
**CONTRACTS FOR A THIRD-PARTY BENEFICIARY:
A BRIEF SKETCH
FROM THE *CORPUS IURIS* TO PRESENT-DAY CIVIL LAW**

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1 Introduction

Contemporary jurisdictions of continental Europe are familiar with the legal concepts of a contract in favour of a third-party beneficiary who is not present when the contract is entered into as well as the right of this third party to enforce such a contract. However, these concepts are not easily compatible with the principles of Roman private law.¹ The Swiss Legislation on Obligations (*Schweizerische Obligationenrecht*) of 1881 was the first to accept the third party contract (art 112 aOR), followed by the German Civil Code (*Bürgerliches Gesetzbuch*) of 1900 (§§ 328ff *BGB*). In the Netherlands it was introduced only in 1992, that is when the sixth book of the present Civil Code (*Burgerlijk Wetboek*) acquired force of law, while in the French *Code Civil* it is still lacking.

In contemporary legal practice the contract in favour of a third party has wide application. In contracts of transport, for instance, one can stipulate a right to delivery of the goods to the addressee. An association can obtain rights for its members, such as a discount when they buy from a certain company. In labour contracts employees can stipulate, among others, payments of the pensions of widows and orphans. In all such cases the third party, although not a party to the contract, has a claim to enforce what is stipulated. As the concept of a third-party beneficiary was not known as such in Roman law, it is of importance to see how and why this developed within the civilian tradition. First we will investigate the possibility of stipulating for an absent person in Roman law and,

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1 In contemporary Dutch private law there are various institutions capable of bringing about that absent persons acquire contractual rights. The Code of Civil Law allows rights to be acquired through an agent. When acting on mandate, such a representative will acquire for his principal. The latter will become the creditor in the obligation (art 3:60 *BW*). Secondly, a party to a contract can transfer his contractual claim through assignment to a third party. In that case the latter will take his place as creditor in the obligation (art 3:94 *BW*). In the third place, there is the contract in favour of a third party. The third will acquire a right from the contract entered into in his favour although he is not a party to the contract. The Dutch Civil Code merely requires that the third party beneficiary accepts the clause in his favour (art 6:253-254 *BW*).

thereafter, the developments in legal scholarship from the Middle Ages, in Roman-Dutch law, and some present-day jurisdictions.²

2 Roman law

As already stated, Roman law is incompatible with the idea of third-party beneficiaries deriving rights from contracts they did not enter into themselves. Moreover, as a principal rule of Roman law, the contract in favour of a third person has no effect even for the contracting parties. According to Justinian's *Institutes* it is impossible to stipulate in favour of a third party: *alteri stipulari nemo potest*.³ This rule implies that such a contract, although not prohibited by law, simply has no effect. From other texts in the *Corpus Iuris Civilis* it appears that this principle not only applied to the verbal contract of stipulation, but also to other contracts, pacts and clauses in favour of an absent beneficiary. At the same time, the *Institutes* acknowledges two exceptions.⁴ The stipulation in favour of a third party is valid in the case where the stipulator has a monetary interest in the performance for the third party, for example, when he stipulates payment to his creditor in order to fulfil an obligation. The second exception exists in the fact that adding a penalty clause renders the *stipulatio alteri* valid. In both cases only the stipulator can invoke the contract. The third party does not acquire a right. The *Institutes* contains yet another maxim which is relevant for the issue under discussion, namely the rule that it is impossible to acquire anything through an extraneous person, that is someone who is not one's slave or child under paternal control: *per extraneam personam nihil adquiri posse*.⁵ Slaves and children, *au contraire*, always acquire rights for their fathers and masters, irrespective of whether they stipulate for these persons or for themselves. Similarly, there are several other situations where an intermediary due to a specific legal relationship can acquire a right for one he represents: the representative of the local authorities (*actor municipum*), for example, acquires for the municipality, the tutor for his pupil and the curator for one confined to his care.⁶ It is impossible to grant someone such capacity through a mandate. As a general rule, a procurator cannot acquire for his principal.⁷ Only the manager of a business undertaking (*institor*), slave or freeman, can acquire

2 More extensive discussion of the legal developments through the ages can be found in Schrage & Ibbetson (eds) *Third Party Rights in Contract* (in progress) and Dondorp (ed) *Contracts in Favour of a Third Party Beneficiary. An Historical and Comparative Account* (in progress).

3 *Inst* 3 19 19.

4 *Inst* 3 19 19-20. See also *D* 45 1 38 17 and 20.

5 *Inst* 2 9 5.

6 *D* 13 5 5 9.

7 Unless this principal was present at the moment the stipulation took place, see *D* 45 1 79.

rights for the owner, his principal.⁸ These two principal rules, as found in the *Institutes*, are based on an even more fundamental rule of the Roman law of contracts, namely that a contract creates a personal bond between parties, comparable to the privity of contract which from the nineteenth century until recently was the prevailing principle of English common law. The Roman-law contract excludes outsiders. Hence, no matter whether we include a pact or contractual clause for another or we stipulate for him, our agreement will be invalid.⁹

However, in the *Corpus Iuris* a few exceptional cases can be found where the third party has the right to enforce the performance stipulated in his favour. Apart from some cases where money is lent out in the name of an absent person and the latter acquires the right to claim the money back,¹⁰ the most important of these is the so-called *donatio sub modo*, the donation under the "mode" or "burden" that the donated object will be passed on to a third party after a certain lapse of time.¹¹

3 Medieval legal scholarship

From the beginning of the twelfth century the *Corpus Iuris* was studied and interpreted, initially maybe as a mere academic occupation. However, the underlying perception was always that Roman law is a universal law, suitable for practical application. For the Church it soon became the law which could serve whenever the sources of Canon law were silent. From the fourteenth century the so-called "reception" of Roman law took place in secular litigation, starting in Italy and from there spreading over continental Europe. During the Middle Ages, the learned jurists interpreted the Roman-law texts in view of such applicability, long before Roman law actually started to penetrate into the legal practice of the secular courts. In order to enhance its utility and acceptability, Roman law was provided with legal dogmatics which were only implicitly present in the Roman-law texts or not present at all. Moreover, the medieval interpretation of substantive rules of Roman law was frequently at odds with the original grammatical significance of the texts.

The writings of the legal scholars, when interpreting a particular text from the *Corpus Iuris*, do not explain the underlying motives of their innovations. They often attempt to substantiate apparent misinterpretations by merely referring to

8 If this is the only possible way a principal can secure his interest. See *D* 14 3 1-2.

9 *D* 50 17 73 4 and *D* 44 7 11.

