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Employment Contracts - Potestative Conditions

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Notes

EMPLOYMENT CONTRACTS—POTESTATIVE CONDITIONS

The plaintiff corporation agreed to hire defendant as division branch manager for an indefinite term at a guaranteed monthly salary plus commissions. The contract was terminable at the will of either party on giving ten days' written notice. The defendant agreed that he would not, prior to termination of the employment or for two years thereafter, in any way persuade any employee or dealer of the company to discontinue his relationship with the plaintiff. Defendant gave the required notice and terminated his employment. The plaintiff, alleging that defendant violated the agreement by persuading its employees to terminate their employment and become engaged as employees in defendant's newly organized business, sued for damages and an injunction restraining defendant from violating the contract stipulation. The lower court, relying on the decision in *Blanchard v. Haber*,[1] invalidated the contract as involving a potestative condition. *Held*, that the agreement was a valid bilateral contract. *Martin Parry Corporation v. New Orleans Fire Detection Service*, 60 So. 2d 83 (La. 1952).

Article 2024 of the Louisiana Civil Code defines a potestative condition as "that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder." Article 2034 provides that "Every obligation is null that has been contracted on a potestative condition on the part of him who binds himself." However, Article 2035 qualifies Article 2034 by limiting its operation to "potestative conditions which make the obligation depend *solely* on the exercise of the obligor's will. . . ." (Italics supplied.) Thus it is seen that not every obligation subject to a potestative condition is null. To illustrate: If *A* promises *B* that he will sell his car to *B* if he wants to sell it to *B*, it is clear that *A* is free to perform or not to perform his promise at his option. Since there is no substantial limitation on *A*'s legal freedom to choose whether or not he will perform the promise, his purported obligation is really no obligation at all and should

1. 166 La. 1014, 118 So. 117 (1928).

come within the nullity prescribed by Article 2034. On the other hand, if *A* promises *B* that he will sell *B* his car if he, *A*, should purchase a new car, *A* has substantially limited his legal freedom, although his obligation still depends on the exercise of his will as to whether he will purchase a new car. Thus, while *A*'s obligation is subject to a potestative condition, the potestative condition in question would seem not to fall within the provision of nullity of Article 2034 because the obligation does not depend *solely* upon an exercise of the obligor's *will* but upon his *doing an act*, that is, purchasing a new car. Where the line of nullity contemplated by Articles 2034 and 2035 is to be drawn in the case of obligations depending upon the doing of some act by the obligor should depend on whether or not there is a substantial limitation on the obligor's legal freedom of choice.

The obligation which is wholly dependent for its execution on the will of the obligor—where there is no substantial limitation on the obligor's legal freedom—is termed by the French writers[2] as an obligation subject to a purely potestative condition. This obligation subject to a "purely" potestative[3] condition is substantially the same as the illusory promise at common law.[4]

The problems involved in employment contracts which contain potestative conditions may be illustrated by the following hypothetical situation: *A* and *B* enter into a contract whereby *A* promises to employ *B* for ten years but retains the right to terminate the employment at any time. *B* promises in return that on termination of the employment he will not compete with *A* for five years. *A*'s promise is illusory or subject to a "purely" potestative condition in that he has not bound himself to employ *B* for any given length of time. The promise would be unenforceable and void as a promise to employ for ten years both at common law[5] and at civil law.[6] Further, at common law *A*'s illusory promise would not be a sufficient consideration for *B*'s return promise not to compete.[7]

The articles of the Civil Code on potestative conditions go no further than to declare that the obligation subject to a potesta-

2. 2 Colin et Capitant, Droit Civil Français, nº 393 (8 ed. 1936); 17 Laurent, Principes de Droit Civil, nº 55 (2 ed. 1876); 7 Planiol et Ripert, Traite Pratique de Droit Civil Français, nº 1028 (1931).

3. For purposes of terminology "purely" potestative will be used to denote that obligation declared null by Article 2034.

4. 1 Corbin, Contracts 487, § 149 (1950).

5. Id. at 461, § 145.

6. Art. 2034, La. Civil Code of 1870.

7. A.L.I., Restatement of Contracts, § 79 (1932).

tive condition is in itself null and void. Whether the return obligation (*B*'s promise above) in what appears to be a bilateral contract is also null should depend on the cause[8] of that return obligation, for at civil law an obligation need not be supported by consideration.[9]

In the situation posed above there are two possibilities with respect to *B*'s intention in making his promise: (1) that *B* was seeking from *A* a promise to employ for a definite period of time, or (2) that *B* was seeking to secure an employment at will in return for his promise. The only way to know whether one obligation has been made to rest on another obligation is to inquire into the intention of the party promising, that is, to determine the cause or motive of the promisor's obligation. Thus if the cause of *B*'s promise was to get a valid and binding return obligation of *A* to hire him for a definite length of time and in fact he received no such return obligation, then *B*'s obligation was contracted under error as to principal cause[10] and would be without effect.[11]

On the other hand, reciprocity of obligations is not the essence of a contract,[12] and it does not necessarily follow that when one obligation in what may appear to have the form of a bilateral contract is subject to a "purely" potestative condition the entire contract will be struck with nullity. This is the position taken by many of the French authorities,[13] who go on to say that in such a case the contract ceases to be bilateral and becomes unilateral. But for such a rationalization to hold true the obligor

8. Art. 1896, La. Civil Code of 1870: "By the *cause* of the contract, in this section, is meant the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which was his inducement for contracting to exist, when in fact it had never existed, or had ceased to exist before the contract was made."

Art. 1824, La. Civil Code of 1870: "The reality of the cause is a kind of precedent condition to the contract, without which the consent would not have been given, because the motive being that which determines the will, if there be no such cause where one was supposed to exist, or if it be falsely represented, there can be no valid consent."

9. Art. 1779, La. Civil Code of 1870: "Four requisites are necessary to the validity of a contract: 1. Parties legally capable of contracting. 2. Their consent legally given. 3. A certain object, which forms the matter of agreement. 4. A lawful purpose."

10. Art. 1825, La. Civil Code of 1870.

11. Art. 1893, La. Civil Code of 1870.

12. 2 Larombière, Théorie et Pratique des Obligations, 358, Art. 1174, nº 11 (1885).

13. 2 Baudry-Lacantinerie et Barde, Traite de Droit Civil, nº 782 (2 ed. 1902); 7 Huc, Commentaire du Code Civil, nº 246 (1894); 2 Larombière, Théorie et Pratique des Obligations, 358, Art. 1174, nº 11 (1885); 17 Laurent, Principes de Droit Civil Français, nº 64 (2 ed. 1876).

must have intended that his obligation should stand alone, for the reality of the cause is a precedent condition to the validity of an obligation. Hence, if *B*'s determining motive was to get the employment and the salary and the experience to be received therefrom, notwithstanding that he was not being assured employment for a definite length of time, then *B*'s obligation should be held to have a real cause and to be valid and enforceable.

In the *Blanchard* case the plaintiff agreed to employ the defendant as a dentist for a period of ten years at sixty dollars a week. The contract further stipulated that either party could terminate it on giving thirty days' notice. The defendant agreed that for ten years following such termination he would not practice dentistry within five blocks of plaintiff's office. The court in effect seemed to divide the contract into two parts, the first containing the plaintiff's obligation to pay defendant for services rendered and defendant's return obligation to work for a stipulated salary, and the second containing defendant's obligation not to compete and plaintiff's supposed obligation to hire him for ten years. In dealing with the second part of the contract, the court found that plaintiff's obligation to hire defendant was terminable at will and was therefore subject to a potestative condition. The court also looked at defendant's return promise in terms of how much he received for it and found an absence of serious consideration[14] to support defendant's obligation as required by Article 2464. The court thus concluded that, there being no mutuality of obligation, defendant's obligation was not enforceable against him.[15]

Although the court in the *Martin Parry* case came to a sound conclusion[16] and did not involve itself with questions of serious

14. The so-called doctrine of serious consideration asserted to be "as old as the civil law itself" was injected into Louisiana law by the decision in Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906). But see Brown, The Potestative Condition in Louisiana, 6 Tulane L. Rev. 23 (1931).

15. The rationale of the *Blanchard* case was substantially followed in Cloverland Dairy Products Co., Inc. v. Grace, 180 La. 694, 157 So. 393 (1934); Shreveport Laundries, Inc. v. Teagle, 139 So. 563 (La. App. 1932); Cali v. National Linen Service Corp., 38 F. 2d 35 (5th Cir. 1930).

The precise problem presented in the *Blanchard* case could not again arise because of Act 133 of 1934 (now La. R.S. 1950, 23:921) declares all provisions of contracts whereby the employee agrees not to engage in a competing business on termination of his contract of employment to be null and unenforceable. However, the general problem as to other restrictions agreed to by employees does not fall within the statutory prohibition.

