ARTICLE 1029 C.C.: STIPULATION FOR A THIRD PARTY NOTES ON THE JURISPRUDENCE OF QUEBEC

Colin K. Irving*

An eminent English barrister has defined a "stipulation for a third party" as:

> . . . an agreement entered into between two persons, whereby one of them (the promisor) undertakes an obligation in favour of a third party, for the fulfilment of which the promisor binds himself towards the other (the stipulator or promisee), such stipulator or promisee contracting in his own name, and not in the name nor as the agent or trustee of the third party, provided that it is the intention of the contracting parties (*i.e.*, stipulator and promisor) that the third party shall acquire an independent right enforceable by him against the promisor, which right flows directly from the agreement entered into between the promisor and the stipulator.[1]

The contract which the author defines, however, is one which is unknown to the common law, where the rule was stated by Lord Haldane speaking in the House of Lords in *Dunlop Pneumatic Tyre Co. v. Selfridge Co.*[2]

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract may sue on it.

It is true that the rule of privity of contract in English common law is applied with certain reservations, notably where one of the parties to a contract acts as agent for an undisclosed principal, but the general rule as stated by Lord Haldane still applies.[3]

The common law rule has been applied in many Canadian cases, of which the most familiar to Quebec lawyers is probably the case of *Vandepitte v. Preferred Accident Insurance Company*[4], a British Columbia case which was eventually decided in appeal by the Judicial Committee of the Privy Council. An excellent and illustrative summary of the *Vandepitte* case was given by Locke, J. of the Supreme Court of Canada in the case of *Northern Assurance Co. Ltd. v. Brown*:[5]

> While the decision of the Judicial Committee in *Vandepitte v. Preferred Accident Insurance* ([1933] A.C. 70) does not affect the question of limitation, the history of that action may be of some assistance in construing the section under consideration. In British Columbia, where statutory conditions in the same terms as those adopted in Ontario in 1922 had been made part of every such insurance contract in the same year by the *Automobile Insurance Policy Act* (c. 35), when the *Insurance Act* of that province was repealed and re-enacted by c. 20 of the statutes of 1925 it contained as s. 24 a provision that where a person incurs liability for injury or damage to the person or property of another and is insured against such liability and fails to satisfy a judgment awarding damages against him, the person entitled to the damages might recover by action against the insurer the amount of the judgment up to the face value

*Of the Bar of Montreal.

[1]Gilbert W. F. Dodd, *Stipulations for a Third Party* (1948), at p. xxii.

[2][1915] A.C. 847, at 853.

[3]Cheshire and Fifoot, *The Law of Contract* (5th ed., 1960).

[4][1933] A.C. 70.

[5][1956] S.C.R. 658, at 665.

of the policy but subject to the same equities as the insurer would have if the judgment had been satisfied.

It was upon this section that the cause of action asserted in *Vandepitte's Case* was based. One Berry was insured against liability in respect of the operation of his automobile by a policy in the form then currently in use in British Columbia which, by its terms, agreed to extend the indemnity to any person driving the car with his permission. Berry's daughter was, by his leave, driving the car when Vandepitte was injured and, when the latter recovered judgment against her and was unable to realize it, the action was brought against the insuring company. Gregory J., who tried the case, held the plaintiff entitled to recover ((1929) 42 B.C.R. 255) and this decision was upheld in the Court of Appeal ((1930) 43 B.C.R. 161). The defendant's appeal to this Court was allowed ([1932] S.C.R. 22) and the appeal taken to the Judicial Committee was dismissed ([1933] A.C. 70).

The action failed on the ground that Jean Berry, the daughter of the insured named in the policy, was not insured against the liability within the meaning of s. 24, she having no enforceable right against the insuring company, there being no privity of contract between them.

Thus the *Vandepitte* case saw a perfect application of the common law rule, stated by Lord Haldane, that

only a person who is a party to a contract may sue on it.[6]

The law of the Province of Quebec on the same point is set out in Articles 1028 and 1029 of the Civil Code of the Province:

1028. A person cannot, by a contract in his own name, bind any one but himself and his heirs and legal representatives; but he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated.

1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it.

It is immediately apparent that the stipulation for a third party rejected by the common law is expressly authorized by Article 1029 C.C.

It would in fact be difficult to find a more striking example of the different approaches taken on occasion by the civil law and common law systems. Apart altogether from the directly opposite conclusions to which the two systems lead, Article 1029, as we shall see, illustrates as well as any other article in the Code, with the possible exception of Article 1053, the flexibility and usefulness which a codified statement of general principle can have.

Contracts which contain stipulations of the type provided for by Article 1029 of the Code are familiarly known as "1029 contracts" or "1029 stipulations" and they will be so referred to in the next few pages.

It is important to note at the outset that, as was pointed out by Rinfret, J. giving the judgment of the Supreme Court of Canada in the leading case of *Hallé v. The Canadian Indemnity Co.*[7]:

Article 1029 of the Civil Code is of general application in the law of contracts in Quebec. . .

