
THE RECEPTION OF *INSTITUTES* 3.19.19 IN FRANCE

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Introduction

Article 1119 of the French *Code Civil* rules that “one cannot, in general, bind himself or stipulate in his own name except for himself”.¹ Acting in one’s own name, not as a representative of another, one can only stipulate a performance to one’s own benefit.

This rule, the French writers explain, derives from Roman law, referring to the fact that in Roman law a contract could not confer a right upon a third party.² In the nineteenth century, however, many French writers gave another explanation. Zachariae, Toullier and Duranton³ refer to *Institutes* 3.19.19, which ruled that one cannot stipulate for another “since these obligations are invented, so that everyone acquires what is in his own interest”. One might argue, they subsequently stated, that we always stipulate in our own interest, even if we stipulate out of affection or humanity that something be given to another. But such was not considered sufficient: The promisee must have a monetary interest. As Marcadé explained, it is easy to understand why one cannot stipulate a performance that merely benefits another. The contract does not create a legal obligation, because the promisee will not be capable of bringing an action, since he suffers no loss in case of non-performance.⁴

This brings me to the central question of my contribution to this volume, dedicated to a scholar whose close reading of the texts of the Roman jurists has been a source of inspiration. What did the French jurists in the nineteenth century mean when they stated that one cannot stipulate for another? Are we dealing here with a reception of the Roman law principle “*alteri stipulari nemo potest*”?

1 Cc 1119: “On ne peut, en general, s’engager ni stipuler en son propre nom que pour soi-même.”

2 See e.g. Malaurie & Aynes, *Cours de droit civil*, VI Obligations (2001), nr. 670.

3 Zachariae von Lingenthal, *Handbuch des französischen Zivilrechts* I (1808), 261; Toullier, *Le droit civil français suivant l’ordre du Code VI* (1821), 91; Duranton, *Cours de droit français suivant le Code civil VI* (1836), nr. 219; Larombière, *Théorie et pratique des obligations* I (1857), 98 n. 3.

4 Cf. Marcadé, *Cours élémentaire de droit civil français ou explication théorique et pratique du Code civil IV* (1852), nr. 428: “Je ne pourrais de vous contindre, vous n’êtes donc pas lié. Il n’y a pas de vinculum, il n’y a pas d’obligation.”

"alteri stipulari"

Originally, in classical Roman law, one could not stipulate that something be given to another: "*Alteri dari stipulari nemo potest.*"⁵ As Hans Ankum has argued, the maxim meant that one could not stipulate the transfer of property (*dari*) to another, because such a *stipulatio* could not be enforced. The reason was the following. In the formulary procedure, if a certain sum or object was promised by *stipulatio*, the remedy to enforce the contract was a *condictio certi* and, as a consequence, the plaintiff had to prove that the promisor owed him the sum or object. This was, of course, impossible when he had stipulated to give something to another. The problem would not arise if one had stipulated to do something for another. The *actio incerti ex stipulatu* instructed the judge to decide in favour of the plaintiff if he had sufficient proof that the *stipulatio* had taken place.⁶ Because of the *condemnatio pecuniaria* principle, the performance to a third party, as every other performance, could only be enforced indirectly, that is by means of an action for damages.

This changed when the formulary procedure was replaced by the *extra ordinariam cognitio*. But, instead of abrogating the rule that one cannot stipulate that something be given to another, the compilers of the legislation of emperor Justinian (482-565) merely deleted the word "*dari*". In the *Corpus iuris civilis* the maxim no longer referred to a procedural problem, as it had done in classical law with regard to stipulations to give something to another. It emphasized a risk which all contracts in favour of a third entail, namely that they may be unenforceable because the promisee has no interest in the performance to another.⁷ It was only a presumption that the promisee had no interest. The following paragraph of the *Institutes* stated that the stipulation was valid if the stipulator had an interest (a monetary interest)⁸ in the performance to the third.⁹

However, this did not imply that the third could enforce the stipulation made in his favour.¹⁰ It was another fundamental principle of Roman law that no one

5 Gai. 3.103; see also Ulp. *D.* 45.1.38.22, Paul. *D.* 45.1.126.2 and C. 8.38(39).3.

6 See Ankum, "Une nouvelle hypothèse sur l'origine de la règle *alteri stipulari nemo potest*", in Andrieu-Guitrancourt (ed.) *Études offertes à Jean Macqueron* (1970), 21-29.

