

Louisiana Law Review

Volume 22 | Number 4

Symposium: Louisiana and the Civil Law

June 1962

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Repository Citation

William Shelby McKenzie, *Obligations - Potestative Conditions - Right to Terminate In Employment Contracts*, 22 La. L. Rev. (1962)

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OBLIGATIONS — POTESTATIVE CONDITIONS — RIGHT TO
TERMINATE IN EMPLOYMENT CONTRACTS

Plaintiff sued his former employer on the ground that the employer had discharged him in violation of their employment contract. The contract was to be of five years' duration with the plaintiff alone reserving the right of termination upon giving two weeks' notice. After the employment had continued for two and one-half years, the defendant discharged the plaintiff without apparent cause. The Second Circuit Court of Appeal approved the district court's conclusion in sustaining the defendant's exception of no cause of action on the basis that the contract on its face was invalid and unenforceable as it contained a potestative condition. On certiorari, the Louisiana Supreme Court, *held*, reversed. A clause in an employment contract giving the employee the exclusive right to terminate merely upon two weeks' notice is not a potestative condition which would result in nullity of the contract. *Long v. Foster & Associates*, 136 So. 2d 48 (La. 1961).

Louisiana jurisprudence on the subject of potestative conditions is a curious admixture of French law, common law, and Louisiana's own unique conceptions. Articles 1170 and 1174 of the French Civil Code deal with potestative conditions.¹ The former defines as potestative a contractual condition the fulfillment of which is within the power of one of the contracting parties to bring about or hinder. The latter article provides that every obligation contracted on a potestative condition on the part of him who purports to bind himself is null. The French authorities limit the effect of the latter article to obligations the *existence* of which are subject to a *purely* potestative condition. A condition is purely potestative when its fulfillment depends on nothing more than the exercise of the will of the obligor — that is, where, because of the condition, no limitation is imposed on the obligor's legal freedom. The existence of an obligation is dependent on a purely potestative condition when the effect of the condition is to prevent the assumption of that obligation until a further exer-

good faith and with a spirit of fair play in his relationship with his principal. This disclosure might operate as a termination of the agency or lead to a revocation of the agency by the principal. This would necessitate an investigation as to whether the relationship as present in the instant case would be a power coupled with an interest such as to render the agency irrevocable. This question was not raised here by the court.

1. These French code provisions correspond identically with LA. CIVIL CODE arts. 2024, 2034 (1870) :

cise of the obligor's will.² For example, if *A* promises to sell his house to *B* if *A* wishes, the obligation is a nullity since any obligation on *A*'s part will not exist unless and until *A* thereafter expresses his will to become bound to sell. On the other hand, if the assumption of an obligation does not depend solely upon a further exercise of the obligor's will, the obligation is not rendered null by Article 1174 even though the performance of it may be suspended by some condition the fulfillment of which rests with the obligor. Where *A* promises to sell his house to *B* if *A* moves to Paris, *A* actually assumes an obligation to sell. The fact that he cannot be obliged to fulfill it unless he moves to Paris does not destroy its obligatory effect. Such a condition is not purely potestative because it does not leave the promisor with his complete legal freedom.³ Likewise the obligation would be effective were *A* to promise to work for *B* for a certain period of time subject to the condition that *A* could terminate this employment at any time within that period. Although the condition is purely potestative, it does not prevent the *existence* of the obligation to work since it has only to do with the *duration* of an obligation which arose when *A* promised to work. These articles deal only with the effect of a potestative condition *on the part of him who binds himself*. They make no reference to the obligee because, under the French theory of the binding efficacy of the will, a person can bind himself without receiving an obligation in return if he possesses the requisite intent to be so bound.⁴

"Art. 2024. The potestative condition is 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."

"Art. 2034. Every obligation is null, that has been contracted, on a potestative condition, on the part of him who binds himself."

2. 4 AUBRY ET RAU, DROIT CIVIL FRANÇAIS n° 302 (6th ed. 1946) ; 2 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL nos 781-784 (3d ed. 1907) ; 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1269A (1959) ; 3 TOULLIER, LE DROIT CIVIL FRANÇAIS nos 492-94 (1846). See, generally, Brown, *Potestative Conditions and Illusory Promises*, 5 TUL. L. REV. 396 (1931) ; Smith, *The Principle of Mutuality of Obligation and Its Juridical Utility in Enforcing Contractual Fair Dealing*, Festschrift für Ernst Rabel, Band I, 279 (1954).