10 *D* 12 1 9 8 and *D* 45 1 126 2.

11 *C* 8 54(55) 3.

other texts in the *Corpus Iuris*. Most of the developments in medieval legal scholarship, which moved away from the original intention of Justinianic law, can be explained by the prevailing social and legal circumstances. Roman law was not rediscovered and introduced into a legal vacuum, and altering it by "misinterpretation" can often be explained as an attempt to adjust Roman law to the existing legal order and, by so doing, rendering it acceptable for practical application. The alternative would have been to admit that the *Corpus Iuris* was the legislation of an alien people from a distant past and that much of it should be considered as unsuited for the present-day.

The interpretation of the Roman-law *alteri stipulari* rule can readily be explained against the background of the existing social and legal order at the time when – or even before – the study of Roman law commenced. By the end of the Middle Ages both the civilians and the canonists, who adopted the Roman *alteri stipulari* rule, considered it possible for contracting parties to stipulate validly that something be given or done to a third-party beneficiary and to bring it about that this third party could enforce what was stipulated in his favour. We will see below what was necessary and which requirements had to be met in order to reach this goal. Accepting this possibility certainly did not imply that the *alteri stipulari* rule was put aside. Reconciling the newly-developed doctrine with this rule was no easy task, especially for the civilians who had to manoeuvre within the boundaries of the *Corpus Iuris*. Although the medieval civilians did not reveal their motives, it could well be that this was an attempt to make Roman law in this way more acceptable. In the Middle Ages there was no system of law or legal circle that was as hostile to the idea of stipulating for a third party as was Roman law. The *lex Salica* was familiar with the *Affatomie*, the transfer of an entire patrimony to an intermediary as trustee, who at a later stage was obliged to pass it on to a third-party beneficiary as indicated by the "donor". In mercantile law there were bills of exchange and bearer instruments. Canon law followed the principle that a man should stick to his word and that a mere promise is, at least morally, as binding as an oath.¹² Almost without exception, stipulations in favour of a third party can be found in the Statutes of the cities of Northern Italy.

Although the medieval civilians did not divulge in their writings why they intended to develop their doctrines in a certain direction, they did indicate the

12 See C 22 q 5 c 12. According to Gratian's Decree (1140/45) it is possible to be bound to an absent person through a promise accepted by someone present (C 1 q 7 c 9). Whether this present person was regarded as an agent (*procurator*) or messenger (*nuntius*) of the absent third party, or as a *stipulator alteri* acting of his own accord, is not clear.

dogmatic course they took. After the doctrine of the early glossator Martinus († after 1157), who generally granted the absent party a remedy to enforce what was promised to his benefit,¹³ had been rejected by the majority of the Bolognese glossators, two important innovations may be traced in the Gloss of Accursius († 1263). As was stated above, a *stipulatio alteri* is effective for the parties to the stipulation, that is stipulator and promisor, if the first has a monetary interest in the performance for the third party. The *Institutes* does not, however, pronounce upon the way the stipulation has to be phrased in order to have effect. This is where the Accursian Gloss introduced a specific requirement. According to the gloss *supra dictum est ad Inst 3 19 19* a *stipulatio alteri* can only be effective when the promise is phrased as addressed to the stipulator himself, that is the “me” in the stipulation “Do you promise me to give X to Titius?” This has to be explained more fully. In medieval doctrine a distinction was drawn between the words of the stipulation indicating to whom a performance should take place (the *verba executoria*) and the words indicating to whom the promise was addressed (the *verba promissoria*). In the event of a *stipulatio alteri* the *verba executoria* would always mention a third-party beneficiary, not the person present. In order to be effective the *verba promissoria* should, at least according to the Accursian Gloss, mention the stipulator and not the beneficiary. In other words, the stipulator, having a monetary interest in the performance for the third party, was capable of binding his promisor, as follows from *Inst 3 19 20*. However, according to the Accursian Gloss this is only if he, the stipulator, formulated the stipulation as addressed to himself. Thus, he could effectively stipulate “Do you promise me to give X to Titius?”, but it was considered void and without effect when the stipulation was phrased as “Do you promise Titius to give him X?”¹⁴ The second innovation consisted in the fact that where the *stipulatio alteri* was phrased correctly, as explained, with the stipulator himself named as promisee, but the stipulator had no actionable interest in the performance for the third party, the stipulation would result in a natural obligation between promisor and stipulator.¹⁵ The *stipulatio alteri* was not seen as *contra legem*, prohibited by the law, but only as *praeter legem*, not supported by the law. However, if the *stipulatio alteri* was

13 Martinus based his view on an extensive application of exceptional cases as C 3 42 8 and C 8 54(55) 3 (*donatio sub modo*). In his opinion equity demands that the underlying principles in these cases are also applied in other cases. Cf Hallebeek *Audi Domine Martine! Over de Aequitas Gosiana en het Beding ten Behoeve van een Derde* (2000).

14 The gloss *supra dictum est ad Inst 3 19 19* also acknowledged the possibility of effectively stipulating that something be performed to the stipulator (promisee) as *recipiens nomine domini mei* (“Do you promise me as recipient in the name of my principal to ... ?”), which formula actually does not contain a *stipulatio alteri*, since there are no *verba executoria* directed to a third party who is not present. According to Jean Faure and Angelus de Gambilionibus the use of this formula was restricted to procurators acting on instructions of their principals and to managers of other people’s affairs.

15 See the gloss *nihil interest ad D 45 1 38 17*.

phrased incorrectly, namely as addressed to the absent beneficiary, it was regarded as entirely invalid, whether the stipulator had an interest or not. The underlying reason was probably that such a stipulation was lacking the immediate answer of the promisee.

