THIRD-PARTY CONTRACTS IN ENGLISH AND CONTINENTAL LAW.*

English law relating to contracts for the benefit of third parties has been in an unsatisfactory position for a long time. Reform has been advocated by prominent legal writers, and more than seventeen years ago an amendment of the law by statute was recommended by the Law Revision Committee in its Sixth Interim Report. It is the aim of this article to consider first the present position of English law in this field, and then to deal with third-party contracts in two of the leading Continental legal systems, the French and German. Some of the Continental experience may be useful in considering future legislation here.

I. English Law.

1. *Contract as the basis of the third party's right.*

The early history of the English law of contract does not show any general disinclination of the courts to allow a third-party beneficiary to sue the promisor. With the gradual refinement of the doctrine of consideration, the courts were sometimes persuaded to deny a third-party beneficiary a right to sue on the ground that he was a "stranger" to the consideration.[1] On the other hand, special circumstances, such as close family relationship, were held to extend the benefit to the "stranger."[2] The law on the contractual rights of a third party under a contract concluded for his benefit did not become settled until 1861 when the case of *Tweddle v. Atkinson*[3] was decided. This well-known case dealt with an agreement under which the fathers of a newly married couple agreed with each other to pay certain sums to the husband who, it was expressly agreed, should have the right to sue on the promise. Dismissing the husband's action against his father-in-law's executors for breach of the agreement, the court gave as its reason that neither had the plaintiff given any consideration for the promise nor was there any privity of contract between the plaintiff and his father-in-law. *Tweddle v. Atkinson* settled the common law rule in denial of any contractual right to a party under a contract to which he is not a party. This rule received the

* A paper read at the Ninth Annual Conference of the Australian Universities Law Schools Association in August, 1954.

1 Bourne v. Mason, (1669) 1 Vent. 6, 86 E.R. 5.

2 Dutton v. Poole, (1678) 2 Lev. 210, 83 E.R. 523.

3 (1861) 1 B. & S. 393, 121 E.R. 762.

full support of the House of Lords in 1915 in the case of *Dunlop v. Selfridge*.[4] Here the plaintiff had sold tyres to *D.*, one of the terms of the sale being that *D.* would obtain an undertaking from any person buying tyres from him for resale that he would observe the plaintiff's list prices; *D.* having sold tyres to the defendant from whom he obtained such an undertaking, the court held that the plaintiff could not enforce the undertaking, not having been a party to the contract with the defendant nor having furnished consideration for the defendant's promise. In the often quoted words of Lord Haldane, "In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract."[5] Lord Haldane admitted that such a right may be conferred "by way of property", as under a trust, "but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."

The possibility of creating third-party rights by way of property, in particular by way of trust, will be dealt with separately below. With regard to the possibility of a right of action by the third party based on contract, the rule denying such a right can, since its sanction by the House of Lords, be abolished or amended only by legislation.

A question which was fully clarified only in such a recent case as *In re Schebsman*[6] is the effect of the rule in *Dunlop v. Selfridge* on the right of the third party: Does the denial of a right of action to the third party affect the validity of the contract in favour of the third party? As was pointed out in both the High Court and the Court of Appeal, there is no rule of English law invalidating third-party contracts. Until the promisor is released from his obligation by the promisee, or until there is a cancellation of the contract by agreement between promisor and promisee, the promisor is bound to carry out his promise in favour of the third party. What, then, are the remedies open to the promisee in case of the promisor's default? Can he bring an action for damages, and if so, can he recover substantial damages? The question was dealt with in *West v. Houghton*[7] where the promisee, although held entitled to damages, could recover nominal damages only; on the other hand, Uthwatt J. (as he then was) in *In re Schebsman* expressly reserved the question arising out of *West's Case* whether more than nominal damages could be obtained by the promisee.

4 [1915] A.C. 847.
5 *Ibid.*, at 853.
6 [1943] Ch. 366; [1944] Ch. 83.
7 (1879) L.R. 4 C.P.D. 197.

2. *The trust concept as the basis of the third party's right.*

English courts have taken a more favourable attitude to the third party in those cases where the promisee was held to be a trustee for the benefit of the third party. This equitable exception to the common law rule regarding *jus quaesitum tertio* was recognised long before the common law rule became firmly settled; the equitable rule is usually traced to the case of *Tomlinson v. Gill.*[8] Here the defendant had promised the administratrix of an estate that if she allowed him to join in the administration he would make good any deficiency in the assets to pay the debts. In a suit by a creditor on the promise, Lord Hardwicke ordered payment on the ground that the promise was for the benefit of the creditors, and the administratrix was a trustee for them.