7 *Inst.* 3.19.19: *Alteri stipulari nemo potest, ut supra dictum est, inuentae sunt enim huiusmodi obligationes ad hoc ut unusquisque sibi adquirat quod sua interest: ceterum ut alii detur, nihil interest stipulatoris.* See also *D.* 45.1.38.17, *Inst.* 3.19.4, *Inst.* 3.19.19 and C. 8.38(39).3

8 See Kaser, "Zur Interessenbestimmung bei den sog. unechten Verträge zugunsten Dritter", in Hübner, Klingmüller & Wacke (eds.) *Festschrift für Erwin Seidl zum 70. Geburtstag* (1975), 75-87.

9 *Inst.* 3.19.20: *Sed et si quis stipuletur alii, cum eius interesset, placuit stipulationem ualere.* See also *D.* 45.1.38.17, *D.* 45.1.38.22, *D.* 2.14.23.pr. and C. 8.38(39).3.

10 Only a few of them concern cases where the third could bring an action as party to the

(sons and slaves excepted) could stipulate, buy or sell something, or contract, for another, so that the latter could bring an action "*suo nomine*", that is as a party to the contract. The other did not stipulate, buy or sell anything.¹¹ In Roman law, when entering into a contract, parties merely represented themselves and acquired what was in their own interest. Hence, it was the promisee who could enforce the stipulation in favour of a third if he had an interest in its performance, for example when a debtor stipulated to pay a sum – his debt – to his creditor. If the promisee had no financial interest, for instance when the performance to the third was meant as a gift, neither he nor the third party could bring an action against the promisor, some specific cases excepted.¹²

"en son propre nom"

In the civilian tradition it has been self-evident that one stipulates in his own name. 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. In other words, they are parties to the contract. The *stipulator* is also promisee.

The legal concept of representation was not unknown in the civilian tradition – as for example in marriages by proxy. However, in the law of obligations it was restricted to one's children under paternal control – as it had been to one's *filius familias* and slaves in Roman law. The medieval civilians and canonists taught that in order to establish an obligation between them, the promisee himself had to accept the promise and had to be present to do so (consensual contracts excepted¹³). He could not ask another person to conclude the contract on his behalf. They phrased this rule within the context of a *stipulatio*, namely that only a son or slave could stipulate "*promittesne Titio ei dari*" or accept a promise directed to his father or master.¹⁴ If others acted in such a way for the promisee, their *stipulatio alteri* would be void.

contract, as e.g. in *D. 45.1.79* (an agent stipulates for his principal who is present and implicitly consents). Other texts, e.g. *D. 14.3.1-2*, indicate that an assignment is feigned in specific circumstances. Literature: Moltzer, *De overeenkomst ten behoeve van derden* (1876); Wesenberg, *Verträge zugunsten Dritter, Rechtsgeschichtliches und Rechtsvergleichendes* (1949); Zimmermann, *The Law of Obligations* (1990), 34ff.

11 See *D. 44.7.11* and *D. 50.17.73.4*.

12 See *C. 8.53(54).3* (*donatio sub modo*), *D. 24.3.45* (restitution of a dowry to a grandson), *D. 16.6.23* (restitution of deposited goods to a son from an earlier marriage).

13 Consensual contracts could be entered into through letter or through messenger.

14 Literature: Buchka, *Die Lehre von der Stellvertretung bei Eingehung von Verträgen* (1852), 122ff; Fränkel, "Die Grundsätze der Stellvertretung bei den Scholastikern", 27 (1912) *Zeitschrift für vergleichende Rechtswissenschaft*, 350ff; Müller, *Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter* (1969), 38ff.

This problem did not arise if one stipulated in one's own name. It was generally acknowledged that a promisor could bind himself towards the promisee to give something to a third party if that was in the promisee's interest. It was the main exception the *Corpus iuris* made to the *alteri-stipulari* rule, allowing the promisee to claim damages in case of non-performance. The majority of the glossators denied the third party a remedy, some specific cases excepted.¹⁵ But according to the dissenting opinion of the twelfth century glossator Martinus Gosia († before 1166), equity required that the third derived an *actio utilis* from a pact made by someone else.

The medieval statutes of the Italian merchant cities also tended to protect the person to whom the promisor must perform.¹⁶ Some, like the statutes of Pisa (1161) – of which the city Besta¹⁷ has in general shown Martinus' influence – seem to acknowledge third-party rights.¹⁸ Others, like the statutes of Brescia (1252) and Florence (1415), tend to acknowledge some kind of representation. The statutes of Brescia ruled that from every contract concerning merchandise or other goods concluded in the name of another (*nomine alterius*), the party or parties in whose name the contract was concluded or to whom the promise was directed acquire an action.¹⁹ Whether this promise must be accepted by the intermediary in the other's name, as the statutes of Florence require, is not clear.²⁰

Although there was a tendency in medieval Italy and Castile²¹ to deviate from Roman law by granting an action to the "other" (the person to whom the promisor must perform), there was no prevailing doctrine to explain why the "other" was able to bring an action according to statutory law. Medieval

15 Though the gloss *Nihil agit ad Inst.* 3.19.4 described 16 exceptions to the *alteri-stipulari* principle, all were qualified as "*specialis*" and were not to be developed into a new general rule.

16 See Freund, *Das Wechselrecht der Postglossatoren* (1909) II, 79; Wesenberg, (n 10) 111; Lange, "*Alteri stipulari nemo potest* bei den Legisten und Kanonisten", 73 ZSS (Rom. Abt.), 291; Müller, (n 14) 58.

17 Cf. Besta, *Le obbligazioni nella storia del diritto Italiano* (1936), 88-90.

18 See *Constitutum usus Pisanae civitatis*, c. 11 (cited by Fränkel, (n 14) 296): *Placuit in omnibus causis praecipuam esse equitatem, quam stricti usus (lege iuris) rationem. Equitati convenire arbitantes statuimus, ut si quis alicui presenti vel absenti dari vel fieri sive sibi pro alio vel eius nomine aut sibi et alii fuerit stipulatus, etiam is cui fuerit stipulatus, rem et penam petere possit.* With "*sibi (dari) pro alio vel eius nomine*" is meant that the promisee will receive the object given to him as detentor, so that the third may acquire possession and ownership. With regard to the acquisition of possession through a "minister", see Fränkel, (n 14) 311-318.

19 Ed. Holtzendorff Kohler, *Enzyklopädie der Rechtswissenschaft I* (1904), 598: *Quod ex omni contractu inito vel facto nomine alterius tam de mercato quam de aliis rebus, adquiratur actio et acquisita sit illi vel illis quorum vel cuius nomine contractus sive promissio factus est vel facta.*

20 *Statuta populi et communis Florentiae* II.39 (cited by Fränkel, (n 14) 296): "... per quemlibet privatum, etiam non notarium, recipientem nomine alterius ... adquiratur obligatio, actio ..."

21 See the *ley Pareciendo* of King Alfonso XI of Castile (1348), discussed in Hallebeek & Dondorp, "Grotius' doctrine on the *acquisitio obligationis per alterum*", in Condorelli (ed.) *Panta rei. Studi dedicati a Manlio Bellomo* (2004) II, 207ff.

scholarship acknowledged that local custom or statute could deviate from the Roman principle that one could not acquire through a third party (C. 4.27.1),²² but did not develop a new doctrine. This began to change only in the sixteenth and seventeenth centuries.²³

There are only a few references indicating that French customary law deviated from the civilian tradition.²⁴ Antoine Favre (1557-1624) reported of Savoy that it was allowed to buy something for an undisclosed principal.²⁵ According to Louis Charondas (1534-1613) a creditor could bring an action against the buyer who had agreed to pay the vendor's outstanding debts.²⁶ Philippe de Beaumanoir († 1296) stated that in the Beauvaisis a "procureur" could accept on behalf of another.²⁷ Charles Dumoulin (1500-1566), discussing a problem of feudal law, adduced as an argument that in Paris a principal could enforce a contract his "procureur" entered into, just as he could enforce a contract he entered into himself by messenger.²⁸ The "coutumes de Paris" and the "somme rural" did not contain provisions on contracts concluded by agents, but it seems undisputed that the principal could bring an action.²⁹ Jean Domat (1625-1690) maintained that someone absent could enter into a contract through intermediaries, namely tutors, curators, and agents.³⁰ So did Claude Serres.³¹ In his *Traité des obligations*, written in 1761, Robert Joseph Pothier (1699-1772) taught that agents do not stipulate for another when they act in

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- 22 See e.g. Baldus d'Ubaldis, *ad C. 5.12.26; consilia* II.10; Angelus Aretinus, *ad Inst. 2.9.5.*
- 23 Together with the development of a general law of contract. See Bart, "Pacte et contrat dans la pratique française", in *Towards a General Law of Contract. Comparative Studies in Continental and Anglo-American Legal History*, Barton (ed.), 1990, 128; Birochi, "La questione dei patti nella dottrina tedesca dell'Usus modernus", in *Towards a General Law of Contract 177f.*
- 24 Macqueron, *Histoire des obligations* (1971), nr. 600, refers to the *coutumes de Beauvaisis*, c. 1004 with respect to "proches parents". This paragraph does, however, not state that "my next of kin", but that "someone of my household (child or servant)" may accept for me.
- 25 See Antoine Favre, *Definitiones forenses* 4.34.1 (ed. Lyon 1641), 429. The "déclaration de command" was generally acknowledged in France. See Merlin, *Répertoire*, s.v. Command.
- 26 Louis Charondas le Caron, *Responses et décisions du droit Français*, 10 reponse 46 (ed. Paris 1612), 397.
- 27 Philippe de Beaumanoir, *Coutumes de Beauvaisis* (1970), nr. 1004. Since his mandate concerned legal proceedings, the text might refer to promises made in court only.
- 28 Cf. Charles Du Moulin, *Commentarii in consuetudines Parisiensis*, 33. 2 nr. 23 (ed. *Opera omnia*, 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 attentata praefata subtilitate iuris Romani.*
- 29 See Jean Bouteillier, *Somme Rural* (ed. Paris 1603), 312-313 and the commentary of Louis Charondas le Caron, 315-316 ("*stipulatio* à autre non present & a personne non present").
- 30 See Jean Domat, *Les loix civiles dans leur ordre naturel* I.1.16 (ed. Paris 1756 fo 20v): "Les conventions peuvent se faire non seulement entre présents, mais aussi entre absents par le procureur ou autre médiateur ou même par lettres". See also *ibid.* I.2. 3-6.
- 31 See Claude Serres, *Les institutions du droit français suivant l'ordre de celles de Justinien*, *ad Inst. 3.19.4* (ed. Paris 1778), 471. Macqueron (n. 24), nr. 600 suggests that ratification was needed, but that was not the case.

their capacity as agent. Their principal becomes the promisee "par leur ministère".³²

In the civilian tradition it had been self-evident for centuries that parties could only act in their own name, that they represented only themselves and acquired what is in their interest. In order to avoid that the contracts they concluded on behalf of their principals were void, agents therefore had to stipulate in their own name and assign their actions to their principals. In France, however, as in the Italian merchant cities, agents were considered to represent their principals – not necessarily because they acted in their name.³³ Apparently, when they accepted a promise to give something to their principal, the *alteri-stipulari* rule did not apply. In other situations the French authors adhered to the Roman-law principle that one cannot stipulate for another. This implied that the promisee could not enforce the contract unless he had an actionable interest in the performance to the third (or added a penalty clause). Because he was no party to the contract, the third party did not acquire a right.

Divergent doctrines

In customary law there was no prevailing doctrine with respect to the effect ascribed to the *stipulatio alteri*. As discussed above, France tended to distinguish between agency and contracts in favour of a third. The Roman-Dutch writers provided several interpretations of the custom of Holland, which all differ from the French in not differentiating between representatives (agents) and other persons who stipulate for another.

Although Hugo Grotius (1583-1645) argued in his *De iure belli ac pacis* that agents could represent their principal and accept a promise on his behalf,³⁴ he interpreted the customs of the province Holland to be in conformity with the rule that one cannot acquire through another (C. 4.27.1). According to the *Inleidinge tot de hollandsche rechtsgeleerdheid* only children under paternal

32 Robert Joseph Pothier, *Traité des obligations* I.1 § 5 nr 74 (ed. Paris 1777), 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..."

33 They did not only represent their principal if they acted in his name. To Charles Dumoulin it was a subtlety of Roman law to distinguish in whose name the agent accepted the promise (see n. 28). Pothier maintained that even if he acted in his own name, it was his principal who became a party to the contract if it concerned the affairs for which he had appointed the agent. Cf. Pothier, *Traité des obligations* I.1 § 5 nr 82 (ed. Paris 1777), 71: "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."

34 Cf. Hugo Grotius, *De iure belli ac pacis*, II.11 § 18 (ed. 1939), 338: *Ubi mandatum tale antecessit distinguendum ultra non puto, sitne persona sui iuris necne quod Romanae leges volunt, sed plane ex tali acceptatione promissionem perfici, quia consensus potest et per ministrum interponi ac significari.*

control could represent their father and accept a promise to him.³⁵ A third party could stipulate that something be given to him, but he would not acquire a right because he was a third party to the contract. According to Grotius, Dutch customary law did, however, provide an alternative: "Since with us more attention is paid to equity than to legal subtlety ... a third party may accept the promise, and thereby acquire a right, unless the promisor has revoked his promise before the third party has accepted it."³⁶ In other words, the agreement between parties implied an offer of the promisor to the third which he could accept.

Another interpretation of Dutch customary law is given by Simon Groenewegen (1653-1652). In his "*Treatise on the laws abrogated and no longer in use in Holland and neighbouring countries*" he argued that the provision of *Codex* 4.27.1 *Per extraneum acquiri non possumus* had fallen in disuse "for under our customs a person can stipulate for another, as I have stated ad Inst. 3.19.19".³⁷ In his view Dutch customary law acknowledged the rights of third parties. The agreement between parties that something be given to a third did not result in an obligation towards the *stipulator*, because that was not the purport of the contract. The *stipulatio alteri* created an obligation towards the third.

A third interpretation is recorded by Cornelis van Bijkershoek (1673-1743) in his *Observationes tumultuariae*, his notes of the discussion in chambers of the High Court of Holland and Zeeland.³⁸ Some judges argued that the customs deviated from the civil-law tradition in allowing the promisee to bring an action, even though he had no financial interest in the performance to the third. This opinion – which the court rejected – resembled the teachings of German scholar Christian Wolff (1679-1754).³⁹

35 Cf. Hugo Grotius, *Inleidinge tot de hollandsche rechtsgeleerdheid* III.1 38. The merchant's agent did not represent his principal, for Grotius described that the merchant must sue for assignment. If the agent did not comply, the assignment was feigned.

36 Cf. *The Jurisprudence of Holland by Hugo Grotius* III.3.38, transl. by Lee, (1934) I, 323.

37 Cf. Simon Groenewegen, *De legibus abrogatis* ad C. 4.27.1 (ed. et transl. Beinart & Hewett (1984), 184) referring to *Inst.* 3.20.19 nr. 3 (ed. Beinart (1974), 76), where he argued that the reason given in *Inst.* 3.19.19 did not satisfy. In Groenewegen's view it was not the purport of the transaction that the stipulator acquired a right to the performance, and there was no *stipulatio* between the promisor and the third party.

38 Cf. Bijkershoek, *Observationes tumultuariae*, III nr. 2792 (ed. Meijers e.a. (1946), 569).

39 He argued that without a mandate one could not accept promises directed to another. If the promise was made to himself and he accepted, the agreement resulted in a right for him, the promisee, to compel the promisor to perform to the third, if he (the third) assented. At the moment he informed the third of their agreement, the promisee tacitly offered the third to bring it about that the promise was performed. When the third accepted, the promisee was obligated either to claim performance himself or to assign his claim to the third party. Cf. Christian Wolff, *Institutiones iuris naturae et gentium*, § 433 (ed. Halle 1750 repr. 1969), 230.

Though the ascribed effect varied in these three interpretations, all expressed that the *nemo-alteri* rule was no longer applied in the seventeenth and eighteenth centuries.⁴⁰ In France, on the other hand, if the stipulator acted in his own name and not as a representative of another, the Roman-law principle still applied. Hence, as article 1119 of the *Code civil* expressed, one could only stipulate "pour soi-même".

"pour soi même"

Pothier had taught that many contracts only seem to be in favour of a third. In reality they are stipulated "pour soi-même", that is in the interest of the promisee. If that was the case, the intended effect, namely that the third could enforce the promise, was achieved indirectly, through cession of the claim. The stipulator acquired a right he could cede to the third. In explaining article 1119 *Code civil*, the majority of the authors in the first half of the nineteenth century followed this line of thought, also borrowing Pothier's examples. A builder, because of his contractual liability towards his principal for whom he was renovating a house, may validly contract in his own name with the carpenter to install new windows.⁴¹ Even without a (pre-existing) contractual liability towards the third, a stipulator may have a financial interest, that is, as an unauthorized manager of the other's affairs. Since the stipulator might suffer a loss because of his liability in case of non-performance, he could claim damages or, if the nature of the performance thus allowed, specific performance. Larombière added that the interest could have an indirect character,⁴² or even be created by adding a penalty clause.⁴³ In the majority view this meant that the promisee could, if necessary, claim the contractual penalty. However, according to Marcadé he could also claim performance. Marcadé interpreted the addition of a penalty clause as a contractual determination of the amount of damages the promisee could claim in case of non-performance⁴⁴ – the idea that the promisee would suffer a financial loss being, of course, a fiction.