Canon law was favourably disposed to the idea of binding oneself through a promise to someone absent. Being faithful to one's word implied more than just a moral obligation. But how could a unilateral promise to an absent person become enforceable? One way was confirming it by oath; another was the acceptance by the beneficiary at a later stage. According to Canon law, mere consent between parties was sufficient for an agreement to be binding, as expressed in the famous maxim *pacta sunt servanda* (X 1 35 1). Canon law was not familiar with such formalities as the presence of the parties and the question and answer as required for the Roman-law stipulation. Nevertheless, where the promise to perform something for an absent beneficiary was accepted by someone present, the canonists were inclined to interpret such a promise with reference to the Roman-law *stipulatio alteri*. They even adopted into Canon law the rule that in principle the *stipulatio alteri* has no effect, probably because it was not confirmed by oath or accepted by the beneficiary. As did the civilians, the canonists rejected the idea that contractual rights can be acquired through the acceptance of someone's agent (*procurator*).¹⁶ Together with the *alteri stipulari* rule from the *Institutes*, later canonists also adopted important elements from the medieval civilian doctrine. They adopted the distinction between the *stipulatio alteri* addressed to the third party and the one addressed to the stipulator who was present.¹⁷ As in the Accursian Gloss, the canonists considered the promise to perform for someone who was not present and which was also addressed to this beneficiary himself as having no effect, albeit for an entirely different reason. Unlike the Roman-law stipulation, Canon law did not require an immediate acceptance by the promisee. However, in order to become enforceable acceptance had to take place. As long as the beneficiary had not accepted or ratified the promise, there was no consent between promisor and promisee and thus no binding force. The canonists adopted from the civilians the idea that, when the promisee (the person present to whom the *stipulatio alteri* was addressed) had no monetary interest in the performance for the third party, the *stipulatio alteri* would result in

16 It is not excluded that some canonists from the twelfth century considered this possible in view of C 1 q 7 c 12, but it was in later times seen as incompatible with canon 27 of the Council of Lyons (1274), the decretal *Quamquam* (VI 5 5 2).

17 This distinction can be found in Nicolaus de Tudeschis (Panormitanus, 1386-1445). The civilian distinction between the two ways the *verba promissoria* can be phrased was not yet drawn by Antonius de Butrio (1348-1408).

a natural obligation between promisor and promisee. As a consequence this promisee could bring no action against the promisor in the event of non-performance. However, from this point Canon law went some steps further. According to a number of canonists the promisor was also bound towards the third-party beneficiary through a natural obligation irrespective of whether the stipulator had an interest or not.¹⁸ As in Roman law, a natural obligation could not be enforced by suing the promisor by means of an action. In Canon law there had been, however, other means to enforce what was promised. Thus, in a specific procedure, the *denuntiatio evangelica*, the one who accepted the promise and (according to some canonists) also the third-party beneficiary could bring a complaint against the promisor, stating that the latter did not abide by his word and did not act as he had promised. Because of canonical equity (*equitas canonica*) the promise, although only resulting in a natural obligation, could be enforced before an ecclesiastical court.¹⁹

Because the civilians of the fourteenth and fifteenth centuries had to manoeuvre within the boundaries of the *Corpus Iuris*, they reached the same goal albeit through a much more complicated and sophisticated line of reasoning. Where a stipulator had no interest in the performance for the third party (and provided the *stipulatio alteri* was phrased correctly), the promisor first had to confirm the promise by oath in order to render the natural obligation into a civil obligation. However, in such a case only the stipulator acquired a right, just as in the case where he had an interest. Then, the next step would be that the stipulator should assign his action to the third party as his procedural representative.²⁰ These two steps, confirming the stipulation by oath and assigning the action, were, in terms of Canon law, redundant.

The idea that adapting Roman law to the existing legal order may indeed have lain at the root of the developments in medieval civilian doctrine, is endorsed by what happened on the Iberian Peninsula. An early reception of Roman law through the *Siete Partidas* (1265) of King Alphonse X the Wise (1221-1284), introduced into Castile a law of contract containing all the Roman-law features. It was adverse to commercial intercourse and incompatible with the fundamental principle that one must keep one's word. It was thus a closed system of contracts, with formalities required for written contracts, real contracts and for

18 This view was defended by Panormitanus, but there were also canonists who taught that only between the promisor and the one who accepted the promise a natural obligation came into being.

19 Since the decretal *Novit ille* (X 2 1 13) of Pope Innocent III († 1216) from 1204, ecclesiastical courts had the competence to judge cases "because of a sin" (*ratione peccati*), ie when one of the parties could be blamed for sinful behaviour.

20 This *procuratio in rem suam* was the only way assignment could take place in Roman law, which did not know our contemporary concept of cession (transfer of a claim).

the stipulation, and the exclusion of outsiders as implied by the *alteri stipulari* rule. But in 1348, the *Ordenamiento de Alcalá* of King Alphonse XI (1311-1350), with one stroke of the pen, replaced these restrictions by a new rule. According to the *ley Pare sciendo* (c 29 of the *Ordenamiento de Alcalá*), one can bind oneself to an absent party as long as one has the serious intention to enter into a contract with this person. How exactly such a contract between absent parties was supposed to have come into existence, was not stated. It was clear, however, that a promisor could no longer raise as a defence that he “had obliged himself to one person, to give something or to do something for another person” (*o que se obligó a vno de dar ode fazer alguna cosa a otro*), which words could be seen as disregarding the Roman *alteri stipulari* rule.

4 Early modern doctrine

In the sixteenth century, particularly on the Iberian Peninsula, new rules were developed concerning a promise accepted by someone who was present but which related to someone who was absent. This is not surprising. In Spain the *ley Pare sciendo* still prevailed. On the one hand this law was very clear regarding the fact that one could bind oneself in an informal way to an absent party, including through a promise accepted by someone present. On the other hand, in many other respects the rule was unclear: What justified the fact that the promisor is bound? What was the role of the person present and his acceptance of the promise? Was it necessary that the promise had to be accepted by the third party at a later stage? The new doctrines were formulated in line with the interpretation of the *ley Pare sciendo* and were thus not without practical significance. Moreover, from the beginning of the seventeenth century these new doctrines started to influence the theories of Natural law in Northern Europe. Especially the teachings of Hugo Grotius (1583-1645) on the issue would be difficult to understand if the writings of the Spanish jurists of the previous century were to be disregarded.