In trying to define the limit of the equitable rule, mention should next be made of the case of *Gregory and Parker v. Williams.*[9] Here *P.*, being indebted to both *W.* and *G.*, assigned all his property to *W.* who promised *P.* to pay a certain sum owing by the latter to *G.* *W.* having obtained the property, but failing to implement his agreement, *G.* and *P.* joined in a suit to obtain specific performance; upon the principle set out in *Tomlinson's Case* this was decreed.

After the passing of the Judicature Act, the doctrine evolved by equity for safeguarding the rights of a third-party beneficiary received the full support of the Court of Appeal in the important case of *Lloyd's v. Harper.*[10] Here the committee of Lloyd's sued the guarantor of an underwriter who had defaulted on certain policies he had issued. The court rejected the argument that the plaintiff had suffered no injury but allowed Lloyd's to recover the full amount due to the policy holders. Lush L.J. went so far as to declare: ". . . I consider it to be an established rule of law that where a contract is made with *A.* for the benefit of *B.*, *A.* can sue on the contract for the benefit of *B.*, and recover all that *B.* could have recovered if the contract had been made with *B.* himself." On the facts the House of Lords reached a similar solution in *Les Affréteurs Réunis S.A. v. Leopold Walford Ltd.*[11] Here a broker had negotiated a charterparty which contained a clause providing for payment of commission by the owners to the brokers. Regarding the charterers as having entered into the bargain in the interest of the brokers and as their trustees, the House

[8] (1756) Amb. 330, 27 E.R. 221.
[9] (1817) 3 Mer. 582, 36 E.R. 224.
[10] (1880) 16 Ch. D. 290.
[11] [1919] A.C. 801.

of Lords held that the charterers, as trustees of the promise for the brokers, were entitled to enforce payment of commission to the brokers.

The subject matter of the trust in all these cases was the contractual promise made by the promisor to the promisee, a chose in action. It is worth while noting that in none of the above cases had the word "trust" been used by the parties. However, by recognition of the trust concept as the basis for the creation of third-party rights the courts had put themselves in a position where they could give recognition to such rights whenever they considered such a trust to exist. Had the courts followed a consistent line in recognizing the existence of a trust in third-party contracts, English law would have reached the position where third-party rights would generally be enforced, though in a roundabout way. However, what has made the law with regard to the recognition of third-party rights based on trust particularly unsatisfactory is the uncertainty as to the principles which will guide the courts in deciding whether or not such a trust exists. For example, in the Privy Council decision in *Vandepitte v. Preferred Accident Insurance,*[12] a promise by the defendant company to *B.* to hold insured against third-party claims those persons who used *B*'s. car with his permission was held not to confer any rights on *B*'s. daughter who was involved in an accident while driving *B*'s. car with his permission. This decision, which is hard to reconcile with *Lloyd's v. Harper,* was based on the reasoning that the intention to create a trust of the contractual promise must be "affirmatively" proved, and there had been no evidence that *B.* had any intention to create a beneficial interest for his daughter. The need for such affirmative proof was even more emphasised in *In re Schebsman;* in the words of du Parcq L.J., "the court ought not to be astute to discover indications of such an intention."[13] Denial of the creation of a trust here enabled the third parties—the widow and daughter of the promisee—to keep payments made under an agreement which otherwise would have been handed over to the promisee's trustee in bankruptcy.

However, in the cases quoted earlier, the courts did not insist on strict proof of intention to create a trust. As Uthwatt J. himself said in *In re Schebsman,*[14] "the cases, no doubt, are hard to reconcile, but, to my mind, the explanation of them is that different minds may reach differing conclusions on the question whether the circumstances sufficiently show an intention to create a trust." There is much persuasion in Professor Winfield's cynical comment, "when the courts wish to enable the beneficiary to sue they make the promisor a trustee,

12 [1933] A.C. 70.
13 [1944] Ch. 83, at 104.
14 [1943] Ch. 366, at 370.

