. P.S. Atiyah, *An Introduction to the Law of Contract*, Oxford 1995[5], p. 355.

[7] E.g. H. Collins, *The Law of Contract*, London 1997, pp. 283, 285–286.

century the Common law judges began to take control over the rules relating to the measure of damages,[8] and as the jury disappeared in contractual actions (a movement largely complete by 1900) the assessment of damages became a purely judicial function. This had a considerable impact on the indirect enforcement of third-party rights, for it locked in place as the primary rule that damages should compensate plaintiffs for the loss which they had themselves suffered, a rule which seems to have been largely ignored when damages were assessed by the jury. Clearly, in so far as a contract provided solely for the benefit of a third party the contracting party would normally not be able to demonstrate that any loss had been suffered.

The problems of twentieth-century contract law did not stem from either of these on its own, but from the fact that they existed together. There was a "legal black hole",[9] where the person who had suffered the loss could not sue and the person who could sue had suffered no recoverable loss. The two issues have to be treated separately; it is convenient to begin with the second one first.

6.2 *Compensatory damages and indirect enforcement*

It was a feature of the medieval action of covenant, and from the sixteenth century of the action of assumpsit, that even though damages were assessed in theory by reference to the plaintiff's loss (calculated by reference to his expectations under the contract), the jury had a very wide discretion and there was in practice very little judicial control over their awards. As a result, there seems to have been in practice no difficulty in a party to a contract recovering damages where the loss had in fact been suffered not by him but by a third party. In the middle of the nineteenth century the judges began to take greater control over damage awards, and the issue arose whether damages could be recovered in respect of third-party losses. That a trustee[10] could sue on contracts made in the interest of a beneficiary under the trust was clear, and

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[8] *Hadley* v. *Baxendale* (1854) 9 Ex 341.

[9] *GUS Property Management Ltd* v. *Littlewoods Mail Order Stores Ltd* [1982] SC(HL) 157, 166, per Lord Stewart.

[10] I.e. a person holding property for the benefit of another, where the beneficiary's rights were recognised in Equity by the Chancery but not as a matter of Common law. See above, pp. 97 and 108–109.

a group of cases from the 1830s extended this more generally.[11] The contracting party might bring an action in respective of the losses of the intended beneficiary, and hold the damages recovered on trust for him. Before the end of the nineteenth century, though, except in exceptional cases, this had been narrowed down to situations in which there was a genuine relationship of trust between the promisee and the third party.[12] Despite an attempt by Lord Denning M.R. to reject it, this firm line was upheld by the House of Lords in *Woodar Investments Development Ltd* v. *Wimpey Construction UK Ltd* in 1980.[13] It was recognised, though, that there would be particular situations in which the rule could not sensibly be applied (as, for example, where a father booked a holiday for all his family),[14] and some inroads (of as yet uncertain scope) have been made into the rule since the decision in *Woodar* v. *Wimpey*.[15] The important point is that for most of the twentieth century it was impossible to avoid the effects of the parties-only rule stated firmly in *Dunlop* v. *Selfridge* by arranging that an action be brought by, or in the name of, a person who was in fact a party to the contract. Contracting parties who wished to provide for enforceable third-party benefits, and third parties who wished to bring claims on contracts or otherwise rely on them, had to find other means of achieving their ends.

Although the assignment of contractual rights had become more straightforward in 1873,[16] the problem of the unavailability of damages in these circumstances meant that there might be no right of any value to assign. The difficulty did not arise, probably, where the right claimed was the payment of a sum of money, since in an action for a fixed sum due to the promisee under the contract it was not necessary to prove loss;[17] it followed therefore that it might be possible to manufacture a

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[11] *Dunlop* v. *Lambert* (1839) 6 Cl & F 600; *Lamb* v. *Vice* (1840) 6 M & W 467; *Robertson* v. *Wait* (1853) 8 Ex 299; *Lloyds* v. *Harper* (1880) 16 Ch D 290.

[12] *West* v. *Houghton* (1879) 4 CPD 197.

[13] [1980] 1 WLR 277. Lord Denning's attack on the doctrine occurred in *Jackson* v. *Horizon Holidays Ltd* [1975] 1 WLR 1468.

[14] *Jackson* v. *Horizon Holidays Ltd* [1975] 1 WLR 1468. Here the contract was made by the father, but if the holiday proved to be a disaster the loss would be suffered equally by his wife and children; it was held that he was able to recover damages for the distress which they had suffered.

[15] *Linden Gardens Trust* v. *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Alfred McAlpine Construction Ltd* v. *Panatown Ltd* [2001] 1 AC 518. See too the earlier limitation on the rule in the context of the carriage of goods by sea in *The Albazero* [1977] AC 774.

[16] Judicature Act 1873 s.25(6).

[17] Treitel, *The Law of Contract* (London 1995[9]), p. 591.

right for a third party by contracting for the payment of a penalty to the promisee (in so far as this was allowed by law) and then assigning the right to demand the penalty to the third party.

6.3 *Direct enforcement and commercial practice: complex contracts*

Much of the twentieth-century law relating to third-party contract rights arose in the context of complex commercial contracts. The problems arising here were fundamentally practical—how to achieve some result—and not at all dogmatic. The solutions which were reached were substantially those of businessmen and their legal advisers, and although they inevitably had a doctrinal dimension, in so far as they had to be legally robust, they were not reached as a result of any desire to solve doctrinal difficulties. In reality, they operated within the orthodox rules but manipulated them in order to reach the desired outcome.

Good examples of these complex commercial arrangements, and the context in which some of the leading cases arose, are resale price maintenance agreements and agreements which purported to exclude or limit the legal liability of non-parties. They provide useful illustrations of the practical and legal responses to the apparent problems of the parties-only rule.

Resale price maintenance agreements

The contract in issue in *Dunlop* v. *Selfridge* involved a resale price maintenance agreement. The plaintiffs, tyre manufacturers, sold tyres to wholesalers on terms that they would not themselves sell them below a certain price, and that they would include a similar term in contracts made by them with retailers. A wholesaler sold tyres to the defendants, including a maximum resale price clause entered into both on their own behalf and as agents for the plaintiffs. The defendants sold tyres below the price fixed and the plaintiff manufacturers brought an action, claiming the benefit of the term contained in the contract between the wholesaler and the defendants. The action failed on the basis that the plaintiffs were not parties to that contract, and because any contract made by the retailer with the manufacturers through the agency of the wholesalers was of no effect since there was no consideration provided by the manufacturers.

Resale price maintenance agreements of this type were common in the motor industry, and the manufacturers' reaction was not simply to

lie down and accept the impossibility of enforcing the terms against retailers.[18] The response of motor manufacturers and traders was twofold. First was to strengthen the disciplinary powers of the Motor Trade Association, the body to which most motor traders belonged. From 1911 this body had begun operating a 'stop list' of retailers who broke the rules of the association, including the restriction on undercutting manufacturers' prices; wholesalers would, in practice as well as theory, refuse to sell cars to retailers who had been placed on a stop list. This was later changed to allow the imposition of a fine, technically a payment in exchange for not being placed on the stop list, a practice upheld as lawful by the House of Lords in *Thorne* v. *Motor Trade Association* in 1937.[19] The desired commercial result was therefore achieved without in any way going against the decision against third-party benefit contracts in *Dunlop* v. *Selfridge*.

Alongside the disciplinary route of the Motor Trade Association, manufacturers did not neglect contractual solutions. To avoid the restrictions of *Dunlop* v. *Selfridge* contracts were drafted which created on-going relationships between dealers and manufacturers. Among the terms of these contracts was one under which the dealer agreed not to sell cars at a price below the manufacturers' retail price (plus a fixed delivery charge), subject to a penalty of £100 payable to either the wholesaler who had supplied him or to the manufacturer.[20] No longer did manufacturers have to try to seek the benefit of a clause in a contract to which they were not parties.[21]

A related problem arose after the Second World War, when the shortage of available new cars was pushing up prices. Now the difficulty was the sale of cars above the manufacturer's price. The pre-war mechanisms were no less effective here to stop dealers selling at higher prices, but they could not prevent the individual car owner reselling their car at a higher price since there was no on-going contractual relationship between the individual and the manufacturer. Hence another mechanism was developed. Purchasers of new cars were required by

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[18] Johnson-Davies. The practice of different industries in relation to resale price maintenance operated is brought out in the Report of the Monopolies and Restrictive Practices Commission, *Collective Discrimination: A Report on Exclusive Dealings, Collective Boycotts, Aggregated Rebates and Other Discriminatory Trade Practices* (Cmd 9504, HMSO, London 1955).

[19] [1937] AC 797.

[20] Reynolds, pp. 46–54.

[21] See below, p. 128.

dealers to enter into a covenant under seal, naming as parties both the dealer himself and the Motor Trade Association, that they would not sell on the car within some fixed period without good reason (to be approved by the Motor Trade Association), and giving the Association an option to purchase at the original market price less depreciation.[22] The problems of resale by individual purchasers disappeared as the rate of production of cars for the internal market rose, but the Motor Trade Association continued to regulate dealers until the *Restrictive Trade Practices Act* of 1956 outlawed such means of collective enforcement.[23] Instead, the Act provided that resale price maintenance agreements contained in contracts between manufacturers and wholesalers could be enforced against dealers who were not parties to those contracts, provided only that they had notice of them.[24]

Exclusion clauses and non-parties

Though *Dunlop* v. *Selfridge* had locked in place the rule that a third party could not normally bring an action to enforce a contract made for his benefit, it did not follow that he could not use such a contract as a defence; and it was in this context that the effects of contracts on third parties were primarily considered in the middle decades of the twentieth century. The gradual acceptance of third-party rights here led on to the eventual overturning of the rule in *Dunlop* v. *Selfridge* and the recognition of third-party rights of action.

It might sometimes happen that a party to a contract wished to restrict not merely his own liability under the contract, but also the liability of other persons (typically employees or sub-contractors). Such a device made economic sense in contracts for the carriage of goods by sea, for example, where risks were allocated between the owner of the goods and the carrier according to well-established rules, leaving each party to insure for the risks which fell on him. It would have distorted this situation if the owner could avoid the consequences of this risk allocation by bringing an action against the owner of the vessel rather than the carrier (in a case where the vessel had been chartered by the carrier), or against an employee or sub-contractor of the carrier.[25]

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[22] Johnson-Davies, pp. 62–84.
[23] Restrictive Trade Practices Act 1956, s. 24.
[24] Ibid., s. 25.
[25] *Elder Dempster & Co.* v. *Paterson Zochonis & Co. Ltd* [1923] 1 KB 420, 441–42, per Scrutton L.J.

The question arose therefore whether a term in the contract between the owner of the goods and carrier could be used as a defence by the employee, sub-contractor or other person not a party to the contract.

In *Elder Dempster & Co.* v. *Paterson Zochonis & Co. Ltd.*,[26] it was held in the House of Lords that an exclusion clause contained in a bill of lading with the charterer of a ship was effective to protect also the owner of the ship, who would otherwise have been vicariously liable for the negligence of the ship's master.[27] This decision reflected the general, perhaps universal, belief in the commercial world at the time;[28] the problem was to explain why it was right. The reasoning of the judges is not at all clear, and it is easy to suppose that they were as much influenced by the commercial absurdity of reaching the contrary conclusion as by any doctrinal nicety.

Two possible reasons for the result in the House of Lords in *Elder Dempster* may be identified, though neither was explored in any detail in the case: the charterer might have been treated as the agent of the owner, who would then have been a party to the contract and hence able to rely on the exclusion clause; or the charterer might have received the goods as a bailee (i.e. a person holding property belonging to another) on terms which exempted him from liability, which terms were incorporated into the sub-bailment from charterer to owner. A third reason can be derived from the judgment of Scrutton L.J. (1856–1934) in the Court of Appeal in the same case, taken in conjunction with his slightly later judgment in *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.*:[29] the owner might have received the goods as agent or servant of the charterer, and where the principal or master was protected by the exclusion clause the effects of this would extend equally to the agent or servant. Although the decision that the owner of the ship could claim the benefit of the exclusion clause contained in the charterer's contract went against the spirit of *Dunlop* v. *Selfridge*, it is noteworthy that no attempt was made to undermine the decision in that case. From the

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[26] [1924] AC 522.

