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virtue of his having merely used the wrong word. Thus, the court under 1041 would not gain the power of appointment of one who was to take charge of the affairs of the estate.

CONVENTIONAL OBLIGATIONS

*J. Denson Smith**

The Louisiana Civil Code is clear to the point that assent to a contract may be express or implied.¹ In the latter case consent may be manifested either by actions or, in some circumstances, by silence or inaction. As an example the Code provides that to receive goods from a merchant without any express promise, and to use them, implies a contract to pay the value. This basic principle was applied in *Bascle v. Perez*,² where the defendant was held bound to pay the reasonable value of services rendered for him by the plaintiff, the compensation not having been fixed by the agreement. Relying on a series of earlier cases, the court observed that this disposition of the case was controlled by the moral maxim of the law that no one ought to enrich himself at the expense of another. Actually, when services are rendered and received with the expectation of payment the recipient impliedly agrees to pay their reasonable value. A judgment for such amount is therefore simply an enforcement of the agreement and reliance on a theory of unjust enrichment is unnecessary.

In *Lafleur v. Brown*³ the court held that an action for damages sustained in consequence of defendant's failure to deepen a well and to install properly a pump therein was contractual. It therefore overruled a plea of one-year prescription based on the mistaken theory that the action was in tort. Although some allegations of the petition gave color to the defendant's position, the petition as a whole amply supported the contrary conclusion.

The case of *Roy O. Martin Lumber Co. v. Saint Denis Securities Co.*⁴ that involved a claim for damages for breach of a contract to sell real estate was lost by the plaintiff's failure to show his acceptance of an offer made by the defendant.

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1. Arts. 1811, 1816, 1817, 1818, LA. CIVIL CODE of 1870. But see Art. 1766, LA. CIVIL CODE of 1870.

2. 224 La. 1014, 71 So.2d 551 (1954).

3. 223 La. 976, 67 So.2d 556 (1953).

4. 225 La. 51, 72 So.2d 257 (1954).

The Code provides that consent, freely given, is a prerequisite to the validity of a contract.⁵ In consequence, an expression of consent may be vitiated by violence and threats. Despite the fact that the language of the Code is suggestive of inconsistency,⁶ the personal characteristics of the individual subjected to the coercion should be considered. The proper inquiry should be whether he (or she) consented freely and voluntarily, or did not do so, not whether, under the circumstances, a person of ordinary firmness would have been deprived of his free will. This approach was properly applied in *Ane v. Ane*,⁷ where the court overruled an exception of no cause of action levelled at a petition charging coercion as a basis for annulling a community property settlement.

In another lack of consent case, error as to the principal cause was found to have resulted from erroneous information given by a real estate agent that the property he was undertaking to sell was in a white neighborhood. The case was *Carpenter v. Skinner*.⁸ In the case of *Parham v. Ruiz*,⁹ the evidence was clearly insufficient to sustain a claimed misrepresentation urged as a basis for annulling a sale of a hotel business.

In *Knight v. Knight*¹⁰ the court found no merit in an attempt to have a transfer of land set aside on the basis of insanity or lesion beyond moiety. Another action of lesion failed in *Dosher v. Louisiana Church of God*.¹¹

In *Roux v. Stassi*¹² a contract for the sale of a house and lot in a new subdivision was annulled at the instance of the purchaser. The sale was conditioned on the latter's securing a loan on the property. Because the default of the contractor resulted in the filing of certain liens, the loan could not be secured. The court refused to award the purchaser a return of double the deposit as provided in the contract in the event of a failure of performance by the vendor but did order the return of the amount put up and the cost of expenditures made by the purchaser on the property.

In a well-reasoned opinion in *Huber v. Taussig*¹³ the court

5. Art. 1819, LA. CIVIL CODE of 1870.

6. Art. 1851, LA. CIVIL CODE of 1870.

7. 225 La. 222, 72 So.2d 485 (1954).

8. 224 La. 848, 71 So.2d 133 (1954).

9. 225 La. 239, 72 So.2d 491 (1954).

10. 224 La. 483, 70 So.2d 97 (1953).

11. 225 La. 21, 71 So.2d 868 (1954).

12. 74 So.2d 161 (La. 1954).