Thus, while for reasons which are obvious, a great many of the reported cases concerning Article 1029 have to do with various types of insurance,

[6]*Dunlop v. Selfridge* [1915] A.C. 847, at 853.

[7][1937] S.C.R. 368, at 377.

nevertheless, a stipulation for the benefit of a third party may be a condition of any type of contract.

The classic example of a contract containing a 1029 stipulation is a life insurance contract with a named beneficiary, and it is in this context that a great deal of the Quebec jurisprudence has developed.[8] In a life insurance policy the person whose life is insured, as a condition of the contract he makes with the insurance company, stipulates for the benefit of a third party, the named beneficiary, who is not a party to the contract.[9]

It may be of interest to note that the 1029 stipulation made by a party to a contract in favour of a third party can be a stipulation establishing in favour of the third party, the same rights as the stipulator establishes on his own behalf.

Thus, in the case of *Marmette et al v. Commercial Investment of Quebec Inc. et al*,[10] Tremblay, C. J. described a stipulation contained in a particular contract as follows:

> La convention du 11 juin 1955 contient aussi une stipulation au profit de l'intervenant. Celui-ci est un tiers, mais cette stipulation est valide parce qu'elle est la condition d'un contrat que le père Paré fait pour lui-même (C.C., art. 1029). Elle deviendra irrévocable de la part du père Paré, le stipulant, quand le tiers, l'intervenant, aura signifié légalement sa volonté d'en profiter (C.C., art. 1029). A compter de cette acceptation, Côté se trouvera aussi le débiteur d'une obligation de payer à l'intervenant la même somme qu'il est tenu conditionnellement de payer au père Paré. Chacun des deux, l'intervenant et le père Paré, aura le droit, si la condition s'accomplit, d'exiger l'exécution de l'obligation en entier et d'en donner quittance au débiteur Côté. Nous serons donc en présence de deux créanciers solidaires (C.C., art. 1100).

It is proposed in this article to consider chiefly the nature of the rights acquired by the third party and certain of the consequences which result from a stipulation under Article 1029, but as a preliminary step one or two ancillary questions with which the courts have been concerned may be considered summarily.[11]

The Identification of the Beneficiary

It has already been suggested that a life insurance contract payable to a named beneficiary is the classic example of the 1029 contract, but the tremendous growth in recent years of group and other types of insurance makes it important to establish to what extent the third party must be identified. Where, for example, insurance against liability arising out of the operation of an automobile is extended to cover parties other than the owner, the eventual beneficiary, *i.e.* a third-party driver, is not known or named in the policy at the time

[8]See for example: *Baron v. Lemieux* (1908) 17 K.B. 177.

[9]In discussing Article 1029, the courts and authors have generally used the terms "stipulator", "promisor" and "beneficiary" to refer to the three persons involved in a 1029 contract. Thus, in the life insurance contract just mentioned, the person whose life was insured would be the "stipulator", the insurance company would be the "promisor", and the beneficiary would be the "beneficiary".

[10][1962] Q.B. 95, at 98.

[11]It should be pointed out that no attempt will be made to consider or evaluate the theoretical arguments expressed by the various authors, except insofar as the courts have relied on them.

the insurance contract is made. Despite earlier statements tending to the contrary view,[12] the validity of such a contract is clearly upheld by the decision of the Supreme Court of Canada in *Hallé v. Canadian Indemnity Company*.[13] Since the *Hallé* case is the leading case on Article 1029 and will be referred to frequently, the facts presented to the Court should be kept in mind.

In the *Hallé* case the appellant was Joseph Hallé. The appellant's brother, Rolland Hallé, who owned an automobile, was insured against liability to third persons by The Canadian Indemnity Co. under a policy containing an *omnibus* clause which extended liability coverage to anyone driving Rolland Hallé's car with the latter's consent. Insofar as it is material, the clause read as follows:

> . . . l'assureur s'engage . . .
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> à indemniser, en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement ainsi que toute personne, société ou corporation légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré, ou si l'assuré est un particulier, que telle permission provienne d'un membre adulte de sa maison autre qu'un chauffeur ou serviteur domestique. . .

Joseph Hallé was involved in an accident while driving his brother's car, and an action was taken against him by one of his passengers who had been injured. The insurance company refused to defend the action on his behalf on the ground, *inter alia*, that the *omnibus* clause was invalid and that Roland Hallé had no insurable interest in his brother's liability. Joseph Hallé then instituted an action in warranty against the insurance company which eventually came before the Supreme Court. The argument that Joseph Hallé was not expressly named in the policy, and consequently was not insured by it, was rejected by Rinfret, J. who gave the unanimous judgment of the Supreme Court of Canada:[14]

> He was not therein mentioned by name; but, according to the law of Quebec, as expressed in French doctrine and jurisprudence, it is not necessary for its validity that the stipulation for the benefit of third parties should be made in words definitely ascertaining these persons; it is sufficient if they are ascertainable on the day when the stipulation takes effect in their favour.