[27] Treitel, Landmarks, pp. 53–58.

[28] Lord Roskill, *Half-a-Century of Commercial Law, 1930–1980*, Birmingham 1981, p. 10. It was, though, recognised that in the precise situation which was to arise in *Elder Dempster* v. *Paterson Zochonis* there might not have been any contractual nexus between the shipper of the goods and the owner of the vessel: T.E. Scrutton & F.D. Mackinnon, *The Contract of Affreightment as expressed in Charterparties and Bills of Lading*, London, 1923[11], p. 59 note l.

[29] (1925) 21 Ll L Rep 375.

standpoint of legal doctrine, all three of the reasons identified could be justified without in any way affecting the rule that only a party to a contract could claim the benefit of it.

Some twenty years later, in *Cosgrove* v. *Horsfall*,[30] it was held in a totally different context that a bus driver could not rely on an exclusion clause contained in a passenger's contract with the bus company, despite the fact that the clause purported to extend not merely to the company itself but also to its employees. Du Parcq L.J. (1880–1949) treated this as no more than an aspect of the *Dunlop* v. *Selfridge* rule, referring to the 'elementary principle of our law' that a person should not be able to take the benefit of a contract to which he was not a party.[31] *Cosgrove* v. *Horsfall* was not strong authority, though, since it was decided without reference to *Elder Dempster* v. *Paterson Zochonis*.

This failing was remedied ten years later, in *Adler* v. *Dickson*,[32] where a passenger on a ship had been injured through the alleged negligence of the ship's master. It was argued that his liability was excluded by a clause in the contract of carriage between the passenger and the shipowners, but the argument was rejected as a matter of construction of the contract. Denning L.J., though, was prepared to allow that a properly worded exclusion clause could have protected the ship's master, provided that the passenger had expressly consented to it, effectively treating *Elder Dempster* v. *Paterson Zochonis* as establishing a rule of general application which did not depend on any analysis of agency or bailment. An alternative approach, also touched on by Denning L.J., was to recognise that the law might infer a contract between the third party and the passenger, collateral to the principal contract between the passenger and the carrier, in which the exclusion clause would also be contained.[33] Significantly, though, the majority of the court moved in the opposite direction from Denning L.J., questioning the decision in *Elder Dempster* v. *Paterson Zochonis*.

The consequences of this were not lost on the commercial world. Their response was to cause to be drafted a clause which would protect the third party without in any way falling foul of *Dunlop* v. *Selfridge*. This was the so-called 'Himalaya clause' (so named after the ship involved

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[30] (1945) 175 LT 334.
[31] 175 LT 334, 335.
[32] [1955] 1 QB 158.
[33] [1955] 1 QB 158, 183, explaining *Hall* v. *North Eastern Railway Co* (1875) L.R. 10 QB 437; 44 LJQB 164.

in *Adler* v. *Dickson*), which made it explicit that the contract was being made by the carrier as agent as well as principal, and on terms which included the exclusion or limitation clause, thereby bringing about a distinct contract between the owners of the goods (or their equivalents) and the third party; the requirement that consideration should move from the plaintiff was satisfied by the third party's performance of its duties under the contract with the original promisee. That the first aspect of this was legally sound was relatively uncontroversial, but it was not clear whether the courts would be satisfied that there was good consideration moving from the third party. Say A, the owner of goods, agreed with B that B would carry the goods from Amsterdam to London, the contract containing a term that neither B nor anyone loading or unloading the goods would be liable for damage caused negligently. C, a stevedore, entered into a contract with B to unload the goods in London, receiving payment from B for doing so. Could it be said that C was providing something for A if all he was doing was carrying out his duties under the contract with B?

The question prefigured in *Adler* v. *Dickson* was revisited in *Scruttons Ltd*. v. *Midland Silicones Ltd*.[34] The question here was whether stevedores who had negligently damaged property could take advantage of a clause in the contract between the property owners and the carriers limiting the carriers' liability to $500. There was no Himalaya clause in the contract, and the majority of the House of Lords held that in the absence of this they could not take advantage of the carriers' contractual protection.[35] On the drafting of the actual clause used there was nothing to support a conclusion that the carriers had acted as agents for the stevedores; there was nothing to justify the inference that there was a collateral contract between owners and stevedores; and *Elder Dempster* v. *Paterson Zochonis* had to be given a narrow interpretation so as not to conflict with *Dunlop* v. *Selfridge*. Lord Denning dissented. He was willing to give *Elder Dempster* a wider interpretation than the other members of the House of Lords. The only reason not to apply the agency analysis found in *Elder Dempster* was that it was contrary to the fundamental parties-only principle; but Lord Denning argued that this 'fundamental' principle was in fact an invention of the nineteenth

[34] [1962] AC 446.

[35] It is a nice coincidence that the counsel for the stevedores in *Scruttons* v. *Midland Silicones* was Eustace Roskill QC, the lawyer responsible for the drafting of the Himalaya clause whose whole purpose was to avoid the situation reached in *Scruttons*.

century and should not be given any great weight in the face of the commercial uncertainties which would follow from the decision reached by the majority.

Lord Denning might not have seen the point. With the benefit of hindsight it can be seen that the important commercial question was not whether third parties should routinely be able to claim the protection of others' exclusion clauses, but whether the Himalaya clause was effective in allowing them to do so. This was not established until the decisions in *The Eurymedon*[36] and *The New York Star*,[37] remarks in the latter case suggesting that the courts should not be too rigid in their assessment whether a relationship of agency 'really' existed.

The impetus behind allowing third parties to take advantage of exclusion or limitation clauses made for their benefit was straightforwardly commercial, and the changes which occurred did so against the background of the continuing applicability of the firm parties-only principle of *Dunlop* v. *Selfridge*. As well, though, there was a clear undercurrent (very clearly visible in Lord Denning's speech in *Scruttons* v. *Midland Silicones*) that it was wrong that the freely negotiated contract of the parties should not be enforced. Lord Roskill (1911–1996), extra-judicially, summarised the development of the law: "The importance of these various decisions is this. They show a fundamental change in the attitude of our courts and a welcome determination to give effect to the intention of the parties where that intention has been clearly expressed in their contract and not to allow technical rules like the doctrine of consideration to stand in the way of so doing. This route is a different route from that which appealed to Lord Denning in his dissenting speech in the Midlands Silicones case, and I venture to think is, with all respect, very much more soundly based in legal principle".[38]

6.4 *Direct enforcement: avoiding the effects of the restriction*

As the discussion of complex contracts shows, the dominant approach of English lawyers in the twentieth century was not to attack the restrictive rule preventing the enforcement of contracts by third-party beneficiaries

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[36] [1975] AC 154.
[37] [1981] 1 WLR 138.
[38] Lord Roskill, *Half-A-Century of Commercial Law 1930–1980*, Birmingham 1981, p. 11, also quoted in Swain.

head-on, but to draft one's contracts carefully or to manipulate one's legal relations in such a way as to reach the desired results without doing anything inconsistent with it. In so far as the rule was disapplied, this was very piecemeal and as a result of legislative intervention.[39]

Statutory exceptions

Dealing with this topic in their report on privity of contract, the Law Commission begin: "This section will outline some of the major legislative exceptions to the third party rule".[40] "Some", only, of the major legislative exceptions: any comprehensive list of statutory provisions allowing actions by third-party beneficiaries would have been very long and very tedious. The most important feature of all of them is their tight drafting and closely-defined scope. Their focus is invariably on the provision of remedies in some precise situation, irrespective of the way in which the contract or contracts are framed. *The Package Travel, Package Holidays and Package Tours Regulations* of 1992, for example, provide a remedy for the consumer (as defined by the regulations) of a package holiday (as defined by the regulations) against the supplier of the holiday, where the obligations under the contract are not properly performed, whether by the supplier himself or another.[41] It is irrelevant whether, as a matter of analysis, this involves the enforcement against the supplier of a contract made between the consumer and a third party or the enforcement by the consumer of a contract made between the supplier and a third party. These regulations were made in order to implement a European Directive,[42] but the technique used is not something alien to the Common law. Reference has already been made to section 25 of the *Restrictive Trade Practices Act* of 1956, for example, allowing for the enforcement against traders of individual agreements relating to resale prices. Only slightly more general was the earlier *Third Parties (Rights Against Insurers) Act* of 1930, laying out with some specificity the circumstances in which a third party might have a direct right against an insurance company on an insurance policy: where a car driver, for example, took out an insurance policy to protect himself against liability

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[39] Privity of Contract: Contracts for the Benefit of Third Parties (Law Commission Report 242, 1996) (available on line at http://www.lawcom.gov.uk/docs/lc242.pdf), pp. 9–37.

[40] Law Commission 242, 31 (emphasis in original).

[41] *Package Travel, Package Holidays and Package Tours Regulations* (SI 1992/3288), reg. 15.

[42] EEC Council Directive 90/314.

to third parties arising out of his negligent driving, such a third party might be able to sue the insurer directly. The only statutory provision which might have been read in any general sense was section 56(1) of the *Law of Property Act* 1925; Denning L.J. attempted to interpret it in this way, but it is abundantly clear that the section was intended only to apply to a narrow class of cases involving land, as was held by the House of Lords in *Beswick* v. *Beswick*.[43]

Doctrinal solutions within the law of contract

In various ways it was possible, within the existing law of contract and without derogating from the parties-only rule, to reach the desired purpose, viz. that the third-party beneficiary was entitled to the performance stipulated in his favour. According to these constructions, however, the beneficiary is no longer a third party, and from the viewpoint of the civilian tradition, such solutions have only little significance for the question of third-party rights, although they are relevant for the development of English law.

The easiest way to ensure that a third party could bring an action on a contract was to draw it up in such a way as to make him a party to it. This had been easily achieved with contracts by deed since the thirteenth century, and the mechanism was equally applicable to unsealed contracts. This was accepted in principle by the House of Lords in *McEvoy* v. *Belfast Banking Co*,[44] though on the facts of that case it was held that the contract had not in fact been properly drafted to reach this result. Exactly what was the effect of the inclusion of the intended beneficiary as a party would depend on the way the contract was formulated; and it was here that the limited value of this solution became visible. Most obviously, the beneficiary could be made joint promisee. Here it did not matter that he had provided no consideration; so long as consideration had been provided by one of the promisees all were included within it.[45] However, it was (and is) a procedural

[43] [1968] AC 58; Treitel, Landmarks, 94–97. The statute provided that: A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

[44] [1935] AC 24.

[45] See the (generally accepted) decision of the High Court of Australia in *Coulls* v. *Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460 (on which, as in *McEvoy* v. *Belfast Banking Co*, the claim failed on the facts).

rule that all joint promisees must be parties to the action, so that the mechanism was not effective to give a right to the beneficiary alone.[46] The alternative was to provide that the contract was made with the promisee and the beneficiary separately. Here each party had the right to sue independently, so the beneficiary could straightforwardly bring an action in his own name; but since he was an independent party it was necessary that he should have provided consideration even though he need not have actively consented to the agreement. It followed that, whether the contract provided for joint or several rights, the simple expedient of adding him as a party was not quite sufficient to avoid the full effects of *Dunlop* v. *Selfridge*.

A second route was more effective, the creation of a separate contract—express or implied—between the promisor and the third party, collateral to the main contract. This was the route adopted to deal with the problems of resale price maintenance in the motor trade,[47] and in the drafting of the Himalaya clause,[48] but the principle behind it is both simpler and of wider application. Its most straightforward form is illustrated by the case which established its legitimacy, *Shanklin Pier* v. *Detel Products Ltd*.[49] The plaintiffs, whose pier needed painting, gave instructions to their contractors to buy and use paint manufactured by the defendants, putting faith in an undertaking of the quality and suitability of the paint which had been given to them by the defendants' representative. The paint turned out not to be suitable. It was held that the plaintiffs could sue the defendants directly. The collateral contract provided an easy way to bring about the enforcement by consumers of guarantees published by manufacturers of goods; all that was necessary was to show that they had acted in reliance on the manufacturers' guarantee when they had entered into the contract with the seller to buy the goods, for otherwise the requirement of consideration would not be satisfied, without there being any further requirement of consent between consumer and manufacturer (the consumer need not, for instance, inform the manufacturer that he was buying the goods on the faith of the manufacturer's guarantee).

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[46] Except, that is, when the other promisee (or, more accurately, all the other promisees) had died.

[47] Above, pp. 119–121.

[48] Above, pp. 123–125.

[49] [1951] 2 KB 854.

A third route was found in *Beswick* v. *Beswick*, a modern analogue of the family inheritance cases found in the sixteenth and seventeenth centuries.[50] A man, wanting to retire and make provision for himself and for his wife after his death, transferred his business to his nephew in exchange for an agreement that the nephew would pay him a weekly salary for the rest of his life and then the sum of £5 per week to his widow. After his death the nephew stopped making the payment to the widow. She was not a party to the contract (though it would have been easy to have made her a party), and it was consequently not clear that she could bring an action. Her husband, however, had died without making a will, and on the ordinary rules of the law of succession she was the administratrix of his estate. Suing in that capacity, and not in her personal capacity, it was held by the House of Lords that she was entitled to an award of specific performance, a discretionary remedy, requiring the nephew to carry out his contract and pay the money owing to her. The facts of the case were very specific, depending on her being both administratrix and beneficiary, and its significance lies rather in the willingness with which the court was willing to apply the existing rules of law for her benefit notwithstanding the rules of privity of contract.

By-passing the law of contract: equity

In the seventeenth or eighteenth centuries, the primary route for the avoidance of the restrictive Common law doctrines was the Equitable jurisdiction of the Court of Chancery, both through forcing the contracting party to sue at law and through the granting of direct actions to the beneficiary himself.[51]

In the nineteenth century this body of doctrine had been largely reformulated in terms of trusts (of property and of promises),[52] but there remained a good deal of potential for development of this mechanism. The way forward seemed clear in *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd*,[53] where it was held that a term in a contract between a shipowner and charterer expressed as being for the benefit of a broker could be enforced by the charterer as trustee

[50] [1968] AC 58; Treitel, Landmarks, pp. 82–105.
[51] Above, pp. 103 and 108.
[52] Above, pp. 97 and 108–109.
[53] [1919] AC 801.

for the broker. This was a case of indirect enforcement—the action was brought by a party to the contract—but the characterisation of him as a trustee suggested that an action could have been brought by the broker as the beneficiary of that trust. This wider basis for the decision was developed by the American scholar Arthur Corbin (1874–1967) in an article in the leading English law journal in 1930.[54] Corbin argued that the Court of Chancery had generally enforced contracts for the benefit of third parties by the device of the trust of a promise; Common law and Equity had been united by the *Judicature Act* 1873, with the rules of Equity taking precedence in cases of conflict; and consequently the post-1873 Common law should follow this line and generally allow actions by third-party beneficiaries. The device continued to be used, but its value was limited by *Re Schebsman* in 1944.[55] This stressed the need to demonstrate a genuine intention to create a trust, and in most contracts for the benefit of third parties no such intention would be visible. The trust of a promise, therefore, ceased to be a tool available to the courts to fashion a remedy for third parties where none was available at Common law. It remained as a drafting device which could be used in appropriate circumstances; but, commonly, where those circumstances do exist there are better ways to achieve the desired end.[56]

This does not, of course, mean that Equity was irrelevant. In any situation where there was a properly constituted trust of property, as where one person transferred property to another to hold on trust for a third, the beneficiary would be fully protected, though his claim would not stem from the contract but from the (Equitable) property right created by the contract. Elsewhere in the law what seem to be contractual rights can be attached to property rights and so affect third parties,[57] and a similar flexibility is seen in the extension of terms in bailments of moveable property to related sub-bailments of the same property.[58] These situations involving the creation of rights in third

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[54] A.L. Corbin, Contracts for the Benefit of Third Persons, *Law Quarterly Review* 46 (1930), pp. 12–45.

[55] [1944] Ch. 83.

[56] Though this method was used in the offshore oil and gas industry, where it was thought to be the best method to deal with the very complex web of parties: Law Commission 242, 48.

[57] As in the running of leasehold covenants, where there is privity of estate: above, p. 102.

[58] *Elder Dempster & Co.* v. *Paterson Zochonis & Co. Ltd* [1924] AC 522; *Morris* v. *C.W. Martin & Sons Ltd* [1966] 1 QB 716; *The Pioneer Container* [1994] 2 AC 324.

parties constituted, deliberately or otherwise, ways round the restrictive third-party rights rule of the law of contract; but by shifting the legal categorisation they were able to leave the contractual rule intact.

From the 1960s, another alternative to a contractual claim was found in the tort of negligence.[59] The possibility of such an action stemmed from the decision of the House of Lords in *Donoghue* v. *Stevenson*,[60] allowing a non-party to the contract to claim damages for personal injury against the negligent manufacturer of a product, and once it was held in *Hedley Byrne & Co* v *Heller & Partners Ltd*[61] that a claim in negligence might lie for purely economic loss the way was open to formulate actions even where there had been no physical injury. In *Junior Books Ltd*. v. *Veitchi Ltd*[62] this route was used to allow a company for whom a building was being constructed to bring an action against a negligent sub-contractor, effectively claiming compensation for the loss of profits which they had hoped to make conducting a business from the building. *Junior Books* represented the high point of this use of the law of torts to achieve a result which might otherwise have been achieved by the recognition of third-party rights in contract. The real problem was that the notion of purely economic loss was under-defined, and although the courts tried to distinguish between genuine out-of-pocket loss and the loss of expectations[63] it was not always easy to do so.

The wholesale use of this route was stopped by the limitations placed on the recoverability of purely economic loss in *Murphy* v. *Brentwood District Council*[64] in 1991, but it has not wholly died out. In *White* v. *Jones*,[65] for example, a disappointed legatee was held able to claim substantial damages from a solicitor who had negligently failed to draft a will before the death of the would-be testator. The courts in cases like *Junior Books* and *White* v. *Jones* showed a clear awareness of the closeness to the provision of a third-party contractual benefit; in the former Lord Keith linked the case to the question of manufacturers'

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[59] Markesinis, p. 354.
[60] [1932] AC 562.
[61] [1964] AC 465.
[62] [1983] 1 AC 520. It should be noted that *Junior Books* was a Scottish case, and that Scots law did in some situations recognise third-party contractual rights. The law of torts was not being used to fill the gap left by the English law of contract by *Dunlop* v. *Selfridge*, but to go beyond the available contractual remedies in Scots law. The case is sharply discussed, with reference to the question of third-party rights in contract, by Rodger, p. 64.
[63] E.g. *Muirhead* v. *Industrial Tank Specialities Ltd* [1986] QB 507.
[64] [1991] 2 AC 398.
[65] [1995] 2 AC 207.

contractual guarantees,[66] while in the latter case part of Lord Goff's reason for favouring the beneficiary's claim was the parallel with the German *Vertrag mit Schutzwirkung für Dritte*.[67] Even where the difficulties of purely economic loss were avoided, though, a remedy in this type of case would lie only if it was shown that the defendant had failed to take reasonable care. It would never have been a means to the general enforceability of third-party contractual rights.

6.5 *Reform of the law*

That there was something badly wrong with the law was visible as early as 1915, when, in *Dunlop* v. *Selfridge* Lord Dunedin (1849–1942) remarked that the effect of the consideration rule was to 'make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.'[68] It would be more accurate to say that it was the combined effect of all the rules which generated the problems, though it was only after the restrictions on the trust of a promise in *Re Schebsman* (1944)[69] that this became fully visible. Careful drafting of contracts might enable the problems to be avoided, but alongside this practical response there were also attempts to tackle the issue head-on by changing the law.

The first serious move towards reform of the law was taken by the Law Revision Committee in 1937.[70] In its *Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration*, it recommended that: "[W]here a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise as against the third party any defence that would have been valid against the promisee. The rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties

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[66] [1983] 1 AC 520, 537.
[67] [1995] 2 AC 207, 255.
[68] [1915] AC 847, 855.
[69] Above, p. 130.
[70] Law Revision Committee, *Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration*, pp. 25–30. For the 1937 Report and its reception, see Beatson.

at any time before the third party has adopted it either expressly or by conduct".[71]

The proposal had three elements: the third-party benefit must be expressly provided for (in preparing legislation to give effect to the provision the Lord Chancellor imposed a further requirement that it be expressed in writing); the third party's rights were derivative, and so subject to defences which could have been raised against the original promisee; and it was only after the third party had adopted—i.e. indicated his consent to—the contract that his rights became irrevocable. A variety of factors, most obviously the outbreak of war, prevented the enactment of this recommendation, and after 1945 it quickly fell off the legislative agenda. It was picked up again on the formation of the Law Commission in 1965, but no firm proposals were made and the issue was again dropped. Criticism of the rigid rule of privity of contract from both academics and judges got ever louder. Lord Diplock (1907–1985), in 1983, spoke of it as 'an anachronistic shortcoming that has for many years been regarded a reproach to English private law.'[72] The Law Commission produced a Consultation Paper in 1991, and a report in 1996[73] recommending wholesale reform of the rule. In the light of this, legislation was introduced into Parliament, becoming the *Contracts (Rights of Third Parties) Act* 1999.

The arguments for reform[74] can be reduced to four. Most other legal systems, and in particular the legal systems of other Member States of the European Union, enforced third-party rights, and there was some desirability in the adoption of a common approach. Secondly, the law as it stood was so complex and artificial as to be both inefficient and uncertain. Thirdly, although the rules as they stood would commonly enable businesses to achieve the results they wanted, there were many situations in which they could not do so; and, as the Law Commission pointed out, the fact that an expert legal draftsman might be able to find a solution to a problem was not a comfort to the individual or business without access to such professional advice. Fourthly, and most importantly, the rejection of third-party rights served to frustrate the intentions of the contracting parties, and to disappoint the legitimate

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[71] *Sixth Interim Report*, 30 (para 48).

[72] *Swain* v. *Law Society* [1983] 1 AC 598, 611.

[73] Law Commission Report 242, *Privity of Contract: Contracts for the Benefit of Third Parties.*

[74] Law Commission Report 242, 39–52.

expectations of third-party beneficiaries who might have acted in reliance on the contract.

Perhaps the most important strategic question, and certainly the most important from a doctrinal standpoint, was the balance between giving maximum respect to the intentions of the parties and protecting the third party. When, if at all, should the parties be able to revoke or vary the agreement to the disadvantage of the third party? The dominant Will Theory of contract which had prevailed since the nineteenth century, according to which liability stemmed from the meeting of minds of the contractors, would favour the freedom of the parties to change their minds; the more protective approach coming to the surface in the late twentieth century would favour the third party. The view of the Law Commission was to lean towards the protection of the third party. A second point of importance was to ensure that there would be as little ambiguity as possible in determining whether the third-party beneficiary had enforceable rights, so as not to undermine the commercial certainty fundamental to the practical working of the law of contract.

6.6 *The Contracts (Rights of Third Parties) Act 1999*

The core of the modern Common law is contained in the *Contracts (Rights of Third Parties) Act* 1999 (CRTPA). It should be noted that this leaves intact most of the devices available at Common law before 1999, doing no more than providing a mechanism supplemental to them to confer enforceable rights on third parties. That said, it is reasonable to assume that those drafting third-party benefit contracts will adopt the simple means now available rather than the artificial complexities of the old law. It is not possible to give a detailed analysis of the Act,[75] but its outlines are sufficiently clear that a brief summary should not be misleading.

When may a third party enforce a term? Section 1 of the Act provides that a third party may enforce a term when the contract expressly provides that he may, or where the term purports to confer a benefit on him and the proper construction of the contract does not show that the parties did not intend him to be able to enforce it. This gives primacy to the

[75] See, for example, Treitel, The Law of Contract (twelfth edition), p. 691ff. The Act will also be dealt with in the next chapter.

intentions of the contracting parties, putting weight on the express terms of the contract but effectively inserting a presumption that they did intend that he should be able to enforce a term which purports to be for his benefit. (Whether a term 'purports to be' for his benefit is a difficult question which is still very controversial.) Even where the contract does not expressly say that the third party is intended to have an enforceable right, it is essential that he be expressly identified in it, if only as a member of a class.[76]

What rights does the third party have? Assuming that the third party has an enforceable right, section 1(5) provides that he has all the remedies he would have had if he had been a party to the contract. It should be noted that he is not made a party to the contract, but for these purposes is treated as if he were a party. Moreover, any enforcement of a term for his benefit is subject to other terms of the contract (for example, a restriction on the amount of damages recoverable).

When can the contract be revoked or varied by the parties to it? Section 2 deals with the central issue of revocability and variation. It allows the parties to revoke or vary the contract until such time as (a) the third-party beneficiary has 'communicated his assent' to the contract (not necessarily in writing, or even by express words) to the promisor; or (b) he has relied on the term to the knowledge of the promisor; or (c) he has relied on the term and the promisor ought reasonably to have foreseen that he would do so. This provision, though, is displaced if the contract itself either allows for cancellation or variation by the parties after this time or requires the consent of the beneficiary to any variation before this time.

Defences against the Third Party: The rights of the third party are, substantially, derivative from the promisee, and hence some defences which could be raised in an action brought by the promisee can be raised against the third party. Unless covered by some express term of the contract, what these defences are is covered by section 3(2) of the Act. It specifies that the promisor can raise any defence which 'arises from or in connection with the contract and is relevant to the term' which could have been raised against the promisee. The precise meaning of this awaits analysis by the courts. In addition, and unsurprisingly, the promisor can raise any defence which would have been available to

[76] See below, p. 152.

him in an action by the third party had the third party been a party to the contract.

Double Jeopardy: A final point, covered by section 5 of the Act, is that where the promisee has recovered compensation from the promisor in respect of the third party's loss, the third party cannot then bring an action to recover compensation for the same loss.

6.7 *Common law and Civil law*

From a civilian perspective, the history of the English law of third-party contractual rights looks most unsatisfactory. There is a frustrating insouciance about doctrinal issues which writers in the civilian tradition found both centrally important and extremely difficult, and what appears to be a very cavalier attitude to the boundaries of the fundamental legal categories of contract, tort, and property.

From the perspective of an English legal historian, things look rather different. Despite the theoretical messiness, before the nineteenth century English law was remarkably successful at reaching practically workable results. Formal contracts under seal were relatively easily drafted in such a way as to make the intended beneficiary a party—since there was no requirement that they should have been present when the instrument was executed—so that the formal rule that non-parties could not gain any rights under the deed was of very little practical effect. Informal contracts may have been more problematic, but if there were real limitations here they stemmed from the rule that the plaintiff in the action must have given *quid pro quo* or consideration, rather than from any rule that only a party to the agreement might sue. If these rules caused difficulties, then the Court of Chancery had sufficient flexibility to provide a remedy which left the Common law rules intact at the same time as undermining their effects. It was only in the nineteenth and twentieth centuries, when (under continental European influence) the doctrinal points were taken more seriously and when the rules had to be applied in more complex commercial settings, that difficulties became apparent. Still, though, the rules developed in previous centuries retained the flexibility to provide solutions to nearly all problems, and commercial lawyers had sufficient ingenuity to frame contracts in such a way as to achieve their desired results. As a result, English law was able to retain its mask of doctrinal purity until statutory reform was achieved in 1999.

CHAPTER SEVEN

CONTEMPORARY LAW

7.1 *Introduction*

In this chapter our focus will be on the comparative analysis of the contract in favour of a third party in three jurisdictions: France, Germany and the Netherlands. French and German law have been selected because they are the parent systems of the two major legal families of the civil law tradition. Legal families are formed by legal systems which have common characteristics in several fields, such as their historical development, distinctive legal institutions, sources of law and legal reasoning. On this basis the leading treatise of comparative law, Zweigert/Kötz, has identified a Romanist legal family, to which French law and legal systems whose codifications are modelled after the French *Code civil* belong. This treatise has also identified a Germanic legal family, which is formed by German law and by legal systems whose codes of private law have been strongly influenced by the German *Bürgerliches Gesetzbuch*.[1] As will be demonstrated below, differences between Romanist systems and Germanic systems also manifest themselves in their approaches towards third-party rights. Dutch (Netherlands) law will be discussed, because it has one of Europe's most recent civil codes (1992). Moreover, interestingly, with its former civil code (1838), it started as a Romanist system, whilst its present civil code (1992) is more closely

[1] Zweigert & Kötz, pp. 63–73. The expression 'Romanist' legal systems is slightly confusing, because the legal systems forming the Germanic legal family have also been strongly influenced by Roman law. Moreover, one can have doubts as to whether the Romanist and the Germanic legal family must be distinguished as separate legal families, since they can be said to belong to a more general category which is often called the 'civil law' tradition. Nevertheless, in this chapter we will use the expressions 'Romanist' and 'Germanic', not only because they are used in the leading comparative treatise, but also because it cannot be denied that the legal systems belonging to these respective legal families share common characteristics which distinguish them from the others. See Zweigert & Kötz, p. 69. The expression 'civil law' will refer to both Romanist and Germanic legal systems, as well as to other systems belonging to the civil law tradition.

affiliated with the Germanic legal family.[2] Again this manifests itself in the approaches towards the contract in favour of a third party which can be found in the old and the new code. Other twentieth century codifications will occasionally be mentioned as well. Regular references will also be made to the treatment of third-party rights in the so-called 'mixed jurisdictions'. These are jurisdictions, such as South Africa, Scotland, Louisiana and Québec, which combine features of both civil law and common law jurisdictions. For this reason they are extremely interesting from a comparative perspective. South African law in particular is of great interest since it builds upon two systems of law which have already been discussed in this book: Roman-Dutch law and English law. Finally, in this comparative account, brief references will also be made to English law, the parent system of the common law family.[3]

7.2 *Towards a fully emancipated contract in favour of a third party*

At present most, if not all, civil law systems recognize that A and B can agree that C shall have a directly enforceable right against B. Contemporary legal systems are based on the idea that, whilst the doctrine of relativity of contract rightly prevents two parties from imposing contractual duties upon someone who is not a consenting party to it, there can, however, be no valid reason why parties should not be able to confer contractual rights upon a third person as long as the latter has the opportunity to accept or to reject the clause in his favour.

The provisions of the French *Code civil* regarding third-party rights, however, have not been altered in the twentieth century. Article 1119 still proclaims the principle that one can only stipulate for oneself, while article 1165 still states that agreements neither prejudice nor benefit third parties, except in the case provided for in article 1121. Hence, contracts confer benefits upon third parties only "when such is the condition of a stipulation that one (*viz*. the stipulator) makes for oneself or of a donation which one makes to another".[4] We have seen in chapter four that at the end of the nineteenth century the French courts have significantly extended the scope of these two exceptions, particularly

[2] Besides, it is the home jurisdiction of the majority of the authors of this book.
[3] For a full treatment of English law, see chapter six.
[4] Above, p. 76.

with a view to life insurances.[5] Also, in areas other than life insurance contracts, the validity of such stipulations has been recognized. The courts have deliberately initiated a development leading to the general recognition of third-party rights and have generalized and extended the stipulation in favour of a third party in order to uphold a number of important operations.[6]

The end result of this development is that whenever A and B agree that C shall have a contractual right against B this will be recognized by the French courts. A leading textbook, therefore, concludes that nothing remains of the rule *alteri stipulari nemo potest*. Those operations, of which article 1119 continues to proclaim that they are invalid as a matter of principle, are in reality always valid. The exceptions of article 1121 have been found by case law to be so extensive that they have been turned into the rule. The principle expressed in articles 1119 and 1165 of the *Code civil* is therefore no longer true: the affirmation of the principle that one can validly stipulate for another person much better reflects the state of French positive law.[7] This development is regarded as one of the most characteristic examples of the transformation of the law and of the role played by case law in it.[8] It is, therefore, no surprise that the proposal to reform the law of obligations purports to codify the results reached in case law and recognizes the third-party benefit contract as a generally available institution. Pursuant to article 1171 of the *Avant-projet*[9] the stipulator may agree with the promisor that the latter shall carry out a performance (merely) for the benefit of a third party. Article 1171(1) adds that the third party will be vested with the right to demand performance from the promisor directly. It is no longer required that the stipulation in favour of a third party is the condition of either a stipulation which one makes for oneself or of a gift which one makes to another.

Similar developments have taken place in other jurisdictions modelled after the French *Code civil*. The provisions of the Belgian *Code civil* are derived from the French and acknowledge third-party rights in only the same circumstances as those mentioned in the French *Code civil*

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[5] Above, pp. 84–86.

[6] Larroumet & Mondoloni, no. 11. See also below, p. 142.

[7] Terré, Simler & Lequette, no. 516.

[8] Ibid., no. 511; in the same sense Larroumet & Mondoloni, no. 6.

[9] *Avant projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)*. It is not known to us whether or when this proposal will be enacted.

(art. 1121). The Belgian courts have, principally under the influence of life insurances with third-party beneficiaries, given a wide interpretation of these exceptions, so that the end result is that article 1119 of the Belgian civil code has virtually become a dead letter. It is sufficient that the stipulator has a personal interest in the stipulation he makes for the benefit of the third party.[10] In the revised codifications of two mixed jurisdictions which originally were full members of the Romanist legal family, Louisiana and Québec, the third-party benefit contract is fully recognized. Article 1978 of the Louisiana Civil Code provides that a "contracting party may stipulate a benefit for a third person, called a third party".[11] To this, article 1981 adds that the "stipulation gives the third party beneficiary the right to demand performance from the promisor". No further requirements—such as the existence of an interest for the stipulator—are imposed by the Louisiana Code. Likewise, article 1444 of the Civil Code of Québec (1994) provides that a "person may make a stipulation in a contract for the benefit of a third person".

The German *Bürgerliches Gesetzbuch* of 1900 went much further than the French *Code civil* and other nineteenth-century codifications by fully recognizing third-party rights. § 328(1) unequivocally states that a contract may provide for a performance to be made to a third person to the effect that the third person directly acquires the right to claim that performance.[12] Thus it is made clear that the parties to a contract are completely free to grant a contractual right to a third person without the imposition of any other requirement than that of the parties' intention being aimed at creating such a claim. As in France and many other jurisdictions, the phenomenon of life insurances created a strong impetus in Germany for the acceptance of third-party rights.[13] In other codifications belonging to the Germanic legal family the modern contract in favour of a third party (third-party benefit contract) has also been fully recognized: for instance in the Austrian *Allgemeines bürgerliches Gesetzbuch* (ABGB)[14] and in the Swiss *Obligationen-*

[10] Dirix, no. 115.
[11] Acts 1984, No. 331, § 1, eff. Jan. 1, 1985.
[12] Translation taken from Kötz, no. 12.
[13] Bayer, p. 103.
[14] Although only in 1916, by way of a statutory change resulting in the present § 881 ABGB.

recht (OR).[15] The Italian *Codice civile* of 1942, on the other hand, despite being influenced by German legal thinking, still requires an interest for the stipulator, albeit that a moral interest is sufficient.[16]

An interesting development has taken place in the Netherlands. We have seen in chapter four[17] that the interpretation of article 1353 (identical to art. 1121 Cc) of the 1838 Dutch civil code began to change at the end of the nineteenth century. The Dutch legislator had followed the *Code civil* and had ruled in 1838 that agreements do not benefit third parties except in the case provided for in article 1353. Hence contracts conferred rights upon third parties only "when such is the condition of a stipulation which one makes for oneself [i.e. the stipulator] or a donation which one makes to another [i.e. the promisor]".[18] Around 1900 many Dutch authors adhered to the view that this meant that the stipulation in favour of the third party must be part of a wider-ranging contract[19] and the courts no longer required a simultaneous promise or donation to the stipulator himself.[20] In 1914, however, the *Hoge Raad* adopted the interpretation of Eduard Maurits Meijers (1880–1954), the future (principal) drafter of the new Dutch civil code, who taught that the stipulator must also stipulate a right for himself.[21] The case in issue involved a loan for use. Paul Kruger (1825–1904), the president of the South-African Republic, had given certain objects on loan to a museum on terms that either he or Willem Johannes Leyds (1859–1940), Kruger's right-hand man, was authorized to terminate the contract. The plaintiff, Leyds, cancelled the loan after Kruger's death and reclaimed the objects. The defendant refused to restore the objects to Leyds, the third party, because the requirements of art. 1353 BW were not met. The lower courts had found for the plaintiff, arguing that the stipulation

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[15] OR art. 112; for the 19th-century interpretation of the homonymous aOR art. 128, see p. 71 n. 4.

[16] Art. 1411.

[17] See pp. 86–87.

[18] Art. 1353 (1) BW 1838:…wanneer een beding, hetwelk men voor zich zelven maakt, of eene gift die men aan een ander doet, zulk eene voorwaarde bevat.

[19] Moltzer maintained 'pour besoin de la cause' that with 'stipulation pour soi même' in art. 1121 Cc and 'beding voor zichzelven' in art. 1153 BW the stipulator's promise of a counter-performance was meant (see p. 86). Thus also Van Troostenburg de Bruijn, Opzoomer and Asser.

[20] Rb. Dordrecht 21 June 1911, *W.* 9230; Hof Den Haag 31 March 1913, NJ 1913, 522; HR 21 November 1913, NJ 1913, 1318.

[21] Cf. E.M. Meijers, Het collectieve arbeidscontract en de algemene rechtsbeginselen, *Themis* 96 (1905), pp. 432–436. This view has, however, not returned in the draft for the new civil code (see p. 142).

in favour of Leyds was the condition of Kruger's promise to lend out the objects, but this line of reasoning was rejected by the *Hoge Raad.*[22] It considered that article 1353 demanded that Kruger had stipulated something for himself as well. In the case at issue this requirement was met according to the *Hoge Raad*, because Kruger had stipulated also for himself the right to terminate the loan. With reference to this decision, it was widely held in the twentieth-century literature, as well as in the commentary on the draft for the new civil code, that the courts would be likely to be very lenient in the application of article 1353. Where someone stipulates in favour of a third party, the requirement of a simultaneous promise to the stipulator is already met when he has the right to claim that the promisor performs to the third party.[23] However, according to the leading commentary on the law of obligations (1954) of Ludwig Rutten (1909–2001), this could not be derived from the *Hoge Raad*'s decision.[24] Accordingly, a stipulation for a third party could only exist as part of a wider ranging contract, since this case, just as the one in a similar decision of the *Hoge Raad*,[25] concerned contracts the nature of which which entailed that the stipulator had also stipulated for himself. Hence, until 1992 the third party could only derive rights from a clause added to a contract, not from a contract with the sole purpose of benefitting him. The *Hoge Raad* has never accepted that a purely moral interest for the stipulator would suffice.

The articles 1351 et seq. of the 1838 *Burgerlijk Wetboek* were generally regarded as outdated and as undesirable obstacles to societal and commercial associations. The draft for a new civil code recognized in general terms the possibility of stipulating a right for a third party. Accordingly, article 6:253(1) of the 1992 *Burgerlijk Wetboek* only requires that the contract contains a stipulation purporting to give the third party the right to claim performance from one of the parties and that the third party accepts this stipulation. After the acceptance by the third party he must be regarded as a party to the contract (article 6:254). A contract which compels performance towards a third party is, as a

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[22] HR 26 June 1914, NJ 1914, 1028.

[23] E.g. S. van Brakel, *Leerboek van het Nederlandse Verbintenissenrecht* I, 1948, no. 402; Hofmann-Abas, *Het Nederlandse Verbintenissenrecht* I.2, Groningen 1977, p. 261.

[24] L.E.H. Rutten, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht*, III.2 *De overeenkomst en de verbintenis uit de wet*, Zwolle 1954, pp. 339–340.

[25] HR 17 December 1926, *W.*11620, concerning the incorporation of a company.

consequence, also valid when the sole purpose of the contract is to attribute rights to the third party.[26]

South African law originally clearly belonged to the civil law tradition but has, since the nineteenth century, been strongly influenced by English law. However, English law—with its negative view on third-party rights—has had little impact on the stipulation in favour of a third party in South African law. The English rule that consideration must move from the promisee was never accepted in South African law and therefore has never been able to undermine the validity of stipulations in favour of a third party.[27] Instead, South African law built upon the Roman-Dutch authorities pursuant to which the principle *alteri stipulari nemo potest* no longer applied. Since the mid-nineteenth century the courts have held that such stipulations are valid as a matter of South African law. The third party's right, however, does not derive from the contract between the stipulator and the promisor. He acquires an enforceable right through his acceptance of the benefit, *viz.* of the promisor's offer.[28] Support for this was found in a number of Roman-Dutch authors, including Grotius, Vinnius and Van der Keessel.[29] Finally, we have seen in chapter six that English law has only recently accepted the third-party benefit contract.

7.3 *The intention to confer a right upon the third party*

Not every contract or contractual clause, which obliges the promisor to give something to or do something for a third person, can be enforced by the latter. In all legal systems that we have examined, the purport of the contract is essential. If the contract is aimed at conferring an enforceable claim to the third party, it can be characterized as a contract in favour of a third party in the present day sense of a third-party benefit contract. Generally, the parties' intention to confer a right upon the third party is essential. For instance, in many legal systems the agreement

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[26] See *Parlementaire geschiedenis Boek 6*, pp. 948, 952–953, 956.

[27] On the doctrine of consideration, see above pp. 111–112. Even Lord de Villiers, who tried to introduce the English doctrine of consideration into South African law, did not regard consideration as an obstacle to the recognition of the stipulation for a third party: according to him consideration need not move from the third party. See Sutherland & Johnston, p. 211.

[28] Cf *McCullogh* v. *Fernwood Estate Ltd* 1920 AD 204, 206.

[29] See pp. 62 and 64.

between A and B that B shall discharge his debt owed to A by paying the indebted amount to C, does not necessarily constitute a contract in favour of a third party. C may function merely as an 'addressee for payment'. Also, the mere fact that a contract may benefit a third party in some way or another is generally insufficient to assume that parties have intended that the third party acquires a claim.[30] When the court must decide whether or not the parties intended to confer a right upon a third party, this is in many jurisdictions a matter of interpretation of the contract between A and B, to which the general rules of contract interpretation are applicable. Thus it may be derived from the content and object of the contract and the circumstances of the case whether a third-party benefit contract was intended.

Moreover, in some jurisdictions, in particular Germany, the civil code itself determines for some specific contracts what should be presumed to be the aim of such a contract. § 330 BGB provides that where a life insurance contract or a life annuity contract provides that payment of the insured sum or annuity must be made to a third person, it is to be assumed in case of doubt that the third person directly acquires the right to demand payment. The same paragraph rules that where, in case of a gratuitous transfer, an obligation is imposed upon the transferee to execute a performance in favour of a third person, the latter acquires a direct right to claim the performance. By contrast, for one specific situation, the civil code determines that the contract should not be characterized as a third-party benefit contract. According to § 329 BGB, where it is agreed between two parties A and B that B shall satisfy a creditor of A, C, it is not to be assumed that C shall directly acquire a right to demand performance from B.

In practice, it may not always be easy to determine, on the basis of the general rules of contract interpretation, whether the parties actually intended to confer a right upon the third party. By way of illustration, some judicial decisions will be briefly reviewed in which courts had to decide whether a contract implied that parties intended the third party to acquire a right.

In a German case an individual client had entered into a travel contract with a travel agent. The travel agent in its turn had entered into a contract of carriage with an airline company. It was decided by the *Bundesgerichtshof* that the interpretation of the contract of carriage

[30] Dirix, no. 126.

entailed that the client had a direct contractual right against the airline company to demand performance from it. The purpose of the contract with the airline company brought with it that individual travellers must be regarded as third beneficiaries in the sense of § 328 BGB.[31]

In a recent Dutch case, the assets of a bankrupt company had been sold by its insolvency liquidator to a purchaser.[32] The contract of sale contained a provision pursuant to which the purchaser undertook to continue the employment relationships with the bankrupt company's employees. One of these employees sued the purchaser on the basis of this undertaking, because the new employment contract which had been offered to him differed considerably from the previous employment contract. The appeal court decided that a contract, pursuant to which a commercial enterprise is taken over from a bankrupt estate and pursuant to which certain undertakings with respect to the employees of the enterprise have been stipulated, purports as a rule to create direct (legal) relationships between the employees and the purchaser, even when this is not expressly provided for. This decision was confirmed by the *Hoge Raad*.

Other examples of contractual clauses where the courts came to this conclusion are: the clause in a contract between a real estate company and its purchasers in Belgium which provided that certain building regulations would be observed in the interest of neighbours,[33] the clause in a lease in Germany providing that a medical specialist named therein had the right to reserve beds in the leased hospital,[34] the clause in a French contract where the lessor of two neighbouring commercial enterprises stipulated that each would not use the premises for the same commercial purpose as the other,[35] and the contract for the carriage of goods between the consignor and the carrier, which under French law implies that the addressee has direct contractual rights against the carrier.[36]

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[31] BGH 52, 194, at 201–2. For an extensive discussion of this and related cases, see Markesinis, pp. 193–194.

[32] HR 1 October 2004, NJ 2005, 499.

[33] Cass., 2 May 1930, Pas. 1930, I, 193; see also Dirix, p. 91.

[34] BGH 16 November 1956, BGHZ 21, 148.

[35] This implies that one lessee is allowed to sue the other lessee when the latter acts in breach of his agreement with the lessor. Cass. civ. 3e, 4 February 1986; English extract in Beale, 7.F.7.

[36] Cass. civ., 2 December 1891, DP 92.1.161.

There are many more examples of cases where parties had agreed that something be given to or done for a third person, in which courts concluded that the intention of the contract was to grant the latter a (direct) right to this performance. However, some of these decisions have been criticized in legal writing because they have made artificial use of the concept of a third-party benefit contract. In order to fill certain gaps in the civil code, courts have sometimes more or less 'invented' the existence of a clause in favour of a third party, although there was neither an expressed nor an implied intention of the parties to create rights in his favour.

For instance, the French *Cour de cassation* ruled that a patient who received a blood transfusion is a third-party beneficiary of the contract existing between the French national service for blood transfusion on the one hand and public hospitals on the other.[37] The patient, who had received contaminated blood, was thus granted a contractual remedy against the blood-transfusion service, although one would have rather expected a delictual action (article 1382 Cc). However, under article 1382 Cc the patient would need to prove the service's negligence, while under article 1147 Cc a defendant in a contractual case has to prove that there was no negligence on his part. According to the commentators on this decision, the contractual burden of proof was regarded as more appropriate for the case at hand and this was the reason for the *Cour de cassation* to 'invent' the existence of a third-party benefit contract.[38]

7.4 *Acceptance, renunciation and confirmation*

There may be situations in which the third party, for various reasons, does not want to receive the benefit stipulated for him. For personal, commercial or political reasons he may want to have nothing to do with the promissor and/or the stipulator; for fiscal reasons (e.g. wealth tax, inheritance tax or income tax) the third party may not want to become entitled to the monetary value inherent in the rights conferred pursuant to the third-party benefit contract. Accordingly, parties should

[37] Cass. civ. 2^{e}, 17 December 1954, D. 1955.269.

[38] See Beale, 7.F.8, with further references. For similar 'invented' third-party benefit contracts, see Zweigert & Kötz, pp. 459–462.

not be capable of unconditionally imposing rights upon a third party against the latter's will.