13. 224 La. 453, 69 So.2d 919 (1953).

found a valid exclusive purchase agreement by a lessee of premises used as a filling station and held that an option to terminate the agreement did not give the lessee the privilege of acting arbitrarily. It found, on the contrary, that there was an implied obligation on his part to act in good faith and that the question of compliance was to be determined objectively.

A considerable amount of jurisprudence has developed the principle recognized in the Civil Code and Code of Practice under which a third party for whom a benefit is stipulated in a contract between others has an action to enforce it. A good addition to this jurisprudence is found in *First State Bank v. Burton*.¹⁴ Taking a very sound approach to the problem, the court found sufficient manifestation of such an intention in the language of an agreement concerning the drilling of an oil well and in the manner in which it had been executed by the parties. Prior cases have established, in harmony with the Code, a liberal tradition with respect to the finding of consent by the beneficiary. The instant case was properly consistent.

The court's opinion in *During v. Thibodeaux*¹⁵ constitutes a new warning that contracts for the payment of money where the value exceeds \$500, when not reduced to writing, must be proved by one credible witness and other corroborating circumstances. The plaintiff, a tile contractor, who had entered into a verbal contract when no one but the other party was present, failed to satisfy this requirement, as the court found. It was also observed that in such cases the finding of the trial court is entitled to great weight. The plaintiff in *Toca v. Thompson & Whitty, Inc.*¹⁶ also failed to prove his case.

In a carefully delineated opinion the court, in *J. F. Auderer Laboratories, Inc. v. Deas*,¹⁷ recognized the right of a sub-lessee to exercise, as assignee, an option to buy granted in a lease. It also held that a suit for specific performance, which is a demand that the contract be carried into effect, is itself a putting in default. To be perhaps overly-technical, since a putting in default is a prerequisite to a demand for damages, and the suit was for specific performance, the stated proposition would be significant only if damages for delay in performing after the filing of the suit (i.e., after the putting in default) were being claimed.

14. 225 La. 537, 73 So.2d 453 (1954).

15. 224 La. 814, 70 So.2d 882 (1954).

16. 224 La. 333, 69 So.2d 364 (1953).

17. 223 La. 923, 67 So.2d 179 (1953).

The problem of the admissibility of parol evidence varying, contradicting, or adding to a written contract holds peculiar and baffling difficulties. In *Rosenthal v. Gauthier*,¹⁸ by admitting parol evidence over the strenuous objection of defendant, the trial court supplied a condition imposing a cost limitation on a building to be designed by the plaintiff. In consequence, plaintiff's suit for his fee as an architect was rejected. The appellate court affirmed. The decision was apparently grounded on the proposition that since the contract with the architect did not set forth the proposed structural cost, a resort to parol evidence was necessary to determine whether such a limitation had been imposed. This proposition, that seems to throw wide the door to parol evidence of anything that might have been but was not included in a written agreement, raises grave questions concerning the meaning and effect of Article 2276 of the Louisiana Civil Code. In the first place, it is not easy to understand why the total failure to include a condition not necessarily a part of the contract, should be deemed to create a hiatus. In the second place, the evidence certainly went beyond anything contained in the writing. True it is that it did not contradict the writing, yet it did vary the latter in a critical way. An unconditional promise to pay became a promise to pay only if the structure designed would meet a certain cost limitation. Article 2276 provides that parol evidence shall not be admitted "against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since." The French tell us that the rule is based on the unreliability of verbal testimony and on the proposition that since the parties have declared their agreement in writing, the admission of parol evidence would substitute another mode of proof for that which the parties have adopted.¹⁹ The rule applies, therefore, to parol evidence, not collateral agreements in writing.²⁰ The validity of counter-letters directly contradictory of a writing is sufficient proof of this.²¹ The present ruling invites the fabrication of testimony to nullify a written obligation in violation of the theories underlying the adoption of the article. It seems clear that the evidence in question would not have been admitted in France. And our article is almost a verbatim copy of Article 1341 of

18. 224 La. 341, 69 So.2d 367 (1953).

19. See Comment, *Parol Evidence to Vary a Recital of Consideration*, 3 LOUISIANA LAW REVIEW 427 (1941), and authorities there cited.