and when they wish to prevent him from doing so they fall back on the shibboleth of privity of contract."[15] The only area of certainty appears to be where affirmative proof exists as to the creation of an express trust. Beyond that area the position is today as uncertain, and therefore as unsatisfactory, as it was in 1937 when the Law Revision Committee said, after a review of the case law in this field, "We feel that this summary of cases—and many might be added to those we have cited—will at least have made one point clear, and that is that the law on this point is uncertain and confused. For the ordinary lawyer it is difficult to determine when a contract right 'may be conferred by way of property', in Viscount Haldane's phrase, and when it may not."[16]

Admittedly there may be advantages in certain cases not to hold that the third party has acquired a *jus quaesitum tertio* by way of trust. *In re Schebsman* was a case in point. *In re Miller's Agreement*[17] was another; here property would have become subject to estate duty and succession duty if the third parties were held to have acquired a beneficial interest. However, such cases are exceptional, and in the great majority of cases it would be in the interest of the third party to acquire a directly enforceable right.

There are, of course, certain disadvantages attaching to the conferring of third-party rights by way of trust. First there is the procedural necessity for the third party to join the promisee-trustee either as plaintiff or as defendant, for according to the principles of equity the contract is always enforced in the name of the trustee. Then there is the disadvantage that once the promisee is considered to hold the benefit of the contractual promise in trust for the third party, the promisor and the promisee cannot cancel the contract, however desirable it may be for them to do so. It is here that the use of the trust concept for the creation of third-party rights often gives that party more than the parties to the contract intend.

3. *Statutory basis of the third party's right.*

In a number of special cases where the legislature felt it imperative, third-party rights have now been created by special statutory provision. This applies to life policies for the benefit of the insured person's spouse and children, to workmen's compensation, and to motor car insurance. A statutory provision which has been suggested as the basis for giving a third party a general right of action is sec. 56 of the (English) Law of Property Act, 1925, and its Australian counter-

15 PROVINCE OF THE LAW OF TORT 107.
16 *Sixth Interim Report* 28.
17 [1947] Ch. 615.

parts (for example, sec. 56 of the Property Law Act (Victoria), sec. 36 of the Conveyancing Act, 1919-1953 (New South Wales), etc.). Under this section "a person may take an immediate or other interest in land or other property, ... although he may not be named as a party to the conveyance or other instrument." Despite the wide language of the section, the courts have given it only a limited effect; they were guided in their attitude by the history of the section. Its predecessor, sec. 5 of the Real Property Act, 1845 (8 & 9 Vict., c.106), which was in similar though more restricted wording, was enacted to enable a person to sue who was not named as a party to a deed, but with whom a covenant in the deed purported to have been made. Sec. 56 (1) of the Law of Property Act, 1925 is in somewhat wider terms than sec. 5 of the 1845 Act, for it added the words "or other property" and "or agreements." Does this enable any third party for whose benefit an agreement regarding property has been entered into to bring an action? This view was rejected in *White v. Bijou Mansions Ltd.*[18] and in a number of other cases which were reviewed by Wynn-Parry J. in *In re Miller's Agreement.* A somewhat extended application was given to sec. 56 by Danckwerts J. in the case of *Stromdale & Ball Ltd. v. Burden,*[19] where the covenant which was enforced was not strictly made "with" the plaintiffs, but it was a covenant that on demand by the plaintiffs the defendant would assign her leasehold interest to the plaintiffs. However, there is no doubt that the English courts would not take up the suggestion of using sec. 56 to enable third-party beneficiaries generally to bring an action on an agreement made for their benefit. It was left to Denning L.J. in the recent case of *Drive Yourself Hire Co. (London) Ltd. v. Strutt*[20] to state the view that the addition of the words "or other property" and "or agreement" in sec. 56 had changed the whole law regarding third-party contracts: "I can think of no words more apt to do away with the rule in *Tweddle v. Atkinson,* leaving the courts free, in cases respecting property, to go back to the old common law, whereby a third party can sue on a contract made expressly for his benefit."

Although in the writer's view the granting of a statutory right of action to a third party is highly desirable, sec. 56 is not the appropriate vehicle to bring about this change. If sec. 56 had the alleged revolutionizing effect a new anomaly would arise in the field of third-party contracts. There would be one law for instruments with regard to property, and another law for other contracts.