3. Though the moving or not moving may depend on *A*'s will, *A* cannot move to Paris without incurring the corresponding responsibility to sell to *B*. Hence the condition imposes a limitation on his legal freedom. Conditional promises such as one by *A* that he will sell if he raises his hand or wears a gray hat are similar in form to a promise to sell if he moves. However, these are considered purely potestative conditions, since the act itself is so trivial that in actuality the obligation rests solely on the obligor's will.

4. 17 LAURENT, PRINCIPES n° 64 (2d ed. 1876). Cf. DALLOZ, JURISPRUDENCE GENERALE, OBLIGATIONS n° 1148 (1860). See Brown, *Potestative Conditions and Illusory Promises*, 5 TUL. L. REV. 396 (1931) ; Smith, *A Refresher Course in Cause*, 12 LOUISIANA LAW REVIEW 2 (1951).

Thus these articles merely recognize that, if a party purporting to obligate himself employs language that does not constitute the assumption of an obligation, it follows that his obligation is null. In effect, the code provisions merely spell out the truism that he who has not obligated himself has no obligation.

At common law, a valid bilateral contract cannot be formed unless each party has given consideration for the promise of the other. In order to constitute consideration, a promise must not be wholly illusory.⁵ A wholly illusory promise is one subject to a condition which imposes no limitation on one's legal freedom regardless of whether it goes to the existence or the duration of an obligation. However if the condition does impose some limitation on the legal freedom of the promisor, it ceases to be wholly illusory and the imposition acts as legal support for the promise of the other party. At common law the promise of the employee to render services subject to a power of cancellation on a period of notice is generally considered sufficient consideration for a return promise by the employer which guarantees the opportunity of employment for a definite period of time.⁶ The promise to work for at least the period of notice constitutes a restraint on the legal freedom of the promisor.

Louisiana Civil Code Articles 2024 and 2034 are identical with French Civil Code Articles 1170 and 1174 discussed above. In addition to these, the Louisiana Civil Code contains Articles 2035 and 2036 which have no counterpart in the French Code.⁷ Generally they present the premise that the performance or the duration of an obligation may depend on the will of a party without affecting the validity of the obligation. It seems, therefore,

5. RESTATEMENT, CONTRACTS § 75 (1933).

6. *Newhall v. Journal Printing Co.*, 105 Minn. 44, 46, 117 N.W. 228 (1908) : "It is, however, well settled that a contract for employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period." See *Stern & Co. v. International Harvester Co.*, 148 Conn. 527, 172 A.2d 614 (1961); 1 CORBIN, CONTRACTS §§ 163-164 (1950); 1 WILLISTON, CONTRACTS § 141 (1936).

7. The provisions of these articles appeared first in the Civil Code of 1825. They state:

"The last preceding article is limited to potestative conditions, which make the obligation depend solely on the exercise of the obligor's will; but if the condition be, that the obligor shall do or not do a certain act, although the doing or not doing of the act depends on the will of the obligor, yet the obligation depending on such condition, is not void." LA. CIVIL CODE art. 2035 (1870).

"An obligation may also be made, by consent of the parties, to depend on the will of the obligee for its duration. Thus a lease may be made during the will of the lessor, and a sale may be made conditioned to be void, if the vendor chooses to redeem the property sold." *Id.* art. 2036.

that the code articles reflect the French principle that it is only the purely potestative condition which prevents the assumption of any obligation that is considered as imparting nullity. By way of example, it is expressly provided that a perfectly valid lease will be formed although a power of termination is reserved to the lessor. Unlike the French, the Louisiana courts have avoided holding definitively that a person may bind himself by his will alone.⁸ In consequence, if the obligation of one party is subject to a nullifying potestative condition, the obligation of the other party to a bilateral contract is also null.⁹

*Blanchard v. Haber*¹⁰ was the first Louisiana Supreme Court decision holding an employment contract invalid because it was subject to a potestative condition.¹¹ Both the employee and the employer had reserved the right to terminate the employment after thirty days' notice. In addition, the contract contained the provision that, in the event it was cancelled, the employee, a dentist, could not compete within a certain area of the city for ten years. The court held the contract null on two grounds.

8. Landeche v. Sarpy, 37 La. Ann. 835 (1885).

9. Murray v. Barnhart, 117 La. 1023, 1031, 42 So. 489, 491 (1906): "We conclude that the contract, since it accorded to the lessee the right to put an end to it at any time, was purely potestative on the part of the lessee, and therefore null. Civ. Code, Art. 2034."