The same reasoning would, it seems clear, apply to all 1029 contracts, and to all the various forms of insurance against future and uncertain events where the benefit is stipulated in favour of persons unknown but ascertainable at a future date.[15]

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[12]See for example *Fry v. O'Dell* (1897) 12 S.C. 263 where Sir L. N. Casault, C.J., giving the judgment of the Court of Review, said at p. 266:

> Mais il faut pour que la stipulation puisse être acceptée, qu'elle soit une indication de paiement à une personne déterminée d'une dette spécifiée.

[13][1937] S.C.R. 368.

[14][1937] S.C.R. 368, at 373.

[15]A good illustration of how useful some of the general principles so concisely set out in the Civil Code can be is afforded by an examination of the Insurance Acts of the common law provinces where, in the absence of any equivalent to Art. 1029 C.C., extensive legislation has been necessary.

The beneficiary must however be ascertainable otherwise than by the mere will of the parties. In *Bilodeau v. Conseil des Métiers de la Construction*,[16] a stipulation was contained in a building contract between Bilodeau and a certain Fabrique that Bilodeau would employ "des ouvriers des unions catholiquement syndiqués autant que possible." Certain workmen, members of Catholic syndicates, demanded jobs from Bilodeau. When they were not hired, they transferred their rights to the Conseil des Métiers de la Construction, which sued, claiming that the workmen were entitled to benefit from the 1029 stipulation made in the building contract. The Court of Appeal held that while the Fabrique could stipulate for the benefit of third persons, the stipulation as made was unenforceable since there was no way in which the persons to be benefitted could ever be ascertained. At p. 429, Mr. Justice Tellier held the stipulation to be of no effect:

> . . . à cause de son indétermination et de son indéterminabilité ou, si l'on veut, parce que sa détermination dépend de la volonté de la défenderesse. . .

Commenting on this case in a later decision of the same Court,[17] Mr. Justice Bond pointed out, however, that Tellier, J. had recognized the validity of a 1029 stipulation where the beneficiary was ascertainable:

> . . . the observations of Sir Mathias Teller C.J. (as he has since become) point clearly to the conclusion that where such a contract indicates the persons to be benefitted and they can be ascertained, that is to say, they are no longer indeterminate, then the clause is to be given its full effect. . .[18]

Thus, while a 1029 stipulation in favour of persons who can never be identified is of no effect, a stipulation in which the beneficiary will only be ascertained on the day when the stipulation takes effect is valid.

The Effect of Acceptance by the Beneficiary

It would seem on reading Article 1029 that the third party's rights are derived exclusively from the contract between the stipulator and the promisor and the acceptance of the stipulation has only the effect of making the stipulation irrevocable. In the *Hallé* case, Joseph Hallé had not signified his assent to the stipulation until after the accident. This was found to be of no importance.

> No difficulty lies in the fact that up to the moment of the accident Joseph Hallé had not yet signified his assent to the stipulation made in his favour by Rolland Hallé. His assent was not necessary to bind the company. It was sufficient if he manifested his intention to avail himself of the stipulation as soon as the event happened which made the stipulation effective in his favour. The notice of the accident given by him to the insurance company was already an indication to the latter that Joseph Hallé was availing himself of the protection afforded by the policy. In his action in warranty against the company, he expressly declared that intention.

[16](1929) 46 K.B. 422.

[17]*Dufresne Construction Co. Ltd. v. Dion* (1934) 57 K.B. 133, at 134.

[18]The rule seems identical in principle to that applied by the courts in contracts where the consideration is undetermined at the time of contracting. If, when the time of execution of the contract arrives, the consideration can be ascertained otherwise than by the mere will of the parties, the contract is enforceable. Otherwise it is not. A recent and authoritative statement of the rule is to be found in *Lord v. Guimond* [1957] S.C.R. 79.

It will be noticed that, under Article 1029 *CC the only effect of the assent of the third person is to make the stipulation irrevocable by the person who made it.*[19]

A later passage in the same judgment, however, suggests that the effect of acceptance goes somewhat further.[20]

> The obligation so undertaken by the assurance company creates an independent right accruing to the third persons as soon as they have manifested their intention to avail themselves of it.

The notion that the independent right against the promisor *accrues* to the third party as soon as he manifested his intention to accept is somewhat difficult to reconcile with the proposition that the "only effect of the assent of the third person is to make the stipulation irrevocable."

There are two well-defined schools of thought among the French authors who have written on the subject, one holding that the acceptance by the third party simply confirms a right already acquired, and the other maintaining that the independent right arises from the acceptance. Both are represented in the reported cases.

Mr. Justice Carroll, in his notes of judgment in the case of *Gagnon v. Gagnon*,[21] stated his support of the first school. In the course of an interesting discussion of both theories he says:

> Le droit du tiers nait du contrat intervenu entre le stipulant et le promettant et les effets du contrat sont les mêmes que si le tiers fut intervenu directement dans le contrat. Le tiers a un droit direct et personnel qui entre immédiatement dans sa succession. . .
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> Etant d'opinion que le bénéficiaire a un droit acquis au moment de la passation de l'acte et que la manifestation d'en profiter ne crée pas le droit mais le conserve. . .

Again in *Gignac v. Siscoe Metals Ltd.*, Mr. Justice Barclay said:

> But in all such cases the acceptance does not complete the contract; it only prevents the revocation of an already existing contract. The acceptance is confirmatory, not acquisitive.[22]

Although Mr. Justice St. Germain concurred with Barclay, J. as to the disposition of the appeal in the case of *Gignac v. Siscoe Metals Ltd.*, he took a completely opposite view as to the effect of acceptance under Article 1029. Mr. Justice St. Germain was of the opinion that:

> Le demandeur, qui n'est pas partie au contrat passé entre le syndic et la compagnie défenderesse n'a établi entre lui et la compagnie un lien de droit que par l'acceptation de la délégation des obligations de ladite succession assumées par la compagnie défenderesse. Jusqu'à l'acceptation de cette délégation par le demandeur il n'y avait aucun lien de droit entre lui et la compagnie et c'est cette acceptation qui a créé, entre lui et la défenderesse, le lien de droit, c'est à dire le contrat qui ferait la base de la présente action.[23]

The conclusion reached by Carroll, J. and Barclay, J. is in conformity with earlier decisions in which it was held that the beneficiary's heirs could accept after his death. In *Gratton v. Lemay*, it was held in part that:

> Les héritiers d'un vendeur en faveur duquel il y a plusieurs indications successives de paiement non acceptées du vivant du créancier, mais non revoquées, peuvent les accepter. . .[24]

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[19]Rinfret, J., [1937] S.C.R. 368, at p. 377. (Emphasis supplied).

[20]at p. 381.

[21](1919) 30 K.B. 503, at p. 508-510.

[22](1944) K.B. 192, at 194.

[23](1944) K.B. 192, at p. 195.

[24](1917) 51 S.C. 493 (Ct. of Review).

and the Superior Court came to the same conclusion in the earlier decision in *Robitaille v. Trudel.*[25]

It is clearly implied in these decisions that the right of the third party does not arise from his acceptance since, if this were so, and the third party were to die without having accepted, there would be no right in existence transmissible to the heirs.

In any event, despite some uncertainty as to when the right accrues to the third party, there can be no doubt since the *Hallé* decision that the right is created by the original contract, and not by the acceptance.

Nor since the *Hallé* decision is there any doubt that the institution of an action by the third party is a sufficient signification of his assent. In fact no particular form of assent is required. In the *Gagnon*[26] case, where the contract was in authentic form, it was argued that the acceptance should be in the same form. Carroll, J.[27] did not agree. He said:

> Cette stipulation au profit d'un tiers peut être faite dans tout acte à titre gratuit ou onéreux, dans une vente par exemple, et comme de sa nature cette stipulation ne participe pas de la donation, l'acceptation peut avoir lieu par acte authentique ou sous seing privé. Elle peut même avoir lieu verbalement ou tacitement, pourvu que la preuve que l'on en fait soit conforme aux principes ordinaires. Ce point, je crois, ne souffre aucune difficulté. Les auteurs français sont unanimes en interprétant l'art. 1121 du C.N., dont notre article 1029 n'est que la copie. Il y a une variante cependant entre les deux articles: celui du C.N. emploie les expressions "a déclaré vouloir en profiter," tandis que notre article édicte "a signifié sa volonté d'en profiter," Mais nos codificateurs ont déclaré que ces variantes ne changeaient pas l'interprétation que l'on devait donner à l'article correspondant du C.N.

The same opinion is expressed in *Fry v. O'Dell*[28]:

> Tous les commentateurs du C.N. s'accordent à enseigner que cette acceptation résulte d'une simple manifestation de consentement; elle peut résulter de faits aussi bien que de paroles; elle peut être tacite.

The Right of the Third Party

We have already seen that the third party in a 1029 contract acquires a right which he can enforce in his own name. The precise nature of this right and the position of the three interested parties is of vital importance and has far reaching consequences.

Trudel[29] describes the right as follows:

> . . . Ainsi le droit du tiers lui sera personnel et direct; l'on ne saurait alors présupposer qu'il vient du patrimoine du stipulant ou de celui du promettant. Le tiers ne bénéficie pas du transport d'un droit acquis préalablement par l'un ou par l'autre. Le tiers acquiert un droit nouveau, créé à son intention par le résultat d'un concours des volontés contractantes. En somme le stipulant et le contractant, sans céder aucun de leurs droits personnels acquis, créent véritablement un objet nouveau qui sera le fondement du droit offert au tiers.

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[25](1899) 16 S.C. 39.

[26](1919) 30 K.B. 503.

[27](1919) 30 K.B. 503, at 506.

[28](1897) 12 S.C. 263, at 266.

[29]*Traité de droit civil du Québec*, vol. 7, at p. 399.