16. The court concluded that the defendant's obligation was a "perfectly lawful promise based on reasonable grounds, i.e., the salary and emoluments to be obtained in the position of Branch Manager."

consideration,[17] there is in the opinion language which perpetuates the existing confusion concerning the potestative condition. Specifically, the court states,[18] "And there is nothing conditional about the promise [the defendant's promise not to entice away plaintiff's employees]; it was absolute—defendant agreeing that, upon the occurrence of a certain event—the termination of employment—he would not disturb the other employees of plaintiff. Albeit, it is difficult to discern why the agreement is said to contain a potestative condition." Later in the opinion the court declares, "Surely the absolute promise of defendant to desist from interference with plaintiff's employees and dealers after the termination of his employment bears little resemblance to a potestative condition as defined by Article 2024 of the LSA-CC." As a matter of fact, the defendant's obligation is not subject to a potestative condition which would operate to nullify the obligation. At any rate, the case should not turn on whether or not *defendant's* obligation was subject to a potestative condition but whether it would be binding on him if *plaintiff's* promise was subject to a potestative condition. If plaintiff's obligation to hire defendant for an indefinite term is terminable at his will, then he is not in effect bound to give defendant employment for the stated period. This being true, his obligation is null within the meaning of Article 2034. The question then reduces itself to a determination of whether the defendant's obligation can stand alone or must fall with the plaintiff's.[19] Suffice it to say, the defendant in the instant case seemed to intend that his obligation should stand alone and that the cause of his obligation was not to get a return promise, but rather to get the employment, salary and benefits therefrom regardless of the length of time the employment should continue. Therefore, the defendant's obligation should be enforced against him.

Despite the approach generally taken[20] by the Louisiana courts in dealing with employment contract cases, they have generally reached desirable results. Probably underlying all their

17. If the court considered at all the question of serious consideration, and it would seem that they did not, then it can be said that they found that the defendant's obligation was supported by serious consideration in the form of the salary and benefits to be gained from the employment.

18. 60 So. 2d 83, 85 (La. 1952).

19. See supra, p. 514, where this question is considered.

20. But cf. Cust v. Item Co., 200 La. 515, 8 So. 2d 361 (1942), where the court, in dealing with a stipulation not to compete in what purported to be a contract of partnership, held the stipulation null as being contrary to public policy. The court made no mention of potestative conditions or serious consideration.

concern with potestative conditions, serious consideration and mutuality of obligations is an ultimate concern with the question of whether the particular stipulation not to compete is opposed to the public policy forbidding unreasonable restraint of trade.[21]

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PRACTICE—SURVIVAL OF ACTION

Plaintiff was injured in a fall in defendant's theater and instituted suit to recover damages. Judgment was rendered in the district court several years later denying recovery. Plaintiff took a devolutive appeal, but pending the appeal she died. Her husband, nearly five years later, petitioned the court of appeal to be made plaintiff. This the court of appeal refused to do, but remanded the case to the trial court to receive evidence of the husband's capacity to prosecute the appeal.[1] Defendant applied to the Supreme Court for a writ of review, contending that judgment should have been rendered dismissing the husband's petition. *Held*, that since the wife had been cast in judgment in the district court, her right of action had not become a property right capable of passing to the husband by inheritance. "The only right to which the husband succeeded was the statutory survival of action under Article 2315 which had to be exercised in accordance with the terms of the statute. . . ." The court expressed a belief that Act 239 of 1946 had been impliedly repealed by Act 333 of 1948, amending and reenacting Article 2315 of the Louisiana Civil Code. *Gabriel v. United Theatres, Inc.*, 221 La. 219, 59 So. 2d 127 (1952).

In the Louisiana Civil Code of 1825, the corresponding article to the present Article 2315 contained no provision for survival of actions in tort after the death of the injured person.[2] By amendment to this article in 1855[3] the tort action of a deceased survives in favor of certain designated beneficiaries, who may bring the action of the deceased in their own right. But this right is limited by a prescriptive period of one year. The court has always inter-

21. See Shreveport Laundries, Inc. v. Teagle, 139 So. 563, 567 (La. App. 1932), where the court in referring to the *Blanchard* case said, "It is conceded that the court could have justifiably held the contract invalid as being against public policy."

1. Gabriel v. United Theatres, 50 So. 2d 514 (La. App. 1951).

2. Art. 2294, La. Civil Code of 1825.

3. La. Act 233 of 1855, amending Art. 2294, Civil Code of 1825.