Spanish doctrines did not only derive from the *ley Pare sciendo*. They also contained materials derived from various legal traditions. In fact, some principles underlying the *ley Pare sciendo* itself played a part, such as the idea that a contract can be concluded by the subsequent acceptance of an earlier offer. In its turn, the binding force of mere consent between parties with a serious intention to be obligated could be seen as a victory of the Canon-law principle of *pacta sunt servanda* over the restricted Roman-law system of contracts overburdened by formalities. By the sixteenth century such a stand

was no longer an exception. In 1536 the *Parlement de Paris* acknowledged that contracts can be validly concluded by letter.²¹ According to early modern writers in Northern Europe it was an accepted rule of legal practice that nude agreements could be enforced. The formalities of Roman law were regarded as derogated and it was no longer necessary for parties to come together, as had been compulsory for the Roman-law stipulation. All contracts could henceforth be concluded through consent and the offer of one party could be accepted by the other party at a later stage, provided the offer was not revoked. The fact that the absent party was allowed to accept the promise at a later stage and by so doing to enter into the contract, put the person present who had accepted the promise in a different light. It was no longer necessary that he acquired an action himself which he could assign to the third-party beneficiary and it was consequently no longer necessary that he had a monetary interest in the performance for the third party or that the promise was phrased as being addressed to him. But if the third-party beneficiary could himself accept the promise, what would be the effect of someone else having done this previously? A similar question was discussed by late-medieval civilians when interpreting the *donatio sub modo* (C 8 54(55) 3). They considered the acceptance by a donee, by a notary, or by someone else in the name of the third-party beneficiary in some cases as making the promise irrevocable. When the promise was accepted in the name of the Church, for example, the mode could no longer be withdrawn. The Church was supposed to have entered into the contract through an agent.²²

Yet another element with its roots in medieval civilian scholarship was still clearly present in the teachings of the sixteenth-century Spanish writers, namely the distinction between *verba promissoria* naming the third-party beneficiary and *verba promissoria* naming the person present to accept the promise. However, unlike the Gloss of Accursius, the first kind of phrasing was no longer regarded as rendering the stipulation void and without effect. In view of the circumstances of the time, this is obvious. For a valid stipulation Roman law required that the stipulator's question be followed directly by the promisor's answer, but according to Canon law and the *ley Pareciendo* a promise could be accepted at a later stage. Thus, when the *verba promissoria* named the absent beneficiary ("do you promise Titius to give him X?"), the promise was no longer considered to be void and without effect. The *ley Pareciendo* explicitly

21 Three years later King Francis I of France (1494-1547) prohibited laymen to turn to ecclesiastical courts to enforce their agreements.

22 Jason de Maino ad *D* 45 1 22 2 n 19. In such cases it was not the donee or the notary who acquired a right they could assign.

ruled that the promisor could not raise as a defence that the promise “was made between absent persons in the presence of a public clerk or someone else, a private person, in the name of the other” (*oque fue fecha aescruano publico ootra persona priuada en nonbre de otro entre absentes*). It has to be established, however, what the effect is of such acceptance by someone present who was not named explicitly in the wording of the promise as the promisee, and, moreover, whether the third-party beneficiary has to accept the promise in order to render it enforceable. According to Antonio Gómez (1501-1562/1572), a jurist from Salamanca, the unilateral promise is in itself binding, as was the Roman *pollicitatio*. As a consequence, acceptance by the person present and acceptance by the third-party beneficiary are not relevant for the enforceability of the promise. It may well be that pronouncing the promise in the presence of a recipient demonstrates the serious intentions of the promisor, but from that moment, that is, from the moment the promise was made, the third-party beneficiary will have a direct action to enforce it.²³ Diego de Covarrubias y Leyva (1512-1577), a Salamancan law professor who later became bishop of Segovia, was of a different opinion. Acceptance by someone present, who was not named as promisee in the wording of the promise, makes the promise formulated as addressed to an absent beneficiary irrevocable, but it becomes enforceable only through acceptance by the beneficiary himself. The underlying idea must have been that it is the consent between promisor and beneficiary which results in a civil obligation and not the unilateral promise itself. Consequently, the question whether the person present who accepts has a monetary interest, became irrelevant. This line of reasoning seems to be in conformity with the principle as expressed in Canon law, in the *ley Pare sciendo* and in other sources of indigenous law, namely that promises can be accepted at a later stage.²⁴

In cases where the *verba promissoria* referred to the person present to accept the promise as the promisee (“do you promise me to give X to Titius?”), the promise had a different effect. When discussing this wording, Gómez confined himself to those cases where the promisee is the beneficiary’s procurator or the manager of his affairs. This is, in fact, the case the *ley Pare sciendo* referred to when stating that a promise “was made between absent persons in the presence of ... a private person in the name of the other”.²⁵ According to

23 Gomezius *Variae Resolutiones* 2 11 18.

24 Covarrubias *Variarum Resolutionum Juridicarum ex Jure Pontificio, Regio et Caesareo Libri* IV 1 14 13.

25 This wording somehow resembles the specific formula mentioned in the gloss *supra dictum est ad Inst* 3 19 19, intended to be used by procurators and managers of a principal’s affairs (“Do you promise me as recipient in the name of my principal to ... ?”), although that formula actually does not contain a *stipulatio alteri*; see n 14 above.

Gómez, the promisee will acquire a contractual claim which he can assign to the third party. A similar view was defended by Covarrubias, who maintained that acceptance of the promise by the third party only implies that the latter is prepared to accept the assignment.²⁶

These and similar teachings, developed in sixteenth-century Spanish scholarship, left their traces on the doctrine of Grotius on this issue in the second book of his *De Iure Belli ac Pacis*. Yet, Grotius' thoughts were original. He did not follow the teaching of any specific writer in an uncritical way.²⁷ Where the *verba promissoria* named the absent beneficiary (which Grotius did not consider being void), he drew a distinction between cases where the person present, who accepted the promise, acted with a mandate from the principal and those where he acted without such a mandate. Where the promise is accepted without a mandate, the person present, not being the promisee, acquires no right. Neither does the beneficiary who has not yet ratified acceptance of the promise, although the promisor can no longer revoke it.²⁸ Where the promise is accepted with a mandate from the principal, the latter acquires a right through his "agent", that is the intermediary he has appointed. He is presumed to endorse the decision, taken by this agent, and to have consented through this agent, a construction which comes close to our present-day concept of direct representation.²⁹

In the case where the *verba promissoria* name the person present to accept the promise, this intermediary will acquire the right "to bring it about that the right will transfer to the other (the beneficiary), if he also accepts it" (*ius efficiendi ut ad alterum ius perueniat, si et is acceperit*).³⁰ To acquire this right, which is not a claim to what is promised to perform for the third party, it is not required that the intermediary has a monetary interest of his own. As Covarrubias has taught, the promisor cannot revoke this promise after it was accepted by the intermediary, but *contra* Covarrubias this intermediary has the

26 Gomezius *Variae Resolutiones* 2 11 18; Covarrubias *In Caput Quamvis Pactum de Regulis Iuris Liber* 6 2 4 13.

27 See Dondorp & Hallebeek "Grotius' doctrine on *acquisitio obligationis per alterum* and its roots in the legal past of Europe" in Condorelli (ed) "*Panta rei*" *Studi dedicati a Manlio Bellomo* II (2004) 205-244.

28 The possibility of ratifying the acceptance afterwards implied that the need for the complicated late-medieval way of rendering a *stipulatio alteri* enforceable diminished: here the *stipulatio alteri* addressed to the stipulator, which resulted in a civil (the stipulator has an interest) or natural (the stipulator has no interest) obligation towards this stipulator. In such a case the stipulator had a claim (civil obligation) or could acquire a claim (when the promisor confirmed the natural obligation by oath) which he could assign to the third party.

29 Grotius *De Iure Belli ac Pacis* 2 11 18[2].

30 Cf Pufendorf *De Jure Naturae et Gentium* 3 9 5.

competence to release the promisor from his promise as long as the beneficiary has not yet accepted it. Only through acceptance does the third-party beneficiary acquire a right to enforce the promise.³¹

5 Legal practice: Roman-Dutch law

During the seventeenth and eighteenth centuries, legal practice in the Northern Netherlands³² was no longer affected so much by the doctrinal distinction between *verba promissoria* addressed to the absent beneficiary and *verba promissoria* addressed to the one present who accepted the promise. This distinction had been rooted in the gloss *supra dictum est ad Inst 3 19 19*, and was adopted by the later canonists. It also played an important role in the Spanish doctrines of the sixteenth century and in the teachings of Hugo Grotius. In legal practice, however, it was another distinction that became more and more important, namely whether the person present to accept the promise was the beneficiary's agent or not. The roots of this distinction may also be found in the gloss *supra dictum est ad Inst 3 19 19*, which ruled it possible to stipulate effectively a performance to oneself "as recipient of his principal". Some late medieval jurists³³ taught that the use of such formula was restricted to procurators acting on the instructions of their principals (agents) and managers of other people's affairs. In early modern times, the distinction between agents stipulating for their principals and other persons stipulating for third-party beneficiaries on their own initiative, became increasingly relevant. Gómez, when discussing the *stipulatio alteri* addressed to the person present, even restricted himself to the case where this person was the beneficiary's procurator or the manager of the latter's affairs. In contrast, Hugo Grotius drew the distinction whether the person present was the beneficiary's procurator or not, within the category of promises addressed to the absent beneficiary and not to the one present who accepted it. In legal practice it seemed no longer to make much difference to whom the promise was addressed, but the exact position of the one present to accept it became increasingly important. When he acted in his capacity as his principal's procurator (agent), the principal would acquire a direct claim, that is without any cession of remedies and irrespective of the fact whether the procurator had acted in his own or in his principal's name. This was, for example, the rule of the *Coutume de Paris* (1510, revised

31 Grotius *De Iure Belli ac Pacis* 2 11 18[1].

32 See Hallebeek "Third party contracts in the civilian tradition and in Roman Dutch law" 1999 *The Bar Association LJ (Sri Lanka)* 26-37; Hallebeek "Jacob Voorda's teachings on the maxim *alteri stipulari nemo potest*" in Van den Bergh (ed) *Summa Eloquentia; Essays in Honour of Margaret Hewett* (2002) 117-133; Dondorp & Hallebeek "Het derdenbeding bij Voorda en Moltzer" 2002 *Pro Memoria* 49-67.

33 These were Jean Faure († ca 1340) and Angelus de Ubaldis (1328-1417).

in 1580). A principal can act through his agent and by so doing he himself becomes a party to the contract.³⁴ In *De Iure Belli ac Pacis* Grotius discussed this possibility in the case where the promise, accepted by the agent, was addressed to the principal, but in France the distinction between the two ways in which the *verba promissoria* could be phrased was seen as a subtlety of Roman law. It was accepted that agents could conclude contracts for their principals and that the one who acted in his capacity as agent was not considered to have stipulated for a third party. It was the principal himself who entered into the contract.³⁵ This view was also defended in the Netherlands at the end of the eighteenth century, for example, by Dionysius Godefridus van der Keessel (1738-1816). When acting through an agent, the principal enters into the contract and there is, in such cases, no need to accept the agreement – not even when the agent acted in his own name.

What were the consequences of the promise to someone who was not acting as an agent, for example someone stipulating on his own initiative or overstepping the boundaries of his mandate that something be given to a third party, either in his own interest or out of generosity? In order to answer this question, some jurists, such as Hugo Grotius, Arnold Vinnius (1588-1657) and Van der Keessel, held to the requirement that the beneficiary must actually accept the promise regarding his benefit in order to acquire a remedy. Others, such as Simon Groenewegen van der Made (1613-1652), Simon van Leeuwen (1625-1682) and Johannes Voet (1647-1713), merely stated that the third-party beneficiary acquires an action to enforce what was promised for his benefit and did not mention the need to accept the promise or to assign the claim.

In his *Inleidinge tot de Hollandsche Rechts-geleerdheid* Grotius still referred to the Roman-law requirement that the person present must either have a financial interest in the performance he stipulates for a third party or add a penalty clause. These were, however, Roman-law subtleties which were no longer observed. We should pay more attention to equity, according to Grotius, and the beneficiary should be allowed to accept the promise as long as the promisor has not retracted it.³⁶ This view was in conformity with what Grotius in later times would write in *De Iure Belli ac Pacis*. The third party acquires a right by accepting the promise at a later stage. That the person present also acquires a certain right by his acceptance, namely the right “to bring it about that the right will transfer to the other (the beneficiary), if he also accepts it” is a

34 The question whether an agent can also obligate his principal is left aside here.

35 Domat *Les Loix Civiles dans Leur Ordre Naturel*, Prem. Partie (Des engagements) 1 116 and 1 2 4; Pothier *Traité des Obligations* 1 1 74.