10. 166 La. 1014, 118 So. 117 (1928).

11. Certain mineral lease cases provided the first opportunity for the Louisiana courts to apply the code provisions dealing with potestative conditions to contracts involving the right to terminate an obligation. Murray v. Barnhart, 117 La. 1023, 42 So. 489 (1906); Goodson v. Vivian Oil Co., 129 La. 955, 57 So. 281 (1912); Berl v. Kehoe, 130 La. 1020, 58 So. 864 (1912); Long v. Sun Co., 132 La. 601, 61 So. 684 (1913). These were generally mineral leases in which the lessee promised to drill within a certain period of time, but reserved the right to terminate this drilling obligation by paying some nominal sum. Out of these cases evolved the doctrine that if the driller does not give "serious" consideration for his right to terminate, the contract contains a potestative condition which renders it null. There is serious consideration only when the amount paid for the lease with the right to terminate is found not to be all out of proportion to the value of the lease. In reference to the effect of potestative conditions, the doctrine of serious consideration seems to be a unique conception of Louisiana law. The power of cancellation, under French theory, would affect only the duration of an existing obligation. At common law the payment of even a nominal sum is generally considered sufficient consideration. However, these decisions are equitable in that the lessor, in signing a mineral lease prepared by the lessee, was obviously laboring under the misconception that the lessee was obliged to drill a well upon his land when in fact the lessee could avoid this obligation entirely by making a nominal payment. Perhaps the doctrine of serious consideration merely reflects the court's adherence to the principle that, where there appears to be lacking a serious and true will to bind oneself, an obligation should not be formed. Applied to the mineral lease cases, this would mean that since the object of the contract from the standpoint of the lessor was to have a well drilled on his land, it could not be said that he had a serious and true will to bind himself in return for a promise subject to a condition which defeated the very purpose of his obligation.

First, the court treated the agreement to pay wages as consideration solely for the agreement to render services and thus concluded that the non-competition obligation was completely unsupported by consideration. Secondly, the court found that the obligations imposed on the employee were contracted under a potestative condition — that there was no “serious” consideration for his promises. Until the decision in *Martin-Parry v. New Orleans Fire Detection Service*,¹² twenty-four years later, the *Blanchard* case was not directly challenged.¹³ Under facts similar to those of *Blanchard*, the court in *Martin-Parry* upheld the contract.¹⁴ It was said that the court in *Blanchard* had been in error when it divided the contract into parts, and then required reciprocal obligations to support each promise. It concluded that the promises of one party act as the inducement for the promises of the other, and that a consideration must be found only in his total obligation and not in each separate promise. Then, relying heavily on the mutuality of the right to terminate, the court found that such a contract was not subject to a nullifying potestative condition.

The instant case involved the first employment contract before the Louisiana courts wherein the right of termination was reserved exclusively in one party. The court of appeal concluded that, since the right was not mutually accorded, the condition was potestative, and thus the contract was null.¹⁵ The Supreme Court reversed on two grounds. First, Article 2035 was found to limit potestative conditions which produce nullity to those which are purely potestative. The court defined a purely potestative condition as:

“[O]ne which is subject only to the whim or pleasure of the promisor and would involve no detriment, disadvantage or inconvenience to him if he brings about or hinders the happening of the event on which the obligation depends.”¹⁶

The period of notice and the loss of certainty of employment

12. 221 La. 677, 60 So.2d 83 (1952).

13. See *Cloverland Dairy Products Co. v. Grace*, 180 La. 694, 157 So. 393 (1934); *Shreveport Laundries v. Teagle*, 139 So. 563 (La. App. 2d Cir. 1932). But see *Cali v. National Linen Service Corp.*, 38 F.2d 35 (5th Cir. 1930), which found “serious” consideration in a similar agreement.

14. The non-competition clause in the contract in *Martin-Parry* was an agreement by employee not to disturb, hire, or entice away any other employee of the company for two years after termination of the contract. See note 18 *infra*.

15. *Long v. Foster & Associates*, 129 So.2d 601 (La. App. 2d Cir. 1961).