The proposition that the right of the beneficiary is deemed not to come from the patrimony of either the stipulator or the promisor seems to be fully established by the jurisprudence, and it is a question of sufficient importance to warrant a review of the leading cases.

In *Baron v. Lemieux*[30] the following passage, taken from Defrénois' *Contrat d'Assurance sur la vie*, appears:

> Mais une fois que la stipulation a été acceptée par le bénéficiaire, elle devient irrévocable. L'assuré ne peut plus disposer du bénéfice, et le montant d'assurance est définitivement acquis au bénéficiaire. Cette acceptation rétroagit au jour même du contrat et, par conséquent, le bénéfice est considéré comme n'ayant jamais fait partie du patrimoine de l'assuré.

In *Gagnon v. Gagnon*, Carroll, J. described the third party's position as follows:

> Le droit du tiers nait du contrat intervenu entre le stipulant et le promettant et les effets du contrat sont les mêmes que si le tiers fut intervenu directement dans le contrat. Le tiers a un droit direct et personnel qui entre immédiatement dans sa succession; le droit romain interprétait la stipulation pour autrui et donnait au tiers ce qu'on appelait une action utile pour faire valoir sa créance.[31]

Even those who hold the view that the third party's right stems from his acceptance appear to agree that the acceptance is retroactive to the date of the contract, and that in consequence the right is deemed to have been directly acquired by the beneficiary as of the date of the contract. In *Borris v. Sun Life Insurance*, Francoeur, J. found that:

> Dès cette acceptation, le bénéfice ne fait plus partie du patrimoine de l'assuré. Berthe Diotte [the beneficiary] a seule, *dès le jour du contrat*, un droit exclusif au montant assuré.[32]

In the *Hallé* case, Rinfret, J. relying in part on Planiol et Ripert, concluded that,[33]

> . . . in civil law a valid stipulation in favour of a third person creates a contract between the third person and the person who has agreed to be bound by the contract. It establishes a vinculum juris between the latter and the third person.
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> Speaking particularly of the present case, the policy confers an independent right upon the third person who is insured under it. Planiol and Ripert say on this subject:
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> > "C'est le but et l'effet essentiel de la stipulation. Pour réaliser cette acquisition conformément à l'intention du stipulant qui normalement doit procurer au tiers le bénéfice à l'exclusion de tous autres, on a été amené à dire que le tiers a contre le promettant un droit direct et personnel remontant aux sources du contrat."

In summary then, the authorities appear to establish:

a) that the right conferred on the beneficiary is created by the contract itself, is retroactive upon acceptance to the date of the contract, and never formed part of the patrimony of either stipulator or promisor;

b) that the beneficiary's right is exclusive to him.

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[30](1908) 17 K.B. 177, at 182.

[31](1919) 30 K.B. 503, at 508.

[32][1944] K.B. 537, at p. 548. (Emphasis supplied.)

[33][1947] S.C.R. 368, at 377.

An excellent illustration of the scope of the first of the two principles just summarized is afforded by the recent decision of the Exchequer Court in *Massawippi Valley Railway Co. v. M.N.R.*,[34] the circumstances of which may be summarized as follows:

By written agreement dated December 27, 1871, appellant leased its railway to the Passumpsic Rivers Railroad Company for a term of 999 years. In consideration of this lease the Passumpsic Company agreed to pay $24,000.00 annually to the bondholders of the Massawippi, agreed to pay dividends to the shareholders at a given rate, and agreed to redeem the outstanding bonds at maturity. The provision of the contract relating to the payment of bondholders provided as follows:[35]

> That the Company of the second part [*i.e.* in 1871, the Connecticut and Passumpsic Rivers Railroad Co.] shall and will and they do hereby stipulate, covenant and agree and bind and oblige themselves in consideration of the foregoing premises to pay to the Holders of the Bonds now issued by the Company of the first part, the sum of Twenty four thousand Dollars annually . . . by semi-annual instalments. . .

The rights of the Passumpsic Company under this lease were transferred from time to time and in 1946 all rights under it were assigned to the C.P.R. which thereupon became responsible for the payments therein specified. All payments were made directly by the C.P.R. to the security holders concerned and the Massawippi Company, although still a corporate entity, carried on no business whatever.

In the year 1951, as in previous years, it reported its net income as being nil, and as in the past no questions were raised by the tax department. In February of 1954, however, the company was reassessed on alleged income of $48,000.00 for the year 1951 and was invited to pay taxes of $24,849.50 for that year under sections 16(1) and 23 of the Income Tax Act.

Before the Tax Appeal Board,[36] however, the Minister relied solely on section 16(1) which provided:

> 16(1) A payment or transfer of money, rights or things made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him.

The Minister claimed that the sum of $48,000.00, which had been paid by the C.P.R. to the holders of the securities of the Massawippi Company under the lease, should be included in the income of the Massawippi Company as being a payment made to some other person for the benefit of the Massawippi Company, or as a benefit that the Massawippi Company had desired to have conferred on the holders of its securities.

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[34][1961] Ex.C.R. 191.