36 Grotius *Inleidinge tot de Hollandsche Rechts-geleerdheid* 3 3 38.

detail that was lacking in the *Inleidinge*. Both in Grotius' doctrine and his description of Dutch legal practice, there was still room for the *alteri stipulari* rule. On the one hand, a promise that something be given to an absent beneficiary, accepted by someone present, not being the beneficiary's agent, can be effective between parties. On the other hand, this effect is not that the performance can be enforced (in that respect the *alteri stipulari* rule was still in force!). According to *De Iure Belli ac Pacis* acceptance by the person present makes the promise irrevocable. The third-party beneficiary cannot derive rights from such acceptance, only from his own acceptance of the promise. The opinion of Grotius was adopted by Vinnius. The third-party beneficiary has to accept the promise in order to acquire an action unless the person present who accepted the promise first was a notary.³⁷ The same rule can be found in Van der Keessel, who explicitly rejected the opinions of Groenewegen and Voet. According to Van der Keessel both Grotius' opinion and his own are not based on the subtleties of civil law, but they are in conformity with nature, which cannot be put aside by deviating legal practice.³⁸

In the works of other "old authorities" of Roman-Dutch law, the *alteri stipulari* rule seems to have lost much of its practical significance. These writers no longer required acceptance of the promise by the beneficiary. It appears that the *stipulatio alteri* itself is sufficient to obligate the promisor towards the third party. At least this is the implication of the statements on the issue by Simon Groenewegen, Simon van Leeuwen and Johannes Voet. The *stipulatio alteri* simply results in the acquisition of an obligation and a remedy. A monetary interest of the stipulator in the performance for the third party is not required for such an effect. An affective interest also suffices. Almost in every instance there will be a monetary or an affective interest. A man is not so stupid (*demens*), Groenewegen maintained, as to stipulate for another unless he thinks that he has an interest himself.³⁹ Other jurists, such as Paulus Voet (1619-1667), explicitly accepted generosity as a valid underlying motive for the *stipulatio alteri*.⁴⁰ These writers did not require, as did Grotius, Vinnius and Van der Keessel, that the third party accepts the promise to his benefit or that the

37 Vinnius *In Quatuor Libros Institutionum Commentarius Academicus et Forensis* ad Inst 3 19 4 n 3.

38 Van der Keessel *Theses Selectae Juris Hollandici et Zelandici* 510. Acceptance by the third party as a requirement for making the promise enforceable is an element which can still be found in some of the present-day codifications of civil law, such as the Dutch Civil Code of 1992 (art 6:253-254 BW).

39 Reference is made here to *D* 18 7 7. See Groenewegen *De Legibus Abrogatis* ad Inst 3 20 19 n 3; cf also Groenewegen ad *D* 41 2 49 2; Leeuwen *Censura Forensis* 4 16 8; and Johannes Voet *Commentarius ad Pandectas* ad *D* 45 1 n 3.

40 Paulus Voet *In Quatuor Libros Institutionum Commentarius* ad Inst 3 19 18.

person who accepted the promise assigns his remedy to the third party, as was necessary in the traditional *ius commune*.

However, in Roman-Dutch law, the acquisition of a claim by the third party without assignment was not beyond dispute as appears from a case from the year 1733 which was recorded by Cornelis van Bijkershoek (1673-1743).⁴¹ Eventually the High Court (*Hoge Raad*) of Holland and Zeeland granted the third party a claim, but it was seriously questioned whether this was possible since the stipulator had not assigned his remedy. Apparently here the third party's claim was directly derived from the agreement to his benefit, although he had not entered into it. A similar effect of the *stipulatio alteri* can be found in the law of Scotland as described by Stair (James Dalrymple, 1619-1695).⁴²

It was not easy, though, to reconcile such a legal concept with the traditional doctrines on the sources of obligation. Most of the writers did not even attempt to do this. Of the few who did, it was Groenewegen who qualified the *stipulatio alteri* as a nude pact (*pactum nudum*) in relationship to the third party and according to contemporary legal practice nude pacts were enforceable. However, nude pacts require consent between parties and there can be no consent between promisor and absent beneficiary as long as the latter has not yet accepted the promise. In the case just referred to, the High Court justified its decision by analogy with comparable situations, where according to Roman-Dutch law the third party beyond doubt has a remedy at his disposal: the intermediary had assigned his remedy to him or the contract was entered into by the manager of his affairs or his agent.⁴³

6 The codifications of civil law

Not only in the Netherlands was the *alteri stipulari* rule for the greater part undermined or disregarded. Meanwhile, also in the *usus modernus* of the German territories it had been accepted that one can stipulate for a third party and that this third party can enforce what was stipulated in his favour. This did not mean, however, that the role of the Roman-law *alteri stipulari* rule was once-and-for-all played out in Europe. In the nineteenth century it was, *au contraire*, notably present in legal doctrine. Two important factors were responsible for this, namely the French Civil Code (*Code Civil*) of 1804, which was introduced not only into many other countries and regions but also served

41 *Observationes Tumultuariae* 2792.

42 *Institutions of the Law of Scotland* (1693) 1 10 5.

43 Deriving a claim directly from the contract made by others in one's favour is a feature which is still characteristic of the concept of third party contracts in the present-day codifications of civil law, such as the German Civil Code of 1992 (§ 328 *BGB*).

as an example for several other European Codes of Civil Law, and the German Historical School (*Historische Schule*). As regards contracts in favour of a third party the French Civil Code mainly relied on the *Traité des Obligations* (1761) of Robert-Joseph Pothier (1699-1772). In this work, Pothier, the last great jurist of the ancient regime and also called the *père du Code Civil*, described the old French law of obligations, although using his own framework and with distinct influences of Roman law. In the mid-nineteenth century, the writers of the Historical School in Germany returned to Roman law and its *alteri stipulari* rule. Consequently both the requirement that the stipulator must have an interest for the *stipulatio alteri* to be effective, and the requirement that the third-party beneficiary can only acquire a remedy through assignment by the stipulator retained an actual significance in legal doctrine.

However, with the progress of the nineteenth century these two requirements were seen as undesirable in view of the increasing social importance of life assurances. The Industrial Revolution had dramatically changed the sources of income of a major part of the population and hence the means to look after the well-being of surviving relatives. The latter was no longer secured by family property. Life assurances took the form of contracts in favour of a third party, but the requirements mentioned above caused at least two problems. First, it was questionable whether a contract of life assurance was effective since the assured person himself seems to have no monetary interest in the beneficiary clause. For this reason it was, in 1888, accepted in French case law that a moral interest (*profit moral*) suffices.⁴⁴ Secondly, it was disputed whether it was only the assured person himself or also the beneficiary who could derive rights from the contract. If the first was the case, the claim against the assurance company would be part of the inheritance. Then the beneficiaries would be dependent on the cooperation of the heirs (if they themselves were not heirs of the assured person) and have to pay succession taxes. Moreover, as long as life assurances were not explicitly provided for by the lawgiver and could only be qualified as contracts in favour of a third party, other questions also remained unsolved. Does a life assurance have to be accepted by the beneficiary? Is a life assurance irrevocable? Does the claim against the assurance company belong to the assured person's estate in case of his bankruptcy?