40 According to Grotius, the promise became irrevocable through their agreement. In Groenewegen's view, the third derived a right from the agreement between parties. Wolff taught that the agreement resulted in an obligation between the promisor and stipulator even where the latter had no financial interest in its performance (and, hence, could not sue for damages).

41 The example derives from Pothier's *Traité des obligations* I.1 § 5 nr 58 & 59.

42 For instance when a lessor stipulates in favour of his tenant, so that he is able to furnish the house. See Larombière, (n 3) *ad* 1119 nr. 8: "Parce que j'ai intérêt à ce qu'il garnisse la maison."

43 See Larombière, (n 3) *ad* 1119 nr. 6. He adheres to the majority view in which the combination of a *stipulatio-alteri* and a penalty clause was interpreted as a contract to pay a certain sum to the promisee under a negative condition, viz. that the promisor did

As a consequence, stipulations merely in the mere interest of a third – which could not be qualified as "stipulation 'pour soi-même'" in the sense of article 1119 *Code civil* – were without effect. Although article 1121 provided an exception to the *alteri-stipulari* rule,⁴⁵ there were still situations in which neither the stipulator (ex 1119 Cc) nor the third (ex 1121 jo 1165 Cc) could enforce the contract.

In his *Traité des contrats* (1870) Demolombe provided such an example. When a friend of mine is abroad and an object he intends to purchase comes up for sale, I buy it for him and agree with the vendor that he will deliver the object to my friend and that he (my friend) will pay the price we agree. As Demolombe explained, the vendor (promisor) would have been bound if the contract had been made in the other's name, that is if it had been apparent that the stipulator had acted as a *negotiorum gestor*. This he could have said in so many words, but it could also be deduced from the circumstances. In this case, if it is apparent that one stipulated it merely to the benefit of a third, Demolombe argued, he must be presumed to have acted in the name of the other. Since the qualification as "stipulation pour autrui" would render the transaction without effect, it must be understood in such a way that it may have some effect (1157 Cc). Colmet de Santerre was of the same opinion.⁴⁶

Such interpretation made article 1119 a dead letter, as Colmet de Santerre and Laurent remarked.⁴⁷ To Demolombe this was no loss, since in his view it was an unfortunate misconception to import the Roman *alteri-stipulari* rule in a modern system of law which acknowledges agency. The underlying Roman principle, that persons only stipulate and acquire what is in their own interest,

not perform to the third.

44 See Marcadé, (n 4) *ad* 1121 nr. 435.

45 When something was stipulated for him the third could bring an action against the promisor if the requirements of art. 1121 Cc had been met, viz. "when such is the condition of a stipulation one makes for oneself or of a donation which one makes to another". Some interpreted this as "if a penalty clause is added" or "if it is the burden (Latin: *modus*) of a donation or other contract" (Delvincourt and (since 1837) Zachariae). Others read "if it is the burden of an onerous contract or a donation" (Zachariae until 1837, Toullier, Duranton, Larombière (n 3), and Aubry & Rau). Cf. Delvincourt, *Cours de Code Civil* (ed. 1819, 1825) II, 121; Zachariae von Lingenthal, *Handbuch des Französischen Civilrechts* (ed. 1808), § 170 (ed. 1837, 1853), § 346; Toullier (n 3), nr. 152, Duranton (n 3), nr. 231; Larombière (n 3), *ad* 1121 nr. 1; Aubry Rau, *Cours de droit français par C.S. Zachariae ... revue et augmenté ... par Aubry et Rau* (1842), § 346.

46 Demolombe, *Traité des contrats* nr 240; Colmet de Santerre, *Cours analytique de Code Civil par A.M. Demante, continuée depuis article 980 par E. Colmet de Santerre* 5 (1869), nr. 33 bis 3.

47 See Colmet de Santerre, (n 46), nr. 33 bis 3; Laurent, *Principes de droit civil* XV (1887), nr. 536.

was no longer valid.⁴⁸ This was apparently also the view of the French courts at the end of the nineteenth century, for they ruled that one could stipulate for a third if one had an "intérêt moral".⁴⁹

48 See Demolombe, (n 46), nr. 209. He quotes Ortolan, *Explication historique des Institutes de l'empereur Justinien*, ad *Inst.* 3.19.4 (1844).
49 E.g. Cour de cassation 16 1 1888 D.P. 1888, 1,177.