[35]The provisions concerning payment of shareholders and redemption of the bonds were in similar terms.

[36](1958-59) 21 Tax A.B.C. 1.

Appellant's argument was principally directed to the proposition that the agreement of 1871 contained a stipulation for a third party and that in consequence the shareholders and bondholders had a direct right against the C.P.R. for the payment of sums which never formed a part of appellant's patrimony.[37] For the Minister it was contended that the 1871 agreement contained merely an indication of payment[38] under Article 1174 C.C. and that there was constructive receipt by Massawippi of all sums paid to its shareholders by C.P.R.

The case first went before the Tax Appeal Board. Considering the matter first from a tax law point of view, Mr. Fordham concluded[39] that the agreement of 1871 had resulted in

> . . . a complete alienation by the appellant of any right to receive payments from the Canadian Pacific and the appellant is, and always has been, powerless to effect any change in the arrangement. . . The said alienation divested the appellant of its beneficial interest in the proceeds of the lease.

Art. 1029, although quoted, is scarcely referred to in the Board's judgment, but it is clear that the contracts were, in Mr. Fordham's opinion, stipulations for a third party. In any event the Minister's contention that the contracts fell within Art. 1174 was rejected in terms.[40]

> The third and fourth of these paragraphs contain covenants, later assumed by the Canadian Pacific to honour the rights of holders of the appellants capital stock. This is not merely an indication by the appellant, as lessor, of the person or persons to whom payment shall be made. Instead, these paragraphs contain terms . . . that create firm obligations between Canadian Pacific and the said stockholders in favour of the latter. I do not think that section 1174 has any application to a transaction of this particular kind or affords assistance to the respondent in the position taken by him herein.

The appeal was consequently allowed and the assessment set aside.

The appeal by the Minister to the Exchequer Court was dismissed in a judgment squarely based on the arguments derived from Article 1029. After noting the virtual identity between 1029 C.C. and 1121 C.N., Mr. Justice Dumoulin continued:[41]

> Henceforth, [after acceptance by the third party] in the eyes of the law *in conspectu legis* the two sole contracting parties remain the "promettant" (originally the Connecticut and Passumpsic Rivers Ry, Co.) and, as stated, the accepting "third party", bondholders and shareholders.
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> A most frequent instance of such transactions is to be found in the realm of insurance, especially life insurance, about which, so far back as 1888, the "Chambre civile de la Cour de Cassation D.P. 88, part 1, 77, 193, the French tribunal of last resort, wrote that:
>
> "Le bénéficiaire acquiert contre l'assureur un droit propre et direct, qui ne fait à aucun moment partie du patrimoine du stipulant . . . Et qui n'est donc pas rapportable à sa succession. (The sentence just preceding is a commentary added by Mr. Crépon, a jurist of the last century.)"

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[37]There was no doubt that the stipulation had been accepted.

[38]The distinction between indication of payment, the associated concept of delegation of payment and stipulations for a third party is dealt with *infra*.

[39](1958-59) 21 Tax A.B.C. 1, at p. 9.

[40]*Ibid.*, at p. 9.

[41][1961] Ex.C.R. 191 at 197.

Mr. Justice Dumoulin concluded, after citing *Baron v. Lemieux*[42] and the *Hallé* case[43] that he agreed with the following summary of the situation:[44]

(a) that the agreements were governed by Article 1029 C.C.;

(b) that the payments by C.P.R. or rights to payments never entered the patrimony of Respondents;

(c) that there was no payment or transfer of any money or right by Respondents to their shareholders;

(d) that Respondents conferred no benefit because the amounts paid or rights thereto were never part of their patrimony, and were never theirs to confer. (This conclusion, I repeat, technically results from a fiction of law, particularizing art. 1029);

(e) that consequently neither Section 16-1 nor Section 23 of the Income Tax Act [1948] applies in the circumstances.

The Right to Enforce the Stipulation

A further consequence of the foregoing rules concerns the right of the stipulator to enforce performance by the promisor. If, as we have seen, the contract is deemed, from the moment of acceptance, to involve only the promisor and the third party to whose exclusive benefit it accrues, what right if any has the stipulator as a party to see to its enforcement? It seems fairly clear that he has none.

Article 71 of the Code of Procedure provides that:

> No person can bring an action in law unless he has an interest therein. Such interest, except where it is otherwise provided may be merely eventual.

In a recent case[45] before the Court of Appeal in which the question of the effect of a stipulation for a third party was involved, Mr. Justice Casey alone of the five-man bench delivered notes discussing the question, and came to the conclusion that the stipulator had no right to enforce the stipulation. The case concerned the sale of an immoveable where the purchaser, in the deed of sale, undertook to pay a hypothecary debt owing by the vendor.[46] Mr. Justice Casey found that:[47]

> When a stipulation made, as this one was, has been accepted by the third person, default by the person who has promised to pay does not give to the one stipulating a direct action to enforce payment. So far as the third person is concerned, his acceptance of the stipulation gives him an additional debtor without in any way affecting his recourse against the person first bound. So far as the original debtor is concerned the claim which he had against his purchaser for the balance of purchase price becomes vested in the beneficiary of the stipulation. With this additional debtor the beneficiary may deal as he wishes, but these dealings cannot affect the rights of the original debtor (the stipulator). In my opinion however, the latter does not count amongst his rights the action to force the new debtor (promisor) to pay when he

[42](1908) 17 K.B. 177.