16. *Long v. Foster & Associates*, 136 So.2d 48, 53 (La. 1961). See also *Humble Oil & Refining Co. v. Guillory*, 212 La. 646, 33 So.2d 182 (1946).

were indicated as definite detriments which the employee would suffer in the exercise of his power of termination. Thus the condition was not purely potestative. Secondly, the court concluded that the contract could have been upheld on the basis of Article 2036 alone. Since employment is considered a lease of labor,¹⁷ an agreement allowing the lessor the right to determine the duration of the lease is expressly valid under this article. The court stated:

“But conceding for the sake of argument that the assailed cancellation clause was purely potestative in nature, nevertheless it related solely to the duration of the contract; and Revised Civil Code Article 2036 *specifically recognizes the validity of an agreement when the duration thereof is left to the will of one of the parties.*” (Emphasis added.)¹⁸

The court of appeal referred to potestative conditions as a “vague and uncertain twilight zone of our jurisprudence.”¹⁹ It seems that the decision in the instant case may have shed some illumination on this darkness. The court emphasized that the nullity under Article 2034 is limited in application to purely potestative conditions. Moreover the court recognized a further important and often neglected limitation on this article when it is construed in the light of Article 2036. This is, that Article 2034 does not render null those obligations where only the duration thereof is left to the will of one of the parties. Hence the court, at least in agreements similar to a lease, seems to adopt the French interpretation that it is only the purely potestative condition which prevents the existence of an obligation that imparts nullity under this code provision.²⁰ The result in the

17. LA. CIVIL CODE arts. 2669, 2673 (1870).

18. Long v. Foster & Associates, 136 So.2d 48, 53 (La. 1961). See also Conques v. Andrus, 162 La. 73, 110 So. 93 (1926) (enforcement of a re-purchase clause). The court also emphasized the error in searching for reciprocal considerations for each stipulation in an agreement. The principal consideration in an employment contract is the exchange of services for wages, and thus all other provisions are merely “incidental” stipulations which are included to form the inducement for making the contract. Such incidental stipulations depend solely on the will of the parties; they need not be mutually accorded; and they must be given effect when not repugnant to law or public policy. Cf. LA. CIVIL CODE art. 1764 (1870) (“accidental stipulations”). The reasoning of the *Blanchard* case was expressly overruled. However, the court indicated that the result reached in that case was correct because that kind of non-competition clause was against public policy.. It was expressly declared so in La. Acts 1934, No. 133. The type of restraint imposed by the contract under consideration in the *Martin-Parry* case was not contrary to this act.

19. Long v. Foster & Associates, 129 So.2d 601, 602 (La. App. 2d Cir. 1961).

20. The mineral lease cases of the type discussed in note 11 *supra*, where the right of termination was held to invalidate the contract were distinguished

instant case is clearly consistent with both French and common law principles and appears to be a commendable addition to the Louisiana jurisprudence.

William Shelby McKenzie

THE PUBLIC RECORDS DOCTRINE, LIS PENDENS, AND CIVIL
CODE ARTICLE 150

Plaintiff filed suit for separation from bed and board against her husband and obtained a preliminary injunction prohibiting him from alienating community property. Neither the suit nor the injunction was recorded in the mortgage or conveyance records of the parish where the community immovables were located. Over a year later, the husband sold a lot belonging to the community to a third person who had no actual knowledge of the pending suit or of the injunction. Plaintiff sued to annul the sale. The trial court dismissed on the ground that the public records doctrine protected the third party purchaser. On appeal to the Fourth Circuit Court of Appeal, *held*, affirmed. A wife cannot annul a sale of community property by the husband to one who purchased in good faith, where notices of a pending action for separation from bed and board and an injunction against alienation of community property were not recorded in the mortgage or conveyance records. *Shapiro v. Bryan*, 132 So.2d 97 (La. App. 4th Cir. 1961).

Article 2266¹ of the Civil Code provides that unrecorded sales, contracts and judgments shall be utterly null and void with respect to third party transferees. The Louisiana Supreme Court in

by the court in the instant case as cases where "the court concluded that there had been no suitable consideration given or obligation incurred by the lessee for the right to 'tie up' the lessor's property for the term of the lease." *Long v. Foster & Associates*, 136 So.2d 48, 54 (La. 1961). When the holding in the instant case is viewed in the light of the mineral lease cases, it appears that the court may require, in enforcing a contract containing a conditional promise, some assurance that a party appreciated the fact that he was binding himself in return for a conditional promise and seriously intended to be so bound. In the instant case the facts afford no basis for believing that there was anything but a serious and true intent on the part of the employer to bind himself as he did. The employer was at least in an equal bargaining position with the employee. If the termination clause were exercised, it also ended the obligations of the employer with respect to the employee. It seems evident that the power of cancellation was simply an inducement for the employee to undertake the employment.

1. LA. CIVIL CODE art. 2266 (1870): "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording."