Louisiana Law Review

Volume 13 | Number 4
May 1953

Contracts - Pre-Existing Legal Duty - Louisiana Law

Geraldine E. Bullock

In Washington, Arizona, Nevada and Texas the division of the community is left to the discretion of the court.[12] The Texas statute concerning alimony pendente lite is most similar to ours, for it is proportioned to the wife's needs and the husband's means.[13] But even in that state the results reached may differ substantially from ours, for Texas spouses may dissolve the community at will by mutual agreement.[14]

Thus it is seen that the statutes and jurisprudence of other community property states shed very little light upon the problem in Louisiana. The major reason for this is the unique stand taken in Louisiana, as opposed to the other states, that the spouses have a very definite vested interest in the community assets. Other states either do not have such a vested interest by the spouses or such interest is indefinite and may be changed by the court depending upon the circumstances.[15] It is believed, therefore, that the solution to the problem lies wholly in a more compete analysis of Article 148 and in a re-examination of prior jurisprudence.

Maynard E. Cush

CONTRACTS—PRE-EXISTING LEGAL DUTY—LOUISIANA LAW

Plaintiff, under a verbal contract of employment, sought to recover from defendant the value of his services for the demolition and removal of a "steel reenforced" concrete foundation of a diesel engine in defendant's plant. The day after work was begun on the removal of the foundation, the plaintiff informed the defendant that he could not afford to work any longer under the original contract, for it had not been contemplated that the concrete would be "full of iron." Another contract was executed at that time whereby the plaintiff agreed to carry on the work until Tuesday morning, meaning the second day after that on

12. However, in some states the court may not only (1) award the husband's entire share of community assets to the wife, but also (2) may order some of the husband's separate assets to be paid over to her. As to (1) above, see N.M. Stat. 1941, § 25-716. Cf. Harper v. Harper, 54 N.M. 194, 217 P. 2d 857 (1950). In this case the court called the award of assets "lump-sum alimony." As to (2) above, see Remington's Wash. Rev. Stat. 1932, § 26.08.110. Cf. Hale v. Hale, 76 Wash. 34, 135 Pac. 481 (1931).

13. Vernon's Tex. Stat. 1948, Art. 4637.

14. Id. at Art. 4624a.

15. The rights of both parties depend on the discretion of the court. Thus the court's only restraint is its own sense of justice. See notes 12 and 13, supra.

which the conversation took place, and the defendant agreed to pay plaintiff an additional $100. When an inquiry was made by the plaintiff as to the continuance of the work after Tuesday, the defendant then said: "I don't care what it will cost, get it out." The plaintiff completed the work and sued the defendant for compensation. In rendering the decision, the court upheld the modified or new promise on the ground that it constituted a good faith setlement of a substantial dispute between the parties as to the effect or construction of the original contract. *Lee v. National Cylinder Gas Company*, 58 So. 2d 568 (La. 1952).

Achieving the result under the theory that the modified agreement was a settlement or compromise of existing differences between the parties is neither questionable nor unique. In numerous decisions when a dispute has developed over the original contract, the subsequent promise has been considered a "compromise of differences" and judgment rendered for the plaintiff.[1] Nevertheless, the court in the instant case, as in previous decisions rendered under this theory,[2] approved, or at least recognized, the rule stated in *Monroe Investment Company v. Ford.*[3] The rule of the *Ford* case had been directly extracted from the common law doctrine set forth in Corpus Juris:

> "A promise to do what the promisor is already bound to do cannot be a consideration, for, if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. Therefore, as a general rule, the performance of, or promise to perform, an existing legal obligation is not a valid consideration."[4]

The Louisiana courts, although often reaching a satisfactory result by application of this common law concept of consideration, have neglected to use the civilian concept of *cause*, which in many instances would have facilitated the rendering of decisions. While one cannot bind himself in the common law unless he receives something in return for his promise to be bound,[5] the civil law doctrine of *cause* exalts the individual will and pro-

1. Moorman v. Plummer Lumber Co., 113 La. 429, 37 So. 17 (1904); Standard Electric Construction Co. v. Frick Co., Inc., 16 La. App. 331, 134 So. 322 (1931); Breard v. Pyramid Oil and Gas Co., Inc., 191 La. 420, 185 So. 303 (1938).

2. Standard Electric Construction Co. v. Frick Co., Inc., 16 La. App. 331, 134 So. 322 (1931); Breard v. Pyramid Oil and Gas Co., Inc., 191 La. 420, 185 So. 303 (1938).

3. 168 La. 475, 122 So. 586 (1929).

4. 13 C.J., Contracts 351, § 207 (1917).