44 Cour de Cassation 16 1 1888, DP 1888 1 177.

6 1 France

Due to the influence of Pothier's *Traité des Obligations*, the *alteri stipulari* rule was embodied in the French *Code Civil*, that is in article 1119 CC, but not phrased negatively – nobody can stipulate for another – but positively and more encompassing: one can only bind oneself and stipulate for oneself (*pour soi-même*). And yet the Roman rule did not revive to its full extent. Pothier had already drawn a distinction between stipulating in one's own name and stipulating in the name of a third party. The latter he regarded as agency and he no longer questioned the possibility that in such a way, namely through an agent as intermediary, the absent person can conclude a contract and by so doing acquire contractual rights. This was also accepted in the *Code Civil* and thus article 1119 CC only referred to stipulating for the benefit of a third party in one's own name. For such a stipulation, article 1119 CC required that it takes place for oneself (*pour soi-même*). These words were not just seen as a modern equivalent of the monetary interest mentioned in the *Institutes* of Justinian. Pothier had already taught that this interest not only exists when one stipulates the payment of a certain amount for his creditor, but also when a manager of another's affairs stipulates a performance for his principal. After all, the fact that the manager is liable towards his principal by reason of the unauthorized administration can be seen as a financial interest.⁴⁵ It was, however, disputed amongst the later French writers whether the management of another's affairs had to have commenced previously. Was a pre-existing interest required, or would it suffice when the interest came into being through the stipulation for the benefit of the principal? In French legal doctrine Pothier's ideas were developed further. Also by adding a penalty clause the *stipulatio alteri* was entered into for oneself. In fact, only when it was impossible to construe some kind of interest, for example when stipulating for a third party took place out of mere generosity, the beneficiary clause was still void under article 1119 CC. There were, however, also jurists in France who in such a case nevertheless presumed the stipulator to be the manager of the beneficiary's affairs. Later in the nineteenth century (1888), it was accepted in case law that the stipulator's interest as required by article 1119 CC could also be a moral interest.

45 Pothier *Traité des Obligations* 1 1 59.

Given the fact that this wide interpretation of the interest requirement had almost entirely eroded the *alteri stipulari* rule, it must be considered in which cases the third party had a remedy at his disposal. It is striking that most of the French writers did not discuss this question in their commentaries on article 1119 CC. Some of them followed the tradition of the older *ius commune* and maintained that it is the stipulator who acquires a remedy which he has to assign to the beneficiary. Others, such as Léobon Larombière (1813-1893), the first president of the Court of Appeal in Paris, followed the doctrines of Natural law and maintained that the beneficiary could only sue the promisor after accepting the promise.⁴⁶ In order to answer the question whether the third party acquires a remedy and if so exactly at which moment, there are other provisions of the *Code Civil* which must be taken into account. Article 1165 CC rules that a contract cannot impose burdens upon a third party, nor can it confer benefits on him except in the two cases mentioned in article 1121 CC. The latter states that one can stipulate for a third party when this is the condition of something one stipulates for oneself or the condition of a donation. The first exception is reminiscent of the Roman-law interest requirement. Every performance stipulated as owed to the stipulator himself and not to the third party was considered to be such a stipulation "for oneself", including a contractual penalty. The second exception echoes the Roman-law *donatio sub modo*. The word "donation" of article 1121 CC was interpreted extensively. It included not just gifts, but any alienation and, moreover, in later times also any *quid pro quo* in return for the performance for the third party, such as, for example, the payment of a premium to an assurance company. As a consequence of this interpretation, the *alteri stipulari* rule of article 1119 CC became a dead letter. In almost all cases the contract in favour of a third person is valid, while in only a small number of cases the stipulator still has to assign his remedy to the beneficiary.

6 2 The Netherlands

The teachings of the authorities of Roman-Dutch law may have lived on in South Africa, but not in the Netherlands. As regards contracts in favour of a third party, the Civil Code of 1838 followed the French *Code Civil* which had been in force in the Netherlands since 1811. The rule that one can only bind oneself or stipulate for oneself (art 1119 CC) can be found in article 1351 *Oud Burgerlijk Wetboek (OBW)*, the two exceptional cases, where a contract can confer benefits to a third party (art 1121 CC) can be found in article 1353 *OBW*.

46 Larombière *Théorie et Pratique des Obligations ou Commentaire des Titres III et IV, Livre III du Code Napoleon* ad art 1121 CC n 7.

It was in particular Jacob Pieter Moltzer (1850-1907), in later years Professor of private law at the University of Amsterdam, who in 1876 in his doctoral thesis strongly argued in favour of the position of third-party beneficiaries. In his opinion the contract in favour of a third party will always result in an obligation between promisor and stipulator, but between promisor and third-party beneficiary only when one of the two requirements of article 1353 *OBW* is met. But how should we interpret the words from this provision that the beneficiary clause is a condition of “something one stipulates for oneself” (*een beding, hetwelk men voor zich zelve maakt*)? Referring to the genesis of the corresponding article in the French *Code Civil*, Moltzer maintained that this clause could be any agreement between stipulator and promisor, not just something for the benefit of the stipulator (eg a contractual fine), as was the prevailing opinion in French and Dutch case law at the time. Thus, the stipulator could also make a promise in return for the performance he stipulated for the third party. In such a case this third-party beneficiary would acquire an enforceable right. The clause itself grants the third party such a right and Moltzer considered the unilateral expression of the promisor’s will to be the source of the obligation (such as the Roman *pollicitatio*). Acceptance by the stipulator only makes the promise irrevocable.⁴⁷ In 1905 Eduard Maurits Meijers (1880-1954), the later author of the New Dutch Civil Code, defended a different view and followed the French case law of the time, requiring that one stipulates something to one’s own benefit, apart from stipulating a performance for the third party. The mere beneficiary clause would be without effect. It can only be effective when it is added to a contract which also grants certain rights to the one who stipulates in favour of the third party.⁴⁸ In 1914 the High Court (*Hoge Raad*) adopted the teachings of Meijers and not those of Moltzer. This leading case dealt with a contract between Paul Kruger (1825-1904), president of the *Zuid-Afrikaansche Republiek*, and the *Zuid-Afrikaansch Museum* in Dordrecht. Kruger gave certain objects in loan to the museum and stipulated the competence to terminate the contract for himself and for a third person after his death. This third person was Kruger’s right-hand man Dr Willem Johannes Leyds (1859-1940). The High Court considered this contract to be in conformity with the requirement of the Civil Code 1838. Kruger had stipulated something for himself and he could thus add a competence stipulated for a third party to this contract. Leyds was therefore entitled to terminate the loan and claim restitution of the objects.⁴⁹ As a result of this decision, under the former Civil