18 [1937] Ch. 610; [1938] Ch. 351.
19 [1952] Ch. 223.
20 [1953] 3 Weekly L.R. 1111, at 1118 *et seq.*

4. *The need for law reform?*

In view of the present state of the law the need for reform of the law relating to third-party contracts appears as urgent today as it was in 1937 when the Law Revision Committee made its recommendations. The Committee advocated the giving of a contractual right to the third party, so that it would no longer be necessary to resort to the trust concept with its concomitant disadvantages as the basis of that right. At the same time the Committee placed limitations on the third party's right. In the words of the Committee's report, the unanimous recommendation was that "where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise against the third party any defence that would have been valid against the promisee." The Committee further recommended that "the rights of the third party shall be subject to cancellation of the contract by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct." By referring to "express terms" of the contract, the Committee intended to exclude third-party rights arising merely by implying a term into a contract. The provision regarding the parties' right of cancellation was to remedy one of the defects inherent in the use of the trust concept for third-party rights. Legislation along the lines of the Committee's Report would place the law regarding third-party rights on a more certain and direct basis.

II. Continental Law.

Whereas Roman law generally did not enable parties to a contract to create a right for the benefit of a third party, modern continental law has taken a more liberal view. Not only do the Codes recognize the principle that a third party may acquire a directly enforceable right under a contract, but the courts have given the relevant code provisions an increasingly generous interpretation in favour of third-party rights in a number of typical fact situations. The change in the attitude of the legislator of 1900 (German Civil Code) compared with that of 1804 (French Civil Code) is significant.

1. *French law.*

With even more than its customary brevity, the Code Civil deals with contracts for the benefit of a third party in a single article of the Code, Art. 1121. In derogation of the general principle of the Code (Art. 1119) that contracts create rights and duties only for the

parties, Art. 1121 enables a person to make a "stipulation pour autrui" (a stipulation for the benefit of a third party) "if that is the condition of a stipulation which he makes for himself or of a gift which he makes to another person." Particularly from the 1860's on, French courts gave Art. 1121, which has been described as "unnecessarily restrictive", a most extensive interpretation in favour of third-party rights by implying the "condition" of Art. 1121 in a number of cases. As a leading commentator says, "Nos tribunaux se sont montrés, en toute cette matière, animés d'un esprit très large et trés progressif. La stipulation pour autrui est devenue un instrument juridique de premier ordre; elle a servi déjà ou servira encore à faire fonctionner des institutions ou a réaliser des opérations qui seraient impossibles ou, tout au moins, plus difficiles avec tous les autres principes du droit."[21]

The stipulation for a third party proved of the greatest importance in the field of insurance law, and most of the specific rules dealing with the rights of the three parties concerned in the *stipulation pour autrui* were developed by the French courts in connection with cases involving insurance for the benefit of a third party, a field now regulated by the Insurance Law of 1930. Typical cases in which the courts have held there was a valid stipulation for the benefit of a third party are, for example,

A life insurance for the benefit of the widow and children of the insured person;

A policy of marine insurance for the benefit of the owner at the time of the loss;

A stipulation in a contract for the sale of a business that the buyer will continue to employ certain members of the staff;[22]

In cases of contracts for the transport of a person by land or sea, the courts have implied a *stipulation pour autrui* in favour of the dependants of the person transported, to the extent that in case of that person's death in a transport

[21] 2 RIPERT-BOULANGER, TRAITE ELEMENTAIRE DE DROIT CIVIL DE PLANIOL (4th ed. 1952) 224. Art. 1119: On ne peut, en général, s'engager, ni stipuler en son propre nom, que pour soi-même. Art. 1121: On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter.

[22] AMOS & WALTON, INTRODUCTION TO FRENCH LAW 172-173.

disaster the dependants were held entitled to bring an action for damages against the transport company.[23]

The nature of the third party's right is not explained in the Code, and various theories with regard to such right have been advanced by jurists. However, a leading decision of the Cour de Cassation in 1884 dealing with the right of a third party under a life insurance contract laid it down that such a right is a "droit propre", a right based directly on the stipulation; in particular, the Court held, such a right had at no time passed through the promisee's estate.[24]

French courts have also held, in harmony with the view taken by textbook writers, that the third party acquires the right immediately on conclusion of the contract. No acceptance or ratification on his part is required. However, acceptance or ratification is of considerable legal significance as it makes the third party's right secure against any revocation. According to the express provision of the Code—Art. 1121, par. 2—the right given to the third party may be revoked by the stipulator at any time before the third party "has declared his intention of taking advantage of the benefit." On the other hand, the courts have interpreted the requirements for such a declaration in a lenient way. No form is required for the declaration; it may be made to the stipulator (promisee) or the promisor, and it may be made even after the death or bankruptcy of the stipulator. This has proved of particular importance in connection with contracts of life insurance for the benefit of third parties.