The manner in which this principle is elaborated differs fundamentally. In one group of legal systems the third party immediately acquires the rights granted under the contract in his favour, but has the power to declare that he renounces these rights. This approach will be referred to as the 'confirmation doctrine', since the third party's declaration serves, at most, only to confirm that he will not renounce the benefit conferred by the parties or to make the stipulation in his favour irrevocable. In another group of legal systems the third party acquires rights under the contract only after he has made a declaration that he has accepted the stipulation in his favour. This approach could be termed the 'acceptance doctrine', since the third party's acceptance is necessary in order for him to acquire a contractual right against the promisor.[39]

Confirmation doctrine

In France the *Cour de cassation* affirmed in 1888 that the third party's rights come into existence immediately after the promisor has made his promise to the stipulator.[40] This is also the prevailing doctrine in legal writing.[41] The confirmation theory also prevails in Belgium and Italy.[42] It appears from the legislative history of § 328 of the German BGB that in Germany the existence of the third party's right is also not conditional upon its acceptance.[43] This is supported by the wording of § 328(2) BGB: "In the absence of an express provision it must be deduced from the circumstances . . . whether the right of the third originates immediately or only under certain circumstances".

Further, it also seems that under the English Contracts (Rights of Third Parties) Act 1999 the third party's acceptance is not required for the third party's right to arise. Subsection 1(1) simply states that a third

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[39] Scottish law is difficult to characterize. However, as the latter immediately becomes entitled and rejection is possible the results are the same as under the confirmation doctrine, since the promisor can directly bind himself to the third party by a unilateral promise to that effect. Sutherland & Johnston, p. 219.

[40] See the decisions rendered on 6, 8 and 22 February and 27 March 1888, DP 88.1.193. Larroumet & Mondoloni, nos. 8 and 25.

[41] Terré, Simler & Lequette, nos. 526 and 528.

[42] Art. 1411, second sentence Italian CC so provides expressly: salvo patto contrario, il terzo acquista il diritto contro il promittente per effetto della stipulazione.

[43] Staudinger/Jagmann, § 328, no. 28.

party may in his own right enforce a term of the contract if (*inter alia*) the contract expressly provides that he may. No further requirements are imposed by the Act. This is confirmed by section 2, which provides that where a third party has a right under section 1 to enforce a term of the contract the parties to the contract (viz. the stipulator and the promisor) may not rescind the contract or alter or extinguish the third party's entitlement under that right without his consent in three situations. These situations are: (a) where the third party has communicated his assent to the promisor, (b) where the promisor is aware that the third party has relied on the term or (c) where the third party has relied on the term and this could reasonably have been foreseen by the promisor. This, in particular situations (b) and (c), presupposes that no acceptance is required by the third party. The latter's manifestation of assent only serves, as in French and German law, to prevent the promisor and stipulator from adversely affecting the third party's right by revoking or modifying the stipulation for a third party.

Acceptance doctrine

In the Netherlands, from the middle of the twentieth century, still under the civil code of 1838, the acceptance doctrine came to prevail. The obligation between promisor and third party was supposed to come into existence at the moment the latter accepted the clause in his favour. It is curious, by the way, that this view was based on exactly the same provisions as those of the French *Code civil*, while in France and Belgium both legal writing and case law adopted the confirmation doctrine.

In a similar way, the Dutch *Burgerlijk Wetboek* (1992) has also incorporated the acceptance doctrine. Article 6:253(1) BW provides that a contract creates a right for a third party to claim a performance from one of the contracting parties when the contract contains a clause to that effect and the third party accepts that clause. The motivation given in the legislative history is twofold. Practice is accustomed to the system of acceptance and the acceptance doctrine removes the relevance of the characterisation of the facts. Hence the court can circumvent the problem whether the contract should be interpreted as either a third-party benefit contract, as an offer of one of the parties (or both of them) to the third party, or as the act of an unauthorized agent.[44] The

[44] *Parlementaire Geschiedenis Boek 6*, p. 948.

acceptance doctrine has the advantage that the moment at which the third party acquires a right is in all these legal constructions the same, viz. the moment at which this person accepts the clause as the beneficiary of a contract in his favour or ratifies it as the (pseudo) principal of an unauthorised agent.[45] There is an even closer similarity between the rules applicable to the contract in favour of a third party and those governing an offer in the Dutch civil code. In order to acquire an enforceable right, the acceptance by the intended beneficiary (of the stipulation in his favour or of the offer) is required, but—before the acceptance—both the stipulation in his favour and the offer can already be rendered irrevocable.[46] The civil code aims at preventing unnecessary differences in legal consequences between these institutions, which in practice may sometimes be difficult to distinguish.

In South Africa a kind of acceptance doctrine also prevails, albeit with a different dogmatic character. Whilst in Dutch law the third party accepts the rights upon which the parties to the contract agreed, in South African Law the third party accepts the offer the promisor is presumed to have made to him.[47] The view forwarded by Johannes Christiaan de Wet (1912–1990) in his Leiden dissertation (1940) that the contract between stipulator and promisor confers a right upon the third party,[48] has so far not been accepted by the courts nor by the majority of legal opinion. This is regretted in contemporary legal writing: "South African law is the poorer for recognizing third-party rights only after acceptance".[49] Indeed, one could say that those legal systems which require acceptance deny the autonomous character of the contract in favour of a third party. For in these legal systems the third party's right can be explained under traditional principles. For instance, in South African law the 'contract for the benefit of a third party' can be analysed as an ordinary contract between the stipulator

[45] Art. 3:69 BW.

[46] By the person who made the offer, or by the parties who concluded the contract. See art. 6:219 BW (irrevocable offer) and 6:253(4) BW (irrevocable stipulation in favour of a third party).

[47] Art. 6:219 BW (irrevocable offer); art. 6:253(4) BW (stipulation in favour of a third party). See further p. 143.

[48] J.C. de Wet, *Die ontwikkeling van die ooreenkoms ten behoewe van 'n derde*, Leiden 1940.

[49] Sutherland & Johnston, p. 214.

and the promisor pursuant to which the latter undertakes to keep open an offer to the third party.[50]

Practical relevance

In practice both doctrines usually reach the same result. Under both doctrines the third party is eventually able to deny his entitlement to performance, either by not accepting the stipulation made in his favour or by rejecting it. Moreover, the act of the third party, irrespective of whether it is a renunciation (as required under the confirmation doctrine) or an acceptance (as required under the acceptance doctrine), will usually have retroactive effect.[51] In other words, under most jurisdictions, a third party, wanting the benefit stipulated in his favour, will be treated as having been entitled to it as from the time of its inception, while a third party not wanting this benefit will be treated as never having been entitled to it.

It is often held that, since the end result is the same, the issue of whether acceptance is required is of very limited importance. This is, however, not entirely true. At both the theoretical and the practical level it does matter which doctrine applies. At the theoretical level it can be argued that, under the acceptance doctrine, the stipulation for a third party is not an exception to the principle of relativity of contracts.[52] Parties are considered not to confer contractual rights upon the third party at all because the latter himself decides whether he acquires the rights stipulated in his favour. This is dependent upon the third party's own manifestation of consent (the acceptance).

More importantly, from a practical point of view, there may be crucial differences between the two doctrines. These may manifest themselves, in particular, where the promisor is declared bankrupt and the third party has not yet made any manifestation of his assent (e.g. because at that time he was not yet aware of the stipulation in his favour). Under the confirmation doctrine this will not matter since the third party's rights

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[50] Ibid., p. 215.

[51] § 333 BGB. This is, however, not always the case. For instance, art. 6:254(2) BW carefully states that the third party "*may*, when this is in conformity with the tenor of the stipulation, also derive rights from it concerning the period before acceptance" (emphasis added). In the commentary to the original draft (of which art. 6:254 was not yet part) it was still assumed that acceptance had retroactive effect although it was also noted that the principle of retroactive effect should not be pushed to its extremes. *Parlementaire geschiedenis boek 6*, p. 768.

[52] Larroumet & Mondoloni, no. 25.

will have already come into existence on the date of the bankruptcy judgment. Under the acceptance doctrine the outcome may very well be different. Many systems of bankruptcy law will not allow obligations to be binding upon the bankrupt estate which have come into existence while the debtor is declared bankrupt. Under the acceptance doctrine the promisor's obligation corresponding with the third party's right only comes into being after acceptance by the third party. Accordingly, if this acceptance takes place during the promisor's bankruptcy, the third party's rights under the stipulation in his favour will not be enforceable against the bankrupt estate. Also, the time of origin may be relevant for the prescription of the third party's claim: if the claim only comes into being upon the time of acceptance by the third party, that time may be the moment at which the prescription period starts to run.[53] Moreover, where someone assigns or charges all his contractual rights to his bank, the assignee (the bank) may be entitled to the rights which were stipulated for the assignor (as a third-party beneficiary) by others. In a system of law which adheres to the confirmation doctrine, the bank acquires this claim even before the assignor (third beneficiary) has assented to the clause in his favour. In a system of law which adheres to the acceptance doctrine, the bank only acquires the claim after the assignor has accepted the clause. When—at that time—the assignor has been declared insolvent, the claim will under many (if not most) bankruptcy laws vest in the insolvent estate rather than be transferred to the assignee.

Revocation

It is probably a universal rule that legal systems which recognize the stipulation of rights for a third party allow the stipulator to revoke such clause as long as the third party has not yet manifested his assent.[54] The general idea is that since the stipulator took the initiative for the stipulation in favour of a third party he should be able to modify or even revoke it.[55] However, after the third party has assented to the clause in his favour a vested right for the latter will come into being which the

[53] Staudinger/Jagmann, Vorbem. 25 zu §§ 328ff.

[54] Art. 1121 Cc; § 328(2) BGB; art. 6:253 BW; art. 1411 Italian CC; art. 1446 Québec CC; art. 1978 Louisiana CC; s. 2(1) CRTPA. For Scotland and South Africa, see Sutherland & Johnston, pp. 230–232.

[55] Cf. Larroumet & Mondolini, no. 25.

stipulator should not be able to unilaterally modify or terminate.[56] Many legal systems even recognize that the stipulator and the promisor can agree that the stipulation for a third party shall be irrevocable. Such irrevocability has absolute effect: it actually deprives the stipulator of the power to revoke the stipulation for a third party (e.g. § 328 BGB, art. 6:253(3) BW).

7.5 *The identification of the third party*

Obviously, where the third party exists and is identified by name in the contract his identification does not pose a special problem. However, is it possible to make a valid stipulation in favour of a third party where the beneficiary does not yet exist: a future child or a company yet to be established? Can a third party or a class of third parties be defined generically, for instance, as the shareholders of a company?

French law does not require that the third party is identified in the contract. When the promisor agrees to this, the stipulator may designate the third party at a later stage.[57] The third party needs only to be ascertainable at the moment at which the stipulation in his favour is to take effect.[58] However, the question whether it is possible to designate a generically identified, but undetermined, beneficiary (*bénéficiaire indéterminé*) or a future beneficiary (*bénéficiaire futur*) has long preoccupied French writers.[59] As far as generically identified beneficiaries are concerned there is now little doubt that they can be validly designated in a contract (or at a later stage). The only consequence is that the beneficiary's rights only come into existence if and when he is determined. Future beneficiaries (which do not yet exist) have caused more problems. It has been held in case law that stipulations designating

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[56] Art. 1119 Cc; art. 1411 Italian CC; art. 1446 Québec CC; art. 6:253(2) BW; s. 2(1)(b) CRTPA. Under s. 2(1)(b) and (c) CRTPA revocation is, under certain circumstances, also not permitted if the third party has relied on the relevant terms of the contract.

[57] When the stipulator ultimately fails to do so, the benefit of the stipulation for a third party must be rendered to the stipulator (or his successors). This is expressly provided for life insurances (art. L. 132–11 code des assurances), but also applies to other stipulations for a third party. Cf. Larroumet & Mondoloni, no. 34. The same follows from art. 6:255 BW.

[58] This is generally the case when the third party has become aware of the clause in his favour and makes himself known to the promisor. See Laurroumet & Mondoloni, no. 36.

[59] Larroumet & Mondoloni, no. 36, with further references.

future beneficiaries can be invalid under article 906 of the *Code civil*, pursuant to which the beneficiary of a gratuitous disposition must have been conceived at the time of a donation or testament. However, this line of case law has been broken by the French legislator with respect to insurance contracts. With reference to this, it is now held, as a general rule, that it is possible to include future persons as beneficiaries of a third-party benefit contract albeit that their rights will only come into existence once they have become present beneficiaries.[60]

More recent codifications have no problems at all in recognizing stipulations in favour of future beneficiaries or beneficiaries which are generically defined. In German law future persons can be named as beneficiaries of a third-party benefit contract. Members of a class of persons can also be generically defined: it is sufficient that the third party is ascertainable.[61] The third party's rights come into existence as and when the third party is determined.[62] In Dutch law the position is the same: the third party does not have to be specifically designated, nor is it necessary that he exists at the time of contracting.[63] The English Contracts (Rights of Third Parties) Act 1999 even devotes a special section to the identification of the third party. Section 1(3) states: "The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into." The Explanatory Notes state that subsection (3) allows the parties to confer enforceable rights on, for example, unborn children, future spouses and companies that have not yet been incorporated.[64]

7.6 *Content of the stipulation for a third party*

In the majority of cases the benefit granted under a stipulation for a third party is the payment of money. However, the benefit may also consist in the transfer of property or the rendering of services to a third party. Contracts may even impose a special duty of care upon the parties vis-à-vis third parties, as, for example, in the French blood

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[60] Larroumet & Mondoloni, nos. 38–39.
[61] Staudinger/Jagmann, § 328, no. 14.
[62] Staudinger/Jagmann, § 328, no. 15.
[63] Asser-Hartkamp II, no. 421.
[64] Explanatory Notes to CTPRA, no. 8.

transfusion case.[65] Here the device of the third-party benefit contract was used—according to some: abused—in order to remedy deficiencies in the law of delict, by implying or 'inventing' a third-party benefit contract so that a contractual duty of care could be imposed.[66] The contract in favour of a third party is also employed in some jurisdictions to give external effect to clauses limiting the liability of one of the parties.[67] It might be agreed, for example, between A and B that the contractual limitation of liability A specified for himself shall also be available to his employees and independent subcontractors. Recent legislation, such as the 1992 Dutch civil code and the English Contracts (Rights of Third Parties) Act 1999, have explicitly taken this possibility into account. Art. 6:253(1) BW provides that a contract in favour of a third party "creates the right for a third person to claim a performance from one of the parties or *to invoke the contract against one of them in another way* . . ." (emphasis added). The phrase in italics was added mainly with a view to so-called Himalaya clauses[68] and other exemption clauses.[69] Subsection 1(6) of the Contracts (Rights of Third Parties) Act 1999 is even more explicit.[70]

Although it is relatively easy to reconcile with the principle of relativity of contracts that contracting parties A and B grant rights to a third person—certainly because the latter can either reject or not accept these rights—it would go against the core of that principle if A and B could impose obligations upon C. Nevertheless, it is possible that the granting of rights is accompanied by the imposition of obligations upon the third party. However, this always requires acceptance by the third party, even in those jurisdictions which adhere to the confirmation doctrine and in which, as a consequence, his acceptance is not required for the acquisition of rights under a stipulation for a third party. Thus, in 1987 the French *Cour de cassation* decided that, after confirmation, the third party became liable for certain obligations.[71]

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[65] See note 37.

[66] This also applies to the German "contracts with protective effect for third persons" (*Vertrag mit Schutzwirkung für Dritte*). See p. 132 and Zweigert & Kötz, § 34 II.

[67] For a comparative discussion, see Casebook 7.1.4.

[68] For the so-called Himalaya clause in English law, see above pp. 123–125.

[69] See also art. 6:257 BW, dealing with limitation clauses in favour of employees.

[70] 1(6) CRTPA: Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

[71] Cass. civ. 1^{e}, 8 December 1987, Bull. Civ. I, no. 343, p. 246.

Under Dutch law, which adheres to the acceptance doctrine, a burden can be attached to a contract in favour of a third party.[72] A special rule is not necessary since acceptance is already required for acquisition of rights by the third party. For instance, where an addressee (third party) has acquired a right to delivery under a contract of carriage, he may be liable to pay the freight fees. Where the addressee does not want to pay the freight fees, he can simply refuse to assent to the clause made in his favour. The down side of this is, of course, that he will then have no contractual rights against the carrier, for example in case the transported goods are damaged by the carrier.

7.7 *The legal relationships between stipulator, promisor and third party*

As is particularly emphasised in German legal writing,[73] three legal relationships can be distinguished in case of a contractual clause in favour of a third party. First, there is the relationship between promisor and stipulator, which is determined by the underlying contract between those parties.[74] The underlying contract also specifies the terms and conditions of the clause in favour of a third party and provides the legal basis for the promisor's obligation to give or do something in favour of the third party. Secondly, there is the relationship between the stipulator and the third party, which the Germans term the *Valutaverhältnis*. This relationship explains why the stipulator wishes to grant a benefit to the third party. The clause can be stipulated in order to settle a debt which the stipulator owes to the third party. For example, under a loan agreement borrower B owes lender L € 100,000. B sells his house to purchaser P: in the contract of sale P (promisor) promises to B (stipulator) that he shall pay the purchase price (also € 100,000) to L (third party) and that L shall have the right to claim this payment directly from P. The *Valutaverhältnis* between stipulator and third party may also be determined by the stipulator's intention to act out of mere generosity (*causa donandi*): in substance one is then dealing with

[72] Asser-Hartkamp II, no. 418, with reference to *Parlementaire geschiedenis boek 6*, p. 956.

[73] See e.g. Staudinger/Jagmann, § 328, no. 19–52. But see also, for example, Terré, Simler & Lequette, nos. 525–530 and Dirix, nos. 106–112.

[74] In German literature this relationship is usually called the *Deckungsverhältnis*. It is so called, because it is from this relationship that the promisor derives the countervalue (*Deckung*) for his promise to the third party. Staudinger/Jagmann, § 328, no. 20.

a donation.[75] For example, S (stipulator) enters into a life insurance contract with insurance company X (promisor), containing the clause that the insured sum shall be payable to S's children (third parties). Finally, there is the relationship between the promisor and the third party, which the Germans often call the *Vollzugsverhältnis*.[76] This is the relationship constituted by the clause itself in favour of a third party. As will be set out below, the nature of this legal relationship differs from legal system to legal system.

Is the third party a party to the contract between promisor and stipulator?

The proper analysis under French law appears to be that only stipulator and promisor are party to the contract they entered into, whilst the third party derives a claim from it without becoming a party to it. The same analysis applied to the 1838 Dutch civil code. Under German law the third party also does not become a party to the contract. The relationship between the promisor and the third party is regarded as a 'quasicontractual' (*vertragsänhliche*) relationship. Likewise, under the English Contracts (Rights of Third Parties) Act 1999 the third party does not become a party to the contract. This appears, *inter alia*, from subsection 1(5) of the Act, which states that the third party shall have a contractual remedy as if he had been a party to the contract. For certain purposes the fiction is employed that the third party is a party to the contract.[77] By way of contrast, article 6:254(1) of the 1992 Dutch civil code provides that after acceptance the third party is regarded as a party to the contract. Where there is only one third party, a three-party contract comes into existence (article 6:254 section 1 BW), which is governed by the rules on multiparty contracts, in particular by article 6:279 BW.[78]

Remedies and defences

The contract between stipulator and promisor constitutes the basis of the rights the third-party beneficiary may acquire. One could say that, generally, the promisor must be deemed to have made his liability

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[75] However, the formalities applicable to donations (e.g. a notarial deed) are generally not applicable. Cf. Terré, Simler & Lequette, no. 530 (French law).

[76] Literally: 'performance relationship'.

[77] Peel, § 14–124.

[78] See below, p. 157.

towards the third party dependent upon the validity and continuation of the underlying contract.[79] Three general rules may be derived from this. First, the validity of the stipulation in favour of a third party depends on the validity of the underlying contract: if the latter is void or subsequently terminated, so will be the first.[80] Secondly, the third party has the same remedies as the stipulator, including the rights to demand performance, to claim damages and to rescind the contract. Thirdly, defences which the promisor has against the stipulator can also be invoked against the third party.[81] However, these general rules are not without exceptions and these exceptions may differ from jurisdiction to jurisdiction. This is a delicate and complicated issue in most jurisdictions and we will only mention a few aspects of it.

For French law, Larroumet and Mondoloni have made an enlightening observation, which holds good also for other legal systems.[82] According to these authors there are two conflicting ideas at play. On the one hand there is the principle that the third party's rights are dependent upon the contract between the stipulator and the promisor. As we have just seen, this entails not only that voidness of the underlying contract affects the clause in favour of a third party, but also that the promisor can invoke against the third party all defences available against the stipulator. On the other hand, there is the idea that the third party's rights are distinct from those of the stipulator under the underlying contract. This implies, *inter alia*, that the right to rescind the contract cannot be exercised by the stipulator without regard to the third party's interests. Under Dutch law, for example, the third party becomes—after acceptance—a genuine party to the contract. Not only does the stipulator have the right to rescind the contract in case of a breach of contract by the promisor, but also the third party himself. However, as a consequence of article 6:279 BW (dealing with the rescission of multiparty contracts) specific rules apply. Thus, as a general rule the stipulator cannot independently rescind the contract because this would deprive the third party of his rights. The stipulator and the third party must together rescind the contract.

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[79] Cf. Larroumet & Mondoloni, no. 47; Dirix, no. 110.
[80] Asser-Hartkamp II, no. 429.
[81] § 334 BGB; art. 1982 Louisiana CC; section 3 CRTPA; art. 1450 Québec CC.
[82] Larroumet & Mondoloni, no. 53.

7.8 *Dogmatic explanations for acquisition of rights by the third party*

It is noteworthy, but perhaps not surprising, that all the explanations for the acquisition of rights by the third-party beneficiary which have been given during the course of legal history have also been endorsed with respect to contemporary legal systems. Most of these explanations are manifestations of a phenomenon one also encounters in other areas: the tendency to explain new legal institutions in terms of already existing institutions, often leading to a denaturalization of both old and new institutions. This juridical 'law of inertia' fully applies to the third-party benefit contract. For instance, in recent Belgian, French and German textbooks it is still discussed whether the third party acquires a right, because he accepts the promisor's offer to do something for him or because he ratifies the stipulator's unauthorized management of his affairs.

The characterization of the third party's assent as the acceptance of an offer is generally rejected in contemporary literature. It is held to be more logical that, as an exception to the principle of relativity of contracts, the contract between stipulator and promissor directly has effect for the third party, independently from any acceptance on his part. The sole function of the third party's assent is to secure the latter's rights.[83] Moreover, it is held that the source and content of the third party's rights lie in the mutual agreement between promisor and stipulator, which is irreconcilable with the idea that his right would find its origin in a unilateral act by the promisor.[84] However, in Scotland the promisor's liability is still regarded as being based upon the unilateral promise by the promisor itself.[85] There has been some debate in modern legal writing as to whether the unilateral promise analysis is still correct. The offer-analysis has also been employed for South African law: "The *stipulatio alteri* is therefore no more than an option in which the offer is made not to the stipulator but to the third party".[86]

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[83] Ibid., no. 8.

[84] Ibid., no. 50. This is true even for Dutch law, although, as we have seen above p. 149, in the 1992 civil code the legislator has deliberately enacted similar rules for both institutions. However, a contract in favour of a third party and an offer are still to be distinguished as different institutions. An offer is a unilateral act by the offeror, while the contract in favour of a third party is a multilateral act by the stipulator and the promisor.

[85] Sutherland & Johnston, p. 216.

[86] Ibid., p. 215.