[43](1937) S.C.R. 368.

[44][1961] Ex.C.R. 191 at 200.

[45]*Lacasse v. Poulin* [1953] Q.B. 125.

[46]This is an extreme simplification of a rather complicated set of facts but sufficient for the purposes of the principle in question.

[47]at p. 128-9.

is unable or unwilling to do so or when the beneficiary is prepared to extend the delay. It appears to me that the new debtor's default gives rise to nothing more than an action to recover the damages suffered as the result of the inexecution of the contract.

The Relationship between "Stipulation for a Third Party" — "Delegation of Payment" — and — "Indication of Payment."

Articles 1169-1174 of the Civil Code, which form part of the section on Novation, refer to three different types of transaction whereby an agreement between two persons may, to some extent, affect the rights of a third person. These transactions, which are not defined as such in the Code, are two types of Delegation — "perfect" and "imperfect", and Indication of Payment.

The relevant articles of the Code are the following:

1169. Novation is effected:

(2) When a new debtor is substituted for a former one who is discharged by the creditor.

(3) When by the effect of a new contract, a new creditor is substituted for a former one toward whom the debtor is discharged.

1172. Novation by the substitution of a new debtor may be effected without the concurrence of the former one.

1173. The delegation by which a debtor gives his creditor a new debtor who obliges himself toward the creditor does not effect novation, unless it is evident that the creditor intends to discharge the debtor who makes the delegation.

1174. The simple indication by the debtor of a person who is to pay in his place, or the simple indication by the creditor of a person who is to receive in his place, or the transfer of a debt with or without the acceptance of the debtor, does not effect novation.

Articles 1169, 1172, and 1173 deal with Delegation. It will be seen that these articles envisage chiefly the situation in which A, the debtor of C, arranges for B to undertake to pay C the debt owed by A. If C accepts and discharges A completely, then there is "perfect" Delegation, and B is C's only debtor. If, on the other hand, C is happy to accept B as an additional debtor, but refuses to discharge A, then there is "imperfect" Delegation, and C now has two debtors, A and B. C is in a position in either case to force B to pay.

Article 1174 envisages a simple Indication of Payment whereby A, who owes C money, advises C that B will pay. B does not bind himself to pay C and C has no right to sue B. However, B may validly pay C and A will be discharged by C.

These articles appear to be inserted in the Civil Code in order to furnish examples of certain typical situations which may or may not effect novation, depending on the facts of the transaction.

However, there have been occasions in our jurisprudence where lines have been drawn between transactions of delegation, indication of payment, and stipulations for a third party, as if each of these three types of transaction were easily identified and mutually exclusive. This thinking appears to have been reflected in the dissenting judgment of Mr. Justice Barclay in the case of

Rocheleau v. Beliveau et al,[48] decided 3-2 by the Court of Appeal in 1935, when he said, at p. 72:

> This constituted, in my opinion, more than a simple indication of payment, and more than a delegation of payment. It included a stipulation in favour of a third party, which would come within the terms of Article 1029 C.C. . . .

The same type of reasoning appears in the case of *Massawippi Valley R.R. Co.*[49]

It is submitted with respect that while the matter is not free from doubt, the position that delegation, indication of payment, and stipulation for a third party, are mutually exclusive is not one which should be accepted.

On the contrary, it seems that the courts tend to examine a stipulation to see if it gives rights to a third party. If so, then the rules of Article 1029 are applied, even though the court may call the transaction indication of payment or delegation.

For example, in the same case of *Rocheleau v. Beliveau*,[50] the other judges of the 5-man bench took different views from Barclay, J.

In that case, the Court of Appeal had to consider the following clause in a deed of sale:

> Cette vente est faite . . . en considération des prix et somme de $3,000.00 courant que l'acheteur sous l'hypothèque desdits lots, promet et s'oblige payer de la manière suivante
>
> 1. A Delle Louise Rocheleau, ou à son ordre . . . $600.00 payables en trois versements égaux, annuels et consécutifs de $200.00 chacun . . . "et ce pour acquitter une pareille et même somme que la venderesse lui doit suivant un billet promissoire de ce montant."
> 2. A la venderesse, ou à son ordre, la balance de $2,400.00. . .[51]

The respondents were the executors of the estate of the vendor who, in default of payment by the purchaser, had obtained retrocession of the property by a notarial deed which provided in part:

> De plus ladite succession, par ses représentants se charge de l'hypothèque de Mlle Louise Rocheleau de Wotton, soit $600.00 et intérêts accrus sur ladite somme, le tout selon les termes dudit acte de vente que les cessionnaires déclarent bien connaître et n'en pas désirer plus amples détails.