The right to revoke the third party's right prior to the latter's declaration of acceptance has been held to be a "personal right" of the stipulator.[25] It may not be exercised by the stipulator's creditors in case of his becoming bankrupt; however, in case of his death, his heirs may exercise the right. It has been held that usually the stipulator does not require the promisor's consent to revoke the third party's right unless this has been agreed upon. However, such an agreement may be implied, e.g., in cases where the promisor has a personal interest in the execution of the promise.

French law allows the promisor the same defences against the third party as he would have against the stipulator. In case of a defence based on non-execution of the stipulator's obligations, the

[23] 2 RIPERT-BOULANGER, *op. cit.* 225. With regard to the rights of spouse and children, see 2 COLIN-CAPITANT-DE LA MORANDIERE, COURS ELEMENTAIRE DE DROIT CIVIL FRANCAIS (10th ed. 1948) 155, and [1933] Dalloz, *Recueil Périodique* I. 137-140.

[24] This is now specifically laid down in Art. 67 of the Insurance Law of 1930.

[25] 2 RIPERT-BOULANGER, *op. cit.* 230-231.

third party may obtain judgment by executing the stipulator's obligations towards the promisor.[26]

Who can sue for performance of the *stipulation pour autrui?* Generally, once the third party has made his declaration of acceptance it is only he who can bring an action. However, it has been held that the stipulator may sue if he has some special interest of his own in performance. Where the action is for damages for non-performance, the stipulator can claim only the damage caused to him; the damage caused to the third party would have to be sued on by the latter. On the other hand, if the third party's right is effectively revoked, the stipulator is generally held entitled to demand performance of the promise for his own personal benefit. It has been suggested that such a demand may be defeated if it can be shown that the promisor had made the promise only in consideration of the third party, or that performance to the stipulator instead of to the third party makes his commitment more arduous, or that it alters the nature of the position created by the stipulation.[27]

2. *German law.*

Even before the introduction of the German Civil Code the principle that a third party acquired a direct right of action whenever the parties to a contract so intended was recognised fairly generally.[28] A point which was not clarified until the introduction of the Civil Code in 1900 was whether a special affirmative act, such as an "acceptance", "adoption", or "ratification", was required to vest the right in the third party. The Code not only decided this point but gave, in Arts. 328-335, a far more detailed regulation of the field of contracts for the benefit of third parties than the French Code had done 100 years before.

26 *Ibid.*, 236.

27 *Ibid.*, 234; 2 COLIN-CAPITANT-DE LA MORANDIERE, *op. cit.* 161. A recent codification based on the French Civil Code — the Italian Civil Code of 1938 — may be quoted for an additional provision of interest. According to Art. 1411, par. 3, of that Code, "In case of revocation of the stipulation or refusal by the third party to take advantage thereof, performance is to be made for the benefit of the stipulator, unless this is contrary to the intention of the parties or to the nature of the contract" (In caso di revoca della stipulazione o di rifiuto del terzo di profittarne, la prestazione rimane a beneficio dello stipulante, salvo che diversamente risulti dalla volontà delle parti o dalla natura del contratto). This Code also lays down in far more general terms than the French Code that a stipulation for a third party may be made "whenever the stipulator has an interest therein" (E valida la stipulazione a favore di un terzo, qualora lo stipulante vi abbia interesse).

28 2 ENNECCERUS-KIPP-WOLFF, LEHRBUCH DES BUERGERLICHEN RECHTS (13th ed. 1950) 137.