One of the most original thinkers in post-war Dutch legal theory, professor Herman Schoordijk, is less original as far as the contract in favour of a third party is concerned. Like Savigny and others before him Schoordijk explains the acquisition of rights by the third party with reference to unauthorised agency: the stipulator acts as the unauthorised agent of the third party and the latter becomes entitled by ratifying, i.e. accepting the stipulator's unauthorised acts. In the 1992 Dutch civil code Schoordijk's view has not been adopted, although, as we have seen, the similarity between the contract in favour of a third party and (*inter alia*) unauthorised agency is recognised.[87]

Nevertheless, most contemporary writers agree that the Dutch contract in favour of a third party is, just as the German and English third-party benefit contract, an autonomous legal institution, which does not need to be explained with reference to other theories or constructions.The same holds good for the stipulation in favour of a third party of the French and Belgian civil codes as it is nowadays interpreted in case-law.[88]

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[87] H.C.F. Schoordijk, *Beschouwingen over drie-partijen-verhoudingen van obligatoire aard*, Zwolle 1958, p. 106.

[88] For Belgium see Dirix, no. 124 and for France Larroumet & Mondoloni, no. 2: une operation originale qui ne peut être ramenée à aucune autre institution connue de notre droit.

BIBLIOGRAPHY

Ankum, J.A. *De voorouders van een tweehoofdig twistziek monster*, Zwolle 1967.

———. Une nouvelle hypothèse sur l'origine de la règle alteri stipulari nemo potest, in *Études offertes à Jean Macquéron*, Aix-en-Provence 1970, pp. 21–29.

Apathy, P. Zur exceptio pacti auf Grund eines pactum in favorem tertii, *Zeitschrift der Savigny Stiftung Rom. Abt.* 93 (1976), pp. 98–114.

Baker, J.H. *The Law's Two Bodies*, Oxford 2001.

———. *Introduction to English Legal History*, London 2002.

———. Privity of Contract in the Common Law before 1680, in: E.J.H. Schrage (ed.), *Ius quaesitum tertio* [Comparative Studies in Continental and Anglo American Legal History, 26], Berlin 2008, pp. 35–60.

Bart, J. Pacte et contrat dans la pratique francaise (xvi–xviii siècles), in: J. Barton (ed.), *Towards a General Law of Contract* [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, pp. 125–137.

Bayer, W. *Der Vertrag zugunsten Dritter, neuere Dogmengeschichte, Anwendungsbereich, dogmatische Strukturen* [Ius privatum, 11], Tübingen 1995.

Beale, H., Hartkamp, A., Kötz, H. & Tallon, D. *Cases, Materials and Text on Contract Law*, Oxford etc. 2002.

Beatson, J. Reforming the Law of Contracts for the Benefit of Third Parties—A Second Bite at the Cherry, *Current Legal Problems* 45 (1992), Part 2, pp. 1–28.

Birocchi, I. La questione dei patti nella dottrina tedesca dell'Usus modernus, in: J. Barton (ed.), *Towards a General Law of Contract* [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, pp. 197–213.

Brockmann, R. *Der Vertrag zugunsten Dritter im Französischen Recht mit rechtsvergleichenden Hinweisen zum deutschen Recht*, s.l. 1979.

Cortese, E. *Il diritto nella storia medievale*, Rome 1998[3].

Dirix, E. *Obligatoire verhoudingen tussen contractanten en derden*, Antwerpen-Apeldoorn 1984.

Dölle, H. Der Beitrag der Rechtsvergleichung zum deutschen Recht, in: E. von Caemmerer e.a. (eds), *Hundert Jahre deutsches Rechtsleben. Festschrift zum hundertjährigen Bestehen des deutschen Juristentages* 1860–1960, II, Karlsruhe 1960, pp. 19–47.

Dondorp, J.H. & Hallebeek, J. Het derdenbeding bij Voorda en Moltzer, *Pro Memorie* 4 (2002), pp. 49–67.

———. Grotius' doctrine on adquisitio obligationis per alterum and its roots in the legal past of Europe, in: O. Condorelli (ed.), *"Panta rei" Studi dedicati a Manlio Bellomo*, Rome 2004, II, pp. 205–244.

Dondorp, J.H. The Reception of Institutes 3.19.19 in France, in: R. van den Berg e.a. (eds), *Ex iusta causa traditum* [Essays in honour of Eric H. Pool], *Fundamina* 2005, pp. 59–68.

———. Ius quaesitum tertio in canon law, in: E.J.H. Schrage (ed.), *Ius quaesitum tertio* [Comparative Studies in Continental and Anglo-American Legal History, 26], Berlin 2008, pp. 109–133.

Feenstra, R. Pact and Contract in the Low Countries from the 16th to the 18th Century, in: J. Barton (ed.), *Towards a General Law of Contract*, [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, pp. 197–213.

Finlay, A.M. *Contracts for the Benefit of Third Persons*, London 1939.

Flannigan, R. Privity—The End of an Era (Error), *Law Quarterly Review* 103 (1987), pp. 564–593.

Fränkel, R. Die Grundsätze der Stellvertretung bei den Scholastikern, *Zeitschrift für vergleichende Rechtswissenschaft* 27 (1912), pp. 289–391.

Gordley, J. Natural Law Origins of the Common Law of Contract, in: J. Barton (ed.), *Towards a General Law of Contract*, [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, pp. 367–465.

Hallebeek, J. Ius quaesitum tertio in medieval Roman law, in: E.J.H. Schrage (ed.), *Ius quaesitum tertio* [Comparative Studies in Continental and Anglo-American Legal History, 26], Berlin 2008, pp. 61–107.

Hartkamp, A. *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 4–II, Verbintenissenrecht, Algemene leer der overeenkomsten*, Deventer 2005.

Helmholz, R.H. Contracts and the Canon Law, in: J. Barton (ed.), *Towards a General Law of Contract* [Comparative Studies in Continental and Anglo-American Legal History, 8], Berlin 1990, pp. 49–65.

Holdsworth, W.S. *A History of English Law* (16 vols), London 1923–1966.

Ibbetson, D.J. *Historical Introduction to the Law of Obligations*, Oxford 1999.

Ibbetson, D.J. & Swain, W. Third Party Beneficiaries in English Law: From Dutton v. Poole to Tweddle v. Atkinson, in: E.J.H. Schrage (ed.), *Ius quaesitum tertio* [Comparative Studies in Continental and Anglo-American Legal History, 26], Berlin 2008, pp. 191–213.

Jagmann, R. e.a., *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Zweites Buch, Recht der Schuldverhältnisse, §§ 328*–359 (*Vertrag zugunsten Dritter; Rücktritt und* Widerruf), Berlin 2004.

Johnson-Davies, K.C. *The Practice of Price Maintenance with Particular Reference to the Motor Industry*, London 1955.

Jones, N.G. Uses, Trusts, and a Path to Privity, *Cambridge Law Journal* 56 (1997), pp. 175–200.

———. Aspects of Privity in England: Equity to 1680, in: E.J.H. Schrage (ed.), *Ius quaesitum tertio* [Comparative Studies in Continental and Anglo-American Legal History, 26], Berlin 2008, pp. 135–174.

Kaser, M. *Das römische Privatrecht* I, Munich 1971².

Kötz, H. Rights of Third Parties, Third Party Beneficiaries and Assignment, in: R. David e.a. (eds), *International Encyclopedia of Comparative Law*, VII, Contracts in General, Chapter 13, Tübingen 1992.

Lange, H. Alteri stipulari nemo potest bei den Legisten und Kanonisten, *Zeitschrift der Savigny Stiftung Rom. Abt.* 73 (1956), pp. 279–306.

Larroumet C. & Mondoloni, D. Stipulation pour autrui, in: P. Reynaud (ed.), *Répertoire de droit civil*, Paris 1998².

Luig, K. *Zur Geschichte der Zessionslehre* [Forschungen zur neueren Privatrechtsgeschichte, 10], Köln-Graz 1966.

Macnair, M.R.T. The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries, in: R. Helmholz & R. Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* [Comparative Studies in Continental and Anglo American Legal History, 19], Berlin 1998, pp. 207–236.

Markesinis, B.S. An Expanding Tort Law—The Price of a Rigid Contract Law, *Law Quarterly Review* 103 (1987), pp. 354–397.

———. e.a., *The German Law of Contract: A Comparative Treatise*, Oregon 2006.

Marshall, O.R. *The Assignment of Choses in Action*, London 1950.

Milsom, S.F.C. *Novae Narrationes* [Selden Society volume 80], London 1963.

———. *The Legal Framework of English Feudalism*, Cambridge 1976.

———. The Nature of Blackstone's Achievement, *Oxford Journal of Legal Studies* 1 (1981), pp. 1–12.

———. *A Natural History of the Common Law*, New York 2003.

Müller, U. *Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter* [Beiträge zur Neueren Privatrechtsgeschichte, 3], Stuttgart etc. 1969.

Otte, G. *Dialektik und Jurisprudenz, Untersuchungen zur Methode der Glossatoren* [Ius commune Sonderhefte 1], Frankfurt/M 1971.
Padoa Schioppa, A. Sul principio della rappresentanza diretta nel Diritto canonico classico, in: S. Kuttner (ed.), *Proceedings of the Fourth International Congress of Medieval Canon Law* [Monumenta Iuris Canonici C subsidia 5], Città del Vaticano 1976, pp. 107–131.
Palmer, V.V. *The Paths to Privity; A History of Third Party Contracts at English Law*, San Francisco 1992.
Peel, E. *The Law of Contract*, London 2007[12].
Pérez Martín, A. El Ordenamiento de Alcalá (1348) y las glosas de Vicente Arias de Balboa, *Ius Commune* 11 (1984), pp. 55–215.
Plucknett, T.F.T. *A Concise History of the Common Law*, London 1956[5].
Reynolds, P.A. *Motor Trade Practice*, London 1937.
Rodger, A. Some Reflections on Junior Books, in: P.B.H. Birks (ed.), *The Frontiers of Liability* 2, Oxford 1994, pp. 64–70.
Roussier, J. *Le fondement de l'obligation contractuelle dans le droit classique de l'eglise*, Paris 1933.
Scholten, P. Het beding ten behoeve van derden, historische interpretatie, *Verzamelde Geschriften* IV, Zwolle 1954, pp. 269–290.
Schrage, E.J.H. (ed.), *Ius quaesitum tertio* [Comparative Studies in Continental and Anglo-American Legal History, 26], Berlin 2008.
Simpson, A.W.B. *History of the Common Law of Contract; The Rise of the Action of Assumpsit*, Oxford 1975.
———. Innovation in Nineteenth Century Contract Law, *Law Quarterly Review* 91 (1975), pp. 247–278.
———. The Rise and Fall of the Legal Treatise, *University of Chicago Law Review* 48 (1981), pp. 632–679.
———. *A History of the Land Law*, Oxford 1986[2].
Spies, F. *De l'observation des simples conventions en droit canonique*, Paris 1928.
Stoljar, S.J. The Transformations of Account, *Law Quarterly Review* 80 (1964), pp. 203–224.
Sutherland, Ph. & Johnston, D. Contracts for the Benefit of Third Parties, in: R. Zimmermann, D. Visser & K. Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, Oxford 2004, pp. 208–239.
Swain, W. Third Party Beneficiaries in English Law, 1880–2004, in: E.J.H. Schrage (ed.), *Ius quaesitum tertio* [Comparative Studies in Continental and Anglo-American Legal History, 26], Berlin 2008, pp. 331–356.
Terré, F., Simler, Ph. & Lequette, Y. *Droit civil, Les obligations*, Paris 2005[9].
Treitel, G.H. *Some Landmarks of Twentieth Century Contract Law*, Oxford 2002.
———. *The Law of Contract*, London 2007[12].
Wesenberg, G. *Verträge zugunsten Dritter. Rechtsgeschichtliches und Rechtsvergleichendes* [Forschungen zum römischen Recht 1.2], Weimar 1949.
Winfield, P. *The History of Conspiracy and the Abuse of Legal Procedure*, Cambridge 1921 (reprint 1982).
van Zeben, C.J. & du Pon, J.W. (eds), *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek, Boek 6: Algemeen gedeelte van het verbintenissenrecht*, Deventer 1981.
Zimmermann, R. *The Law of Obligations; Roman Foundations of the Civilian Tradition*, Cape Town etc., 1990.
Zweigert, K. & Kötz, H. *An Introduction to Comparative Law*, Oxford 1998.

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