Mlle Rocheleau in her action sought to enforce payment of the $600.00 by the executors and relied on the fact that the vendor had assumed the obligations stipulated in her favour in the deed of sale. She was met with the defence that the contracts had not invested her with any right of action, and that she could succeed only on the original note given to her by the vendor. In the Superior Court the action was dismissed with costs on the ground that appellant had no right to bring a hypothecary action and that the note itself was prescribed. The judgment dismissing her action was maintained by a 3-2 decision, Hall and Barclay, JJ. dissenting.

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[48](1936) 60 K.B. 60.

[49][1961] Ex.C.R. 191.

[50]60 K.B. 60.

[51](1936) 60 K.B. 60, at p. 61.

Sir Mathias Tellier, C. J. was of the opinion that the clause constituted an indication of payment which had not been accepted.

> Le premier de ces actes ne contient en sa faveur rien de plus qu'une indication de paiement. Comme elle ne paraît pas avoir accepté cette indication de paiement, ni même avoir manifesté l'intention de l'accepter ou d'en profiter, quand c'était le temps, je ne vois pas comment un lien de droit aurait pu se former entre elle et l'acheteur Dion.[52]

Letourneau, J. agreed that there had been no acceptance prior to revocation, but he seems without expressly deciding the point to treat the clause as a *stipulation pour autrui*.[53]

Of the dissenting judges, Hall, J. took the view that there had been a delegation of payment which had been tacitly accepted by appellant. He said:

> Now that the appellant accepted this delegation of payment is, in my opinion, fully established by the fact that the obligation was kept alive throughout the whole period of 10 years from 1923 to 1933 and both Dion and the Respondents recognised its existence when the property was retroceded.

Thus, in this case, the influence of Article 1029 seems to have been felt by all four judges who gave notes.

Barclay, J. found that the plaintiff was entitled to rely on a 1029 stipulation which she had accepted; Letourneau, J. found that the "stipulation for the benefit of appellant" had remained without effect because it was not accepted before revocation; Hall, J. found that the same stipulation had been accepted by appellant and that "delegation" and novation was therefore complete; and Sir Matthias Tellier, C. J. called the stipulation an "indication of payment," but appears to have applied the rules of Article 1029.

There are many other cases to illustrate the proposition that our courts, once they have determined that a particular transaction contains a stipulation governed by Article 1029, do not unduly concern themselves with the niceties of definition of the underlying agreement.

In *Gratton v. Lemay*[54], for example, Mr. Justice Martineau found that:

> L'indication de paiement dans un acte de vente et comme partie du prix ne constitue point un contrat de délégation, mais une stipulation pour autrui.

In *Caron v. Page-Tremblay and Sun Life Assurance Company*[55] Greenshields, C. J. spoke of a life insurance contract with a named beneficiary as constituting:

> . . . a delegation of payment within the meaning of Art. 1029 CC. Until that delegation is accepted by the person in whose favour the delegation is made it may be revoked, but once it is accepted, or once the third person in whose favour it has been made has signified his assent to it, it becomes irrevocable. . .

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[52](1936) 60 K.B. 60, at p. 66.

[53](1936) 60 K.B. 60, at p. 67.

The opening line of his brief judgment reads:

> "La stipulation au profit de l'appellante que nous pourrions voir dans le premier des deux actes invoquées en la déclaration . . . est restée sans effet puisque revoquée avant que la bénéficiaire n'eut signifié sa volonté d'accepter. . ."

[54](1917) 51 S.C. 493, at 495.

[55](1935) 73 S.C. 123, at 126.

Again, in the case of *Lacasse v. Poulin*,[56] Casey, J. treated a classic case of imperfect delegation as being also a stipulation under Article 1029 C.C.:

> When a stipulation made, as this one was, has been accepted by the third person, default by the person who has promised to pay does not give to the one stipulating a direct action to enforce payment. So far as the third person is concerned, his acceptance of the stipulation gives him an additional debtor without in any way affecting his recourse against the person first bound.

Conclusions

The jurisprudence of the Province of Quebec concerning Article 1029 C.C. shows:

(a) A person may, in a contract which he makes for himself, stipulate for the benefit of a third person.

(b) Once the third party has signified his assent to it, such a stipulation becomes irrevocable.

(c) Signification of acceptance by the third person is not subject to any particular requirements of form and may even be tacit.

(d) Acceptance may be made at any time before revocation and may even be made by his legal representatives after the third party's death.

(e) The right of the third party arises from the contract itself and is deemed never to have formed a part of the patrimony of either the stipulator or promisor.

(f) The right of the third party once the stipulation has been accepted dates from the moment the contract is formed.

(g) That the right of the third party once accepted can be enforced by the third party by legal action directly against the promisor.

(h) That the stipulator has no right to force the promisor to perform his obligations towards the third party who has accepted.

(i) Article 1029 C.C. is of general application to all contracts.

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[56][1953] Q.B. 125, at 128.