

UY TAM AND UY YET, PLAINTIFFS AND APPELLANTS, VS. THOMAS LEONARD ET AL., DEFENDANTS AND APPELLEES.

G.R. No. 8312. March 29, 1915

Ponente: TRENT, J.

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TRENT, J.:

An appeal from a judgment of the Court of First Instance of the city of Manila sustaining the defendants' demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and dismissing the complaint with costs.

This is an action by a third person upon a bond executed between the individual defendants as obligors and the city of Manila as obligee. The bond was executed in connection with and to secure the performance of a contract entered into by Hosty and Brown, the principals of the bond, for furnishing crushed rock to the city of Manila for one year. The plaintiffs furnished the contractors with certain materials for use in the performance of said contract, having previously notified the defendants of the acceptance of the conditions of the bond relating to laborers and materialmen. The city of Manila was joined as a party defendant for the reason that it refused to join as a party plaintiff in collecting the amount claimed by the plaintiffs. No damages are claimed against the city, and the city is merely a party pro forma.

The bond reads as follows: "Know all men by these presents, that we, R. C. Hosty and W. W. Brown, of the city of Manila, Province of Manila, Island of Luzon, Philippine Islands, as principals, and George C. Sellner, Geo. E. Brown, Walter E. Olsen, Harold M. Pitt, and Thomas Leonard, all of the city of Manila, P. I., as sureties are held and bound, unto the city of Manila in the penal sum of twenty-eight thousand five hundred pesos, Philippine currency, to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, and administrators, in the amount for which each has severally qualified as shown in the several affidavits hereto attached.

"The condition of this obligation is such, that whereas the above-bounden R. C. Hosty and W. W. Brown have on the 12th day of January, 1911, entered into a contract with the city of Manila, represented by the president of its Municipal Board, for furnishing crushed rock for a period of one year:

"Now, therefore, if the above-bounden R. C. Hosty and W. W. Brown, their heirs, executors, and administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said R. C. Hosty and W. W. Brown to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the city of Manila as during the original term of the same, and shall promptly make all payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

"It is hereby stipulated, that suit on this bond may be brought in the courts of the Philippine/Islands for the district in which the said contract is executed; and if at the time of the suit any of the obligors is found therein,

service of process as to such obligors may be made by delivering a copy of the same to the clerk of said court, who is hereby appointed agent of the obligors for this purpose."

Article 1257 of the Civil Code reads: "Contracts shall only be valid between the parties who execute them and their heirs, except, with regard to the latter, the case in which the rights and obligations arising from the contract are not transmissible, either by their nature, or by agreement, or by provision of law.

"Should the contract contain any stipulation in favor of a third person, he may demand its fulfillment, provided he has given notice of his acceptance to the person bound before it may have been revoked."

The second paragraph of this article creates an apparent exception to the first. (20 Scaevola, 552.) Under the first paragraph, the cardinal rule of contract is laid that only parties thereto and their privies acquire rights and assume obligations thereunder; while the second paragraph permits a third person to avail himself of a benefit extended to him by its term. Manresa says that the second paragraph of this article corresponds almost always to the juridical conception of a gift, it being necessary in such case to apply the rules relating to gifts in so far as the form of acceptance is concerned. This is true where the stipulation is for the sole benefit of the third person. But where, for instance, a transfer of property is coupled with the purchaser's promise to pay a debt owing from the seller to a third person, it can scarcely be said that the stipulation is in the nature of a gift, and yet such a stipulation is in favor of a third person. So, stipulations in favor of a third person may be divided into two classes: those where the stipulation is intended for the sole benefit of such person, and those where an obligation is due from the promisee to the third person which the former seeks to discharge by means of such stipulation.

The civil-law origin and history of the second paragraph of article 1257 is a matter upon which the authorities are in some conflict. Perhaps the first unequivocal authority in the civil-law countries recognizing without reservation such a stipulation is the Code of Napoleon of 1804, which provided as follows: "A person may likewise stipulate for the benefit of a third party when such is the condition of the stipulation that the person makes for himself or of the donation which he makes to another person. The person who has made the stipulation cannot revoke it if the third party has declared that he wished to take advantage of it." (Art. 1121.)

"Contracts only produce effects between contracting parties. They do not affect third parties and do not benefit them except in the case provided by article 1121." (Art. 1165.)