47 Moltzer *De Overeenkomst ten Behoeve van Derden* (1876) 318ff and 361ff.

48 Meijers “Het collectieve arbeidscontract en de algemeene rechtsbeginselen” 1905 *Themis* 432-436.

49 HR 26-6-1914, W 9713. NJ 1914/1028. In later years the High Court would also decide that the third party will acquire a right only through acceptance (HR 13-2-1924, NJ

Code (1838) the stipulation in favour of a third party could never develop into a fully emancipated contract, but always had to take the form of a beneficiary clause added to another contract in which the contracting party also stipulated something in his own favour.⁵⁰

6 3 Germany

In Germany a different development had taken place. In the German territories the sources of law varied from state to state. Some had codified private law, some still used the French *Code Civil*, while others applied the uncodified *ius commune*. The jurists of the Historical School attempted to create a common legal doctrine based on Roman law for all these territories. In the middle of the nineteenth century they returned to the Roman *alteri stipulari* rule, in the sense that they taught that it is impossible to acquire contractual rights through an intermediary. Initially, this rule was also regarded as incompatible with the concept of direct representation. Soon, however, Friedrich Carl von Savigny (1779-1861), the most important protagonist of the Historical School, defended the view, which was by no means obvious, that direct representation was already acknowledged in Roman law.⁵¹ For the contract in favour of a third-party beneficiary to be effective, this implied that the stipulator had to have an interest of his own in the performance for the third party. Moreover, the latter could only acquire a remedy through assignment of the stipulator's claim. In the indigenous law of the German territories, there were, however, various legal concepts granting the third-party beneficiary a claim of his own without any assignment.⁵² In order to explain the existence of such claims in Roman-law terms, it was necessary to presume that assignment had taken place or to regard the Roman-law *donatio sub modo* as the underlying justification. Moreover, case law of the time sometimes presumed that the beneficiary had accepted an offer made to him. Apart from reconciling existing legal practice with Roman legal theory, there was also serious criticism of the *alteri stipulari* rule. The requirement of interest was seen as incompatible with freedom of contract. According to many writers, there were no good reasons to justify that the stipulator would not acquire a remedy which he could assign if he had stipulated for a third-party beneficiary out of mere generosity.

1924/71) and that the parties, ie promisor and stipulator, must have the intention that the third party will acquire a right of his own. The mere request to the bank to make a payment to someone does not grant this person an enforceable right (HR 10-1-1967, NJ 1967/97).

50 The contract of life assurance was in the meantime embodied in the Dutch Commercial Code.

51 This was based on a controversial interpretation of *D 41 1 53*. See Savigny *Das Obligationenrecht als Theil des heutigen römischen Rechts 2* (1853) 19-20 61-62 71-72.

52 These were the *Erbverträge* and *bauerliche Gutsabfindungen*.

The German Civil Code (*Bürgerliches Gesetzbuch*) of 1900 reflects the teachings of one of the most important German jurists of the nineteenth century, Bernhard Windscheid (1817-1892), who was a Professor in Leipzig from 1874. In his textbook *Lehrbuch des Pandektenrechts* he stated that indigenous German law was familiar with many exceptions to the Roman *alteri stipulari* rule. Initially Windscheid explained the existence in legal practice of remedies for the third-party beneficiary as just described that are based on Roman law. However, in the fifth (1879) and later editions of his textbook there is a new dogmatic explanation. When the stipulator accepts the promisor's statement that the latter will do something for or give something to an absent beneficiary, the promisor's will is held (*festgehalten*) by the stipulator. This means that he is no longer capable of altering this will.⁵³ Following this view, the first draft of the *Bürgerliches Gesetzbuch* already stated in general terms that third-party beneficiaries derive a right from the contract concluded in their favour if this was the intention of the contracting parties. Nowadays, we find the contract in favour of a third-party beneficiary in a similar form in § 328 *BGB*: by means of a contract one can stipulate a performance for a third party to the effect that the third party directly acquires the competence to enforce the performance.

7 Actual situation

Nowadays most European jurisdictions are familiar with the concept of contracts in favour of a third-party beneficiary, although in some instances this is of recent date. In the Netherlands it was introduced only when the sixth book of the present Civil Code came into force (1 January 1992). In 1999 the English doctrine of privity of contract, which predominated English common law since the nineteenth century, was put aside by the *Contracts (Rights of Third Parties) Act 1999*. Paragraphs 1(1) and 1(2) of this enactment provide that the beneficiary may in his own right enforce a term of the contract if the contract expressly provides that he may, or 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.

The various European jurisdictions, however, still show remarkable differences. In some countries, such as France and Belgium, there is no clear statutory basis for contracts in favour of a third party. Moreover, there are serious differences between the various codes of private law which do acknowledge

53 At precisely which moment the beneficiary acquires a right depends on the agreement between parties. That could be at the moment a condition is fulfilled or at the moment a certain period of time ends.

third-party contracts, and these should not be disregarded. The German version of a third-party contract does not require acceptance by the third-party beneficiary and, moreover, what this person acquires is a direct claim and not a claim presumed to be assigned by the stipulator. History demonstrates that a similar concept was already known in the seventeenth and eighteenth centuries, for example in the writings of Groenewegen, Leeuwen and Johannes Voet, and in Stair's *Institutions of the Law of Scotland*. Also English law does not require acceptance by the third-party beneficiary in order to acquire an enforceable right, but parties do have the competence to vary or revoke the contract as long as the third-party beneficiary has not yet shown his assent to the term in his favour or relied on it to the knowledge of the promisor. The Dutch version of a third-party contract (art 6:253 *BW*) requires acceptance by the third-party beneficiary, as does South African case law since the mid-nineteenth century.⁵⁴ This time it seems to be the approach of Natural law, as previously defended by Roman-Dutch jurists as Grotius, Vinnius and Van der Keessel, which rears its head. The requirement of acceptance implies that no rights are acquired by the third-party beneficiary and that the promise can be revoked as long as acceptance has not yet taken place (art 6:253 lid 2 *BW*). The Dutch Civil Code goes one step further. It states explicitly that after accepting the promise, the third-party beneficiary is considered to be a party to the contract (art 6:254 *BW*). In view of this provision it is doubtful whether contemporary Dutch law actually accepts the *stipulatio alteri* as a fully developed legal concept. The contract between promisor and stipulator seems to exist in no less and no more than an offer to the third party which the latter can accept or not. At any rate this version of the third-party contract deviates fundamentally from the German one.

54 See also *McCullogh v Fernwood Estate Ltd* 1920 AD 204 206.