5. Restatement, Contracts § 75 (1932).

vides that the promisor can bind himself merely by expressing a will to do so.[6] Thus, had the Louisiana courts followed this civilian principle, the decision would hinge around the question of fact: Was the promisor's new promise given because of duress or coercion, or was it voluntarily given? In those situations in which the new promise is practically extorted, a real will to bind is lacking and no contract results. In cases where the new promise is voluntarily given, the will to bind exists and results in a contract.

The great exponents of the civil law in France have accorded this theory full recognition. There is substantial agreement that a promise to do more than one is legally bound to do may be based on an invalid cause. Pothier, Aubry and Rau, and Baudry-Lacantinerie suggest that the promise has an illicit cause when it is the debtor who exacts the promise in return for doing what he is already obligated to do.[7] Demolombe disregarded the concept of illicit cause but achieved the same result on the notion that the obligation is invalid under Article 1133 of the French Civil Code.[8] A study of the Louisiana jurisprudence makes it apparent, however, that the Louisiana courts have either failed to consider this treatment of the question or have not thought it to be the proper way of solving the issue.

There is another approach which excludes the use of the doctrine of consideration and under which the courts could reach results, in most cases, exactly corresponding to those of the common law courts.[9] The Anglo-American opinions make it evident that in most cases the issue of enforceability actually turns on the good or bad faith of the parties. The cases manifest a tendency to apply the principle strictly when the circumstances show that the new promise was not voluntarily made, but given because of duress or coercion.[10] On the other hand, the courts often make an exception in cases where the new promise was

6. Smith, A Refresher Course in Cause, 12 LOUISIANA LAW REVIEW 2, 4 (1951).

7. 4 Aubry et Rau, Cour de Droit Civil Français 550 (5 ed. 1902); 2 Baudry-Lacantinerie, Précis de Droit Civil, nº 124 (13 ed. 1925); 1 Pothier, Obligations 126, nº 46 (Evans, 1853); Snellings, Cause and Consideration in Louisiana, 8 Tulane L. Rev. 178, 200 (1933).

8. 1 Demolombe, Cours de Code Napoleon XXIV, Traité des Contrats, nº 380 (1 ed. 1877); Snellings, Cause and Consideration in Louisiana, 8 Tulane L. Rev. 178, 200 (1933). Note that Article 1133 of the French Civil Code corresponds to Article 1895 of the Louisiana Civil Code.

9. Smith, A Refresher Course in Cause, 12 Louisiana Law Review 2, 28 (1951).

10. Davis & Co. v. Morgan, 117 Ga. 504, 43 S.E. 732 (1903); Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S.W. 844 (1890).

voluntary and prompted by a recognition of the unforeseen hardship involved in the performance of the original contract.[11] Where the facts of a case are such that the court feels that the parties have in good faith adjusted their differences, it is very likely to make use of the argument that the new agreement is valid for the reason that there had been a rescission of the former contract.[12] It is believed that in most cases of this kind there is lacking a solid factual basis for finding mutual cancellation and that to rest a decision upon a rescission is to rest it upon a fiction. Louisiana courts could, by applying Article 1901 of the Code, which specifically provides that obligations must be performed in good faith, refuse to give validity to a promise of additional compensation except in cases where the plaintiff's conduct is not morally blameworthy and where the new promise was given because of some unforeseen hardship.

The language of the instant case is, however, in line with past decisions regarding the performance of pre-existing legal duties. The opinion of the court indicates that if necessary it would not have hesitated to resort to the use of the common law concept of consideration in rendering the judgment. As the jurisprudence stands at present, a pre-existing obligation will be held enforceable if the promise can be supported as a "compromise of differences and not a gratuitous undertaking." If the facts of the case will not lend themselves to a compromise situation, the obligation will be held invalid for lack of common law consideration.

Geraldine E. Bullock

LEGISLATION—CONSTRUCTION OF STATUTES

In *State v. St. Julian*[1] the Supreme Court dealt with the question as to which of two acts passed at the same session of the Legislature purporting to amend the same section of the Revised Statutes should be given effect. This problem is one which the Supreme Court will be called upon to decide again in the near future, because there are several other instances in

11. Linz v. Schuck, 106 Md. 220, 67 Atl. 286 (1907); Munroe v. Perkins, 26 Mass. 298, 20 Am. Dec. 475 (1930); Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 131 N.E. 887 (1921).

12. Martiniello v. Bamel, 255 Mass. 25, 150 N.E. 838 (1926); Munroe v. Perkins, 26 Mass. 298, 20 Am. Dec. 475 (1830); Schwartzreich v. Bauman-Basch, Inc., 231 N.Y. 196, 131 N.E. 887 (1921).

1. 221 La. 1018, 61 So. 2d 464 (1952).