The Partidas, which were in force in Spain until the adoption of the present Civil Code, contained a general rule invalidating such stipulations, followed by some exceptions whereby representatives or attorneys in fact of third persons were allowed to recover on such stipulations. We find in the Fifth Partida, title XI, law 7, as follows: "One man cannot receive from another a promise in the name of a third person under whose power he is not. As if one should say to the other, 'Do you promise me that you will give to such a one, such a thing?' and the other answer, 'I promise.' Such a promise would not be obligatory on him who made it; and the third person in whose name it was made neither can nor ought to compel him to its performance."

But it seems clear that the supreme court of Spain recognized a contrary doctrine without reservation as early as 1868. Its judgment of June 24 of that year, as well as the one dated October 17, 1874, are quoted by Scaevola as bearing out the principle as it is found in the Civil Code.

Pothier, of a much later date than the Partidas, treats of the subject as follows: "Reasons for the principle that a person cannot stipulate or promise for another.—When I stipulate with you for a third person, the agreement is void: for by this agreement you do not contract any obligation in favor either of such third person or myself. It is evident that you do not contract any in favor of the third person: for it is a principle that agreements can have no effect except between the contracting parties, and consequently that they cannot secure any right to a third person who is not a party to them, as we shall see hereafter. By this agreement you do not contract any civil obligation in

my favor: for what I have stipulated in favor of the third person, not being anything in which I have an interest capable of pecuniary appreciation, no damage can result to me from a failure in the performance of your promise, and therefore you may be guilty of such failure with impunity." (Obligations, No. 54.)

"This first part of the principle that nothing but what one of the parties stipulates on his own behalf can be the object of an obligation only prevails when considered as a matter of law, (dans le for exterieur) and with regard to civil obligations: but in point of conscience, if I agree with you that you shall give something to, or do something for a third person, the agreement is binding: although the interest which I have in the subject is not capable of pecuniary appreciation, still it is a real interest: hominis enim interest alterum hominem beneficio affici, and this interest arising from mere affection for a third person gives me a sufficient right in point of conscience to require the performance of your promise, and is sufficient to render you culpable in refusing to accomplish it, provided you have it in your power, and the other person is willing to accept of what was promised to be given." (Id., 55.)

"For the rest, according to the principles of this ancient law, the third person who was no party to this contract of donation, subject to the charges of your giving him something, had not any action against you for the recovery of it: and this was founded upon the principle that contracts have no effect except between the contracting parties: hence it follows, that no right can arise from a contract to a person who was not party to it: but according to the constitution of the Emperors, the third person in whose favor the donor imposed a charge on his donation has an action against the donatory to compel him to execute it." (Id., 71.)

In Louisiana, the Civil Code provides: "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract; and if such a third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked." (Art. 1890.)

"But a contract in which anything is stipulated for the benefit of a third person who has signified his assent to accept it cannot be revoked as to the advantage stipulated in his favor, without his consent." (Art. 1902.)

In discussing the history of these provisions the supreme court of that State said in *Duchamp vs. Nicholson* (2 Mart. N. S., 672) : "According to the ancient Roman law, no person could stipulate for another, but an indirect mode was resorted to, of receiving promises or engagements for the benefit of a third party. The person receiving the engagement, made a donation to the obligor, and imposed a condition that he should give a certain sum to a third party. If the person thus promising failed to comply with his engagement, he who stipulated had an action to recover back the amount given as a donation, but the party for whose benefit the stipulation was made could not bring an action of any kind to enforce it.

"In the latter days of the Roman jurisprudence, a change was introduced which, with more regard to equity, extended to him for whose benefit the stipulation was made an action to carry it into effect. (Code, liv. 8, tit. 55, l. 3.)

"Hence, according to Merlin, even before the passage of the Napoleon code, it was not doubted in France, that a third party might sue to enforce an obligation in which he had an interest. (Merlin, Questions de Droit, vol. 5, verbo, stipulation pour autrui, 3 Pothier, Traite des Obligations, No. 71.)

"Since the enactment of the Napoleon code, the 1121st article of which expressly provides that 'stipulations may be made to the profit (or benefit) of a third party,' there seems not to be any doubt entertained on the question. Toullier states, 'The third party to whose profit the burden has been imposed in a contract in which he took no part may act directly to force the promisor to fulfill his promise.' (Toullier, Droit Civil Frangais, liv. 3, tit. 3, chap. 2, No. 150.)

"The author of the *Curia Philippica* seems to have thought such a right was not conferred by the Roman law, but that it was given by the positive law of Spain. (*Curia Phil.*, lib. 2, cap. 6, no. U, verbo, cesion; *Novissima Recopilacion*, lib. 10, tit. 1, ley 1.) It is a matter of little importance from what source that right sprang, so that

it existed. And even if it was not found in that jurisprudence, the provision in our code which is, verbatim, that of the Napoleon just referred to, we are satisfied, introduces it. (C. Code, 263, art. 20.)"

Again in *Gravier vs. Gravier's heirs* (3 Mart. N. S., 206), it is said: "A law of the recopilacion permits in express terms a contract to be made for the benefit of a third party. It is the opinion of the Spanish commentators, that according to this law, the person in whose favor the stipulation is made, may maintain an action to enforce it. In this they seem to think a material difference exists between the laws of Spain and those of Rome. But according to other writers on the civil law, this is a mistake. Merlin, who has examined the subject fully, and who cites a vast number of authorities in support of his opinion, shows, we think, satisfactorily, that the early established doctrine in the Roman jurisprudence, that no one could stipulate for another, was subsequently altered and modified by different edicts of the emperors: and in the late and more improved state of their laws, such contracts were authorized, and might be enforced by the third person, in whose favor they were made."

It appears certain that the Roman law did not at first recognize stipulations in favor of third persons at all. If there was a gradual relaxation of the rule, it is still clear from what Pothier and the *Partidas* say that the civil law was still against the enforcement of such stipulations, although many exceptions to the rule had crept into the law. With the enactment of the French Code and of the Spanish Civil Code, whatever vestige of the ancient Roman law remained was swept away, and it is with this modern law we have to deal.

If we turn now to Anglo-American law, we find the same opposition against permitting the enforcement of stipulations of a contract in favor of a third person as was encountered in the early civil law. In fact, the English courts to this day decline to recognize stipulations *pour autrui*. "As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it." (*Halsbury's Laws of England*, vol. 7, p. 342.)

This has been denominated the English doctrine, and American commentators frequently suggest that it has been evaded in some cases by a strained application of the law of trusts (15 *Harvard Law Review*, 775; Page on Contracts, sec. 1318) ; and the doctrine was found so inconvenient in the administration of the modern insurance law that the Married Woman's Property Act (45 & 46 Vict., c. 75, sec. 11) gave to a wife, husband, or children named as beneficiary in a policy the right to its proceeds, although they were not allowed to sue directly for them. (15 *Harv. Law Rev.*, 775.) The English rule has been followed in some of the states of the American Union, but possibly with still less rigor. The case law indicating the jurisdictions in which the English rule has found favor, as well, indeed, as a general survey of the whole field of American case law on stipulations *pour autrui*, has been collected in the excellent monographic notes to *Baxter vs. Camp* (71 *Am. St. Rep.*, 169), and *Jefferson vs. Asch* (25 *L. R. A.*, 257). The provisions of our Civil Code make futile an examination of the authorities supporting the English rule.

But in the greater number of the American states, stipulations *pour autrui* are enforced with more or less liberality. And where the law is in such condition, it is referred to as the American rule in contradistinction to the English rule above referred to. A case often cited as the real starting point of the American doctrine is *Lawrence vs. Fox* (20 *N. Y.*, 268). In that case, one Holly gave the defendant \$300 to be delivered by him to the plaintiff the next day in payment of a debt owing from Holly to the plaintiff. The court held that the plaintiff had a right of action to recover the money. In a few states, where codification of substantive law has done its work, legislative recognition of stipulations *pour autrui* may be found. Thus, in California (*Civil Code*, sec. 1559), it is provided that: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Exactly the same provision is found in Idaho (*Rev. Codes*, sec. 3317) ; North Dakota (*Rev. Codes*, sec. 5285); and

Montana (Ann. Codes, sec. 2103.). The Georgia Code (sec. 2747) provides that "if there be a valid consideration for the promise, it matters not from whom it is moved, the promisee may sustain his action though a stranger to the consideration."

As stated above, the enforcement of stipulations pour autrui under the American rule is hedged in with various restrictions, not at all uniform in the various states where the principle is recognized. The doctrine was limited in *Vrooman vs. Turner* (69 N. Y., 280), as follows: "To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally."

This New York limitation of the rule is approved in Nevada (*Ferris vs. Carson Water Co.*, 16 Nev., 44) ; and Kansas (*Burton vs. Larkin*, 36 Kan., 246) ; and possibly in some other states. In Illinois no obligation need be due from the promisee to the third person (*Dean vs. Walker*, 107 Ill., 540.). This is also true in Ohio (*Brewer vs. Maurer*, 38 Ohio, 543; 43 Am. Rep., 436) and Tennessee. (*McCarty vs. Blevins*, 5 Yerg., 195; 26 Am. Dec., 262.) Compromises between the two extremes of various shades may be found in many other jurisdictions. It would not be profitable to pursue this branch of the inquiry to its ultimate end for we do not think that limitations on the rule of this nature are applicable in this jurisdiction. Article 1257 if makes no such restriction. The reason for it in the United States is possibly due to some extent to the aversion in that country against enforcing an executory gift.

Another limitation to the doctrine, however, which has been extensively developed by the American courts, is worthy of more attention, and is, we believe, equally applicable in this country. It is no artificial limitation but one arising from necessity, and without which the rule itself would not be workable, and indeed, the freedom of contract would be considerably impaired. It is that a mere incidental interest of a third person is not within the doctrine. A statement of this limitation which has received approval on more than one occasion is the following from *Simson vs. Brown* (68 N. Y., 355) : "It is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as an object, and he must be the party intended to be benefited."

In *Crandall vs. Paine* (154 Ill., 627), it is said: "It would be going too far to hold that a mere stranger to the contract, who was to derive only an incidental benefit therefrom, might recover for a breach of such contract."

In 2 Page on Contracts, sections 1312 and 1313, many cases are collected as illustrations of what has been held to be an incidental benefit. A contract between the United States and a state for the maintenance of a canal cannot be enforced by one who has made use of water furnished from such canal. (*Walsh vs. C. H. V. & Athens R. Co.*, 176 U. S., 469.) A contract between an employer and employee, whereby the former agreed to furnish the latter a physician if the employee was injured in the course of his employment, could not be enforced by a physician whom the employee engaged. (*Thomas Mfg. Co. vs. Prather*, 65 Ark., 27.) A very numerous group of such cases involves contracts with a city to furnish water for fire protection, the weight of authority holding that inhabitants of the city have only an incidental benefit therein, and, hence, no action against the contractor for nonobservance of the contract. These cases are collected and the rule affirmed in *Allen & Currey Mfg. Co. vs. Shreveport Waterworks Co.* (113 La., 1091). A number of French cases are reviewed in the last cited case in which an alleged stipulation pour autrui was held to be only an incidental interest.

"A contract by an employer with a physician to attend to all his sick and injured employees held not a stipulation pour autrui, and the employee had no right of action against the physician for breach of contract. *Montastier c. A_____*, Pau, 1st May, 1900, *Sirey*, 1900, vol. 2, p. 301, *J. P.* 1900, part 2, p. 301. A

corporation bought a boatload of coal, and, before having paid for it, it was put in the hands of a receiver. Held, that a contract by which a person agreed with the receiver to pay this debt was not a stipulation pour autrui, and the seller of the coal had no action upon it. *Watts-Ward c. Cels*, 20th Dec., 1898, *Sirey*, 1901, vol. 1, p. 270, J. P. 1901, part 1, p. 270."

In this last case, the court said: "If article 1121 of the Civil Code (Code Napoleon) permits a stipulation to be made in favor of a third person when such is the condition of the stipulation made for one's self, we must not conclude therefrom that any clause in a contract susceptible of procuring advantages to a third person brings into existence in favor of the latter a right of action directly against the contractor, when it has not been the intention of the parties to confer it upon him."

Just above we have said that, with the enactment of the second paragraph of article 1257 of the Civil Code, the law invalidating stipulations pour autrui was swept away. What was that prohibition? It was not a prohibition against indirect benefit to third persons arising from a contract between parties. The prohibition was a limitation upon the freedom of the parties to insert what they pleased in a contract. The law of the Partidas which we have quoted above illustrates this quite accurately. It states the rule against stipulations pour autrui and then gives the following concrete example: "Do you promise me that you will give to such a one such a thing?" and the other answers, "I promise." And it says that such a promise cannot be enforced. In other words, the actual intent and desire of the parties to confer a favor upon a third person was what the law prohibited. It took no cognizance of the indirect benefits to third persons which might arise through the due performance of the contract. These were allowed to fall where they might. And, indeed, any principle of law which would endeavor to take notice of such incidental benefits accruing to strangers by the performance of a contract would be too unwieldy and complicated and too restrictive upon the freedom to contract to be practicable. The prohibition is directed to what the parties may voluntarily agree to perform. The word used, stipulation (*estipulation*), is defined by Escriche in his *Dictionario de Legislation y Jurisprudencia*, as follows:

"A promise made juridically, according to the solemnities and forms prescribed by law; or an unilateral contract by which a person, in suitable response to a question addressed him by another, cedes the thing or authorizes the doing of the act requested, thereby becoming obliged to fulfill the said contract."

The Latin equivalent, *stipulatio*, is defined in *Black's Law Dictionary* as follows: "In the Roman law, *stipulatio* was the verbal contract (*verbis obligatio*), and was the most solemn and formal of all the contracts in that system of jurisprudence. It was entered into by question and corresponding answer thereto, by the parties, both being present at the same time, and usually by such words as 'spondes?' 'spondeo,' 'promittis?' 'promitto,' and the like."

A stipulation is one of the intended features or effects of a contract. The parties set their minds upon it and agree to its consummation. Each party to the contract may or may not speculate upon the probable consequences performance thereof will have upon the fortunes of third persons. But what they stipulate they desire to accomplish. Their minds met upon the point. Now, the law prohibited a stipulation in favor of a third person. In other words, the law prohibited the parties agreeing to the performance of an act which would directly and materially benefit one not a party to the contract. A meeting of their minds upon such a matter was, by law, deprived of contractual effect. This was the prohibition which was swept away by the second paragraph of article 1257. The exact words of the latter are, any stipulation in favor of a third person. Bearing in mind the meaning of the word stipulation as it is used in the Partidas and defined in the dictionaries, it will be at once seen that contracting parties may now do what was prohibited to them under the former law. Their minds may unite upon an act to be performed in favor of a third person and the law will now enforce performance. The word any clears up all doubts as to the entire removal of restrictions upon the right of contracting parties to stipulate in favor of a third person. So, we believe the fairest test, in this jurisdiction at least, whereby to determine whether the interest

of a third person in a contract is a stipulation pour autrui or merely an incidental interest, is to rely upon the intention of the parties as disclosed by their contract.

If a third person claims an enforceable interest in the contract, that question must be settled by determining whether the contracting parties desired to tender him such an interest. Did they deliberately insert terms in their agreement with the avowed purpose of conferring a favor upon such third person? In resolving this question, of course, the ordinary rules of construction and interpretation of writings must be observed.

The very next article of the code seems to furnish additional evidence that this must be the true test of a stipulation pour autrui. Article 1258 reads: "Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use, and law."

It is elementary that parties do not attempt to stipulate all that their contract legally binds them to. They have in mind the salient points of the contract, the particular acts they desire to be performed, the sine qua non of the agreement, and usually specify these, that is, expressly stipulate them. But they leave to the law such matters as the statutes of fraud, prescription, exemption, etc., and they leave not a little sometimes to custom or usage. So, this article recognizes a distinction between the obligations of a contract, those which are expressly stipulated, and all others. Since the rights of a third person under the second paragraph of the preceding article are limited to the stipulations of the contract, it is clear that he cannot base his claims upon any other ground than that the parties intended to benefit him.

In applying this test to a stipulation pour autrui, it matters not whether the stipulation is in the nature of a gift or whether there is an obligation owing from the promisee to the third person. That no such obligation exists may in some degree assist in determining whether the parties intended to benefit a third person, whether they stipulated for him. Thus in a purely commercial contract, as is the one we have under consideration in the case at bar, it is not likely that the promisee would go out of his way to favor a third person without exacting a "pound of flesh." On the contrary, where the third person is a close relative of the promisee, we may often expect an expression of generosity and find some reason for believing that the promisee did exact a promise in benefit of his relative. But these are at best mere aids in arriving at the intention of the parties. We close this part of the discussion by quoting from Elliott on Contracts, section 1413, as follows:

"It is a rule of practically universal application that there must exist on the part of the original parties to the contract a clear intent to benefit the third party, although a majority of the courts do not go so far as to hold with Connecticut that the contract must be for the sole and exclusive benefit of the third party."

We now come to a consideration of the bond which is the basis of this action. It being a contractor's bond does not in any degree distinguish it from other contracts in applying the test we have outlined above for determining whether it contains a stipulation pour autrui. On the contrary, the rule requiring a clear intent on the part of the parties to benefit a third person should be reenforced by a due regard for article 1827 of the Civil Code, which provides: "Security is not presumed; it must be express and cannot be extended further than that specified therein."

Did the parties to the bond intend to secure the claims of materialmen? Did the city of Manila so demand, and did the sureties so promise? Or did the city only demand and the sureties only promise to secure the city of Manila in damages against such claims? These are the controlling questions upon which depend the plaintiffs' claim that the clause referring to the materialmen, etc., is a stipulation pour autrui.

In the first place, we are informed by the pleadings that the alleged promisee refused to join as plaintiff in this action and we find on this appeal its brief opposing the pretensions of the plaintiffs. We have, thus, the parties

signatory to the bond all denying that they intended to confer a benefit upon the materialmen by the terms of the bond. If, as urged by the appellants, the city is not liable for their claims, any intention on its part to secure their payment must have been an act of generosity. If so, why this change of front? Why was the favor withdrawn?

Again, legal precision would require that the materialmen and others mentioned in the controverted clause of the bond should have been included as obligees on the bond had it been desired to protect their claims thereby. If the contention of the appellants be true that the city had no interest to subserve in inserting the clause in question and if that were the view taken by the city officials, the city must be considered by all hands as a mere nominal obligee as to this clause. Why, then, did they not make the bond read ad hoc "unto all materialmen," etc.?

Again, the closing stipulation is that "suit on this bond may be brought * * * in the district in which the said contract is executed." Here was another neglected opportunity, if, indeed, it were the intention of the parties to confer an interest in the bond upon the materialmen, to show to whom the bondsmen were obligated. Having named the obligee in the bond, the parties concluded by providing for its enforcement. By whom? By the city of Manila or by any person interested therein or benefited thereby? No, indeed. There is no more effort to name the materialmen as entitled to a right to bring action on the bond in the judicial district of Manila than there is to name them obligees in the bond. Undoubtedly the city required the insertion of the disputed clause in the bond. If it were inserted for the purpose of protecting materialmen, why were not apt words used to that end? The attention of the sureties being called to possible litigation by the last paragraph of the bond, it might also be asked whether, assuming that they understood the bond to be for the benefit of materialmen, etc., they desired to make themselves liable to suits by an indefinite number of undetermined persons for claims as yet unknown? They might well agree to answer in damages to the city of Manila by reason of such claims and yet hesitate upon the proposition that they answer directly and for the full amount of such claims.

As illustrative of the apt words used in a bond securing unnamed persons, we call attention to Act No. 1901, which specifies the contents of a sheriff's bond. The Act provides that it shall read "for the benefit of whom it may concern" and that it shall be available "for the benefit of the Government and of any person in interest."

It seems to us that to hold that the parties intended to make the materialmen obligees in the bond involves a disregard for its actual language which is not becoming in a court of law. To reach such a conclusion it is necessary to surmount two rules of construction peculiarly applicable to the instrument: First, that a stipulation pour autrui must be clearly expressed; and second, that a contract of surety is not to be presumed but must be express. If these be disposed of, it then becomes necessary to insert actual words in the bond, naming the materialmen, etc., as obligees, and giving them the right to sue thereon in the judicial district of Manila; and the conclusion must finally be reached that the sureties and the city officials are now acting in collusion in denying that there was an intention to confer the benefit of the bond upon the materialmen.

But if the clause in question was not inserted for the benefit of the materialmen and the city is not in any way liable for their claims against the contractor, for what purpose was it inserted in the bond? The first answer which suggests itself to this question, assuming that the hypothesis is correct, is that it was inserted ex abundanti cautela. And this does not appear so specious when we consider such articles of the Civil Code as article 1111, which gives to creditors the rights and actions of their insolvent debtors and article 1597, which gives to materialmen and laborers a right of action against the owner for any sum remaining in his hands due the contractor. At the present time we refrain from determining whether the city had legal reason for protecting itself in the bond from the claims of materialmen for the reason that the question appears to us too difficult for an offhand decision. But we do think that these articles of the code show some considerable reason for inserting in the bond protection against such claims.

Litigation has occurred with some frequency in the United States on contractors' bonds which contain clauses similar to the one under consideration. We have made some study of these cases, and they seem to call for some comment. In some of them the bond read directly to the materialmen, etc. With these cases we are in complete accord, and had the bond in the instant case spread, there could be no doubt as to the liability of the bondsmen to the plaintiffs. We cite, as instances of this class of cases, *St. Louis vs. Von Phul* (133 Mo., 561; 54 Am. St. Rep., 695); *Getchell & Martin Lumber and Mfg. Co. vs. Peterson & Sampson* (124 Iowa, 599); *Philadelphia vs. Harry C. Nichols Co.* (214 Pa., 265).

In those cases which may be said to run directly counter to the view we have taken of the bond under consideration, the materialmen, etc., were not named or referred to in any way as obligees in the bond. Yet, the sureties were held liable. From both Nebraska and Indiana come a number of cases which have so construed bonds given by contractors and reading only to the owner as obligee. The Indiana cases are collected in the late case of *Knight & Jillson Co. vs. Castle* (172 Ind., 97) ; while the Nebraska cases are collected in *Korsmeyer Plumbing & Heating Co. vs. McClay* (43 Neb., 649), and *Morton vs. Harvey* (57 Neb., 304). The supreme court of Missouri, in *Devers vs. Howard* (144 Mo., 671), apparently allowed recovery upon such a bond, although the decision hardly gives a sufficient outline of the bond to so state positively. In all these cases, the language of the bonds declared upon was disregarded, and by what we deem a forced and unwarranted construction of the instruments, it was held that the parties had expressly stipulated in favor of the materialmen, etc.

The last class of cases to which we find it necessary to refer supports the stand taken by us. The decision in *Electric Appliance Co. vs. United States Fidelity & Guaranty Co.* (110 Wis., 434), concludes as follows: "We have arrived at the conclusion that the contract and bond in suit do not disclose an intent to secure third parties. We deem it clear, under the circumstances, that the bond was taken for the city's benefit, and this conclusion is amply confirmed by the practical construction given it by the parties."

Brower Lumber Co. vs. Miller (28 Ore., 565), and *Weller vs. Goble* (66 Iowa, 113), are also in accord with us. The only decision from Louisiana, which should be regarded with special interest coming as it does from a civil law jurisdiction, is also wholly in our favor. (*Salem Brick & Lumber Co. vs. Le Sassier*, 106 La., 389.) Counsel has made strenuous efforts to distinguish that case from the one at bar. It is asserted that the clause in that bond was inserted by way of preamble to a condition in the bond and was not a condition, properly speaking, of the bond, while in the bond at bar the clause constitutes an express stipulation. We doubt if so fine a distinction may fairly be drawn. But we think the opinion of the supreme court of Louisiana as to whether it be a case in point is decisive for us. The case is thus reviewed in *Allen & Currey Mfg. Co. vs. Shreve-port Waterworks Co.* (113 La., 1091), under the following introductory statement: "As furnishing instances where the implication was very strong, yet not strong enough to induce the courts to recognize a stipulation pour autrui, the following cases may be cited."

For a lengthy review of the American case law upon this particular phase of stipulations pour autrui, see the monographic note to *Jefferson vs. Asch* (27 L. R. A. [N. S.], 573). For the foregoing reasons the judgment of the lower court, sustaining the demurrer to the complaint, is affirmed, with costs against the appellants. So ordered.

Arellano C. J., Torres, Carson, and Araullo, JJ., concur.

Johnson, J., dissents.

MORELAND, J., concurring:

I am for affirmance on the ground that it is clear that the bond is not susceptible of the construction placed on it by the plaintiff. Such a construction might seriously affect the interests of the city of Manila; and it is not to be inferred that the officials of the city would accept the bond which by its very terms might deprive the city of all

protection thereunder.

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