Art. 328 lays down the general principle that a third party acquires a "direct right" whenever a stipulation to that effect is contained in the contract. Failing such express stipulation, the Code says that "it is to be gathered from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right; whether the right is to accrue immediately, or only under certain conditions; and whether any right is reserved to the parties to the contract of revoking or modifying the third party's right without his consent." The Code has thus left it wholly to the courts to determine whether in the circumstances of a case it is to be assumed that the parties intended to give the third party a direct right, or whether such a right is limited in any way. The courts have held that whenever performance is agreed on in the sole interest of the third party, the third party is presumed to have acquired a direct right without condition or limitation. Generally, the tendency of the German courts has been, especially during the last thirty years, to base their decisions, failing any clearly established intention of the parties, on the "purpose of the contract" as interpreted by the court. This has led generally to the recognition of direct third-party rights in a number of important types of contracts. Cases decided by the Reichsgericht in favour of direct third-party rights include the following:

A father bought railway tickets for himself and members of his family who were travelling with him; the latter were held to be third parties with a direct right of action against the railway administration.[29]

Members of the family of the tenant of a flat were held in a number of decisions to be third parties with a direct right of action against the landlord, e.g., for damage suffered as the result of negligent lack of repair of the staircase in the block of flats.[30]

A contract between the owner of a block of flats and the local municipality for the supply of water to the premises has been held to be a contract for the benefit of the tenants of the flats, giving them a direct right of action against the municipality.[31]

A contract between a father and a doctor for the medical treatment of his child, and a contract between a father

29 Entscheidungen des Rechtsgerichts in Zivilsachen (hereafter quoted as RGZ), Vol. 87, 64.

30 RGZ Vol. 91, 24; RGZ Vol. 102, 232.

31 Reichsgericht, in Juristische Wochenschrift (1937) 737.

and the headmaster of a school for the child's education, were held to be contracts for the benefit of the child.[32]

In a contract of employment under the terms of which an annuity was promised to the employee's next-of-kin in the event of the employee's death, the next-of-kin were held to be third parties and were thus able to sue for the annuity.[33]

In a case in which a prospective father-in-law promised his prospective son-in-law that he would pay his daughter the sum of 100,000 marks on the day after the marriage this was held to be a promise in favour of the daughter which she was then able to enforce.[34]

On the other hand, there have been conflicting decisions as to whether the opening of a bank account in the name of a third person creates a direct right in that person. The Reichsgericht has held that where a bank book is issued for the account, there is a presumption in favour of a third-party right only if the third party holds the book.[35] In cases of life insurance and annuity contracts the Code lays down a presumption in favour of direct third-party rights whenever "the payment of the insurance money or the annuity is stipulated to be made to a third person" (Art. 330). According to the Law on Insurance Contracts (Art. 167), these rights remain unaffected by a renunciation of the insured party's inheritance by the third party; insurance moneys and annuities do not form part of the estate of the insured person in such cases.

The third party acquires—provided that this was, according to Art. 328 of the Code, the actual or presumed intention of the parties—his rights direct from the contract. No act, nor even knowledge of the contract, is required on his part to vest the right in him.[36] However, he may renounce the acquisition of the right by making a declaration to that effect to the promisor, and in such event the right is considered as never having vested in the third party (Art. 333). Any revocation of the third party's right can take effect only if a power of revocation has been reserved at the time of the making of the contract. According to Art. 332, a promisee who has reserved to him-

32 RGZ Vol. 152, 177; RGZ Vol. 127, 223.

33 Reichsgericht, in Warneyer (1923-24), No. 170.

34 RGZ Vol. 67, 206.

35 The references to decisions by the Reichsgericht are based on 2 ENNECCERUS-KIPP-WOLFF, *op. cit.* 141-142, and 1 MANUAL OF GERMAN LAW (H.M.S.O. 1950) 73.

36 2 ENNECCERUS-KIPP-WOLFF, *op. cit.* 145.

self the right to substitute another third party for the one named in the contract may exercise such right by act inter vivos or by will. The Code also contains a special provision (Art. 334) that defences available to the promisor against the promisee are available to him also against the third party. A final provision—Art. 335—deals with the right of action of the promisee. According to this provision, the promisee is entitled, unless a contrary intention of the parties to the contract may be inferred, to sue for performance in favour of the third party. This right is quite independent of the third party's right to sue the promisor himself.

In conclusion, it may be said that from a comparative viewpoint the most interesting features of the French and German law regarding third-party rights appear to be:

(a) the extent to which French jurists and courts (la doctrine and la jurisprudence) have overcome the restrictive provisions of the Civil Code;

(b) the avowed tendency of both French and German courts in favour of protecting the third party by granting that party direct rights in a number of typical fact situations.

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