20. Under the common law proof of oral collateral agreements, terms or conditions is permissible. See CORBIN, CONTRACTS § 582 *et seq.* (1951).

21. See Art. 2239, LA. CIVIL CODE of 1870.

the Code Napoleon. In any event, in view of the fact that evidence imposing an unexpressed and oral condition on an unconditional written promise works a serious change in the character of the obligation assumed, peculiarly strong and convincing testimony should be required. The fact that such a condition is not stated in the writing should be accepted as strong evidence that it was not made a part of the agreement.²²

Another case involving a problem of parol evidence was *Smith v. Bell*.²³ Here the court rejected an attempt to prove by parol and through the provisions of an earlier written contract, that the farm implements and equipment on certain farm lands transferred by an authentic act of sale had been reserved by the vendor. The proffered evidence was found to be inconsistent with the act of sale inasmuch as, under the provisions of the Civil Code, the sale of the land would include the implements of husbandry thereon. Although the court recognized that extrinsic written evidence is admissible to prove a collateral agreement going beyond a writing, it found this rule inapplicable because the result of the application would have been to contradict the act of sale. If, however, this test is sound, any counter-letter contradicting a written act would be inadmissible. But this is not the case. If the parties intend a later act to supersede an earlier one, that intention should, of course, be controlling; but, if a contrary intention appears, the later act should not be deemed controlling merely because it is the later or the more formal. This is what gives force and effect to a counter-letter. The parties might well intend to segregate the farm implements from the farm when a sale of the latter is being made and if they make this meaning clear in writing the supposed inconsistency between the act and the writing should not be allowed to defeat their intention. Of course, under this approach, the result arrived at in the instant case may have been completely sound.

Forced heirs are expressly authorized by the Code²⁴ to use parol evidence to prove the simulated contracts of those from whom they inherit. Inadequacy of the price paid does not render the transfer a simulation. In *Succession of Nelson*²⁵ the court

22. See *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110 (3d Cir. 1903); *Learned v. Holbrook*, 87 Ore. 576, 171 Pac. 222 (1918). But see *Brandin Slate Co. v. Fornea*, 183 So. 572 (La. App. 1938).

23. 224 La. 1, 68 So.2d 737 (1953), 14 LOUISIANA LAW REVIEW 704 (1954).

24. Art. 2239, LA. CIVIL CODE of 1870.

25. 224 La. 731, 70 So.2d 665 (1953).

found that there was a real although inadequate price and refused to set aside, as simulated, certain transfers by plaintiffs' ancestors.

In *Fuss v. Cordeleria de San Juan, S.A.*²⁶ there was a reaffirmation of the rule that a creditor who accepts a payment tendered in full settlement of a disputed claim is estopped to demand any additional amount.

PARTICULAR CONTRACTS

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SALE

The sale is one of the particular contracts given special treatment in the Civil Code. To it are applicable certain particular rules that, as such, are not applicable to contracts generally. Otherwise, the general rules of conventional obligations apply.

A demand for specific performance of a contract to sell real estate was rejected in *Guzzo v. Liggio*.¹ No time for performance was fixed by the agreement, but since three and one-half years had elapsed the court felt that the reasonable time within which performance should have been rendered had expired. There was some evidence of lack of a serious intent to contract for the actual sale of the house but the question of the admissibility of parol to show such intent was not discussed.

In *Wainwright v. Lingle*² the court found that the plaintiff who had paid for fifty shares of stock in a development company was entitled to the stock notwithstanding that two years had elapsed since the contract was formed. The award of specific performance was considered proper on the ground that by paying for the stock the purchaser had acquired rights of ownership.

In *Berniard v. Galiano*³ the plaintiff, after successfully maintaining a suit for specific performance of a contract to convey certain improved real estate, was given judgment for the value of the use and enjoyment of the property dating from the demand for specific performance until the surrender of possession. Inter-

26. 224 La. 338, 69 So.2d 365 (1953).

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1. 224 La. 313, 69 So.2d 357 (1953).

2. 224 La. 702, 70 So.2d 594 (1954).

3. 224 La. 1100, 71 So.2d 857 (1954) and 224 La. 1111, 71 So.2d 861 (1954).