

Louisiana Law Review

Volume 23 | Number 2

*The Work of the Louisiana Appellate Courts for the
1961-1962 Term: A Symposium*
February 1963

Private Law: Conventional Obligations

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Repository Citation

J. Denson Smith, *Private Law: Conventional Obligations*, 23 La. L. Rev. (1963)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol23/iss2/9>

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question whether the apparently mandatory provisions of Article 926 of the Civil Code can thus be waived, the question still remains whether, had he refused, the vendee could have been compelled, in a suit for specific performance, to accept the title tendered to him by his vendor.³⁹

In *Succession of Quartararo*⁴⁰ the court, for the first time, interpreted the 1948 amendment of Article 1705 of the Civil Code as meaning that a testament falls by the subsequent adoption of a person by the testator, whether the person adopted is a minor or a major. The court clearly explained that the person adopted acquires the status of an heir, no matter what his age might be, and thus dismissed as unsound the argument advanced that by the use of the word "child" in the amendment, the legislature intended to limit the article to the adoption of minors.

And in *Daigle v. Fournet*⁴¹ the court applied Article 1740 of the Civil Code and permitted the plaintiff to recover his engagement ring from the defendant when the latter broke off their engagement to be married. This was but a clear application of the rule expressed in the article that a donation made in contemplation of marriage is void if the contemplated marriage does not take place.

CONVENTIONAL OBLIGATIONS

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GENERAL

If a person conditions the assumption of an obligation on a subsequent exercise of his will, he does not actually obligate himself. Article 2034 of the Civil Code recognizes this fact by stating that such an obligation is null. The potestative condition to

to plaintiff's original and amended petitions the special defense of estoppel. This defense is predicated upon plaintiff's execution of an affidavit wherein he attested to the status of Clarence Huckaby as an acknowledged natural child which affidavit was made a part of the succession proceedings and made a basis of judgment in those proceedings. This judgment of possession constituted the basis of the subsequent sale of the property to Tony Greco, co-defendant herein. Plaintiff, therefore, in effect was a party to the proceeding of which he now attacks. These factual circumstances present a clear case of sustaining the plea of estoppel." *Id.* at 74.

39. Cf. *Wimberly v. King*, 179 So. 515 (La. App. 2d Cir. 1938).

40. 139 So. 2d 277 (La. App. 4th Cir. 1962), *cert. denied*, 1962.

41. 141 So. 2d 406 (La. App. 4th Cir. 1962).

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which this article applies is not one which subjects the performance of an obligation to the will of the obligor, but simply one which makes the very assumption of an obligation subject to a later exercise of his will.¹

In *Henry v. Scott*² an automobile dealer accepted two vehicles from the plaintiff and gave the latter a credit memorandum covering each of them to be used toward the subsequent purchase of a new car and truck. Before any further action was taken, the defendant went out of the automobile business. Thereafter plaintiff filed suit seeking to recover the proceeds derived by defendant from the sale of the vehicles and claimed that defendant had rendered himself unable to comply by discontinuing the automobile business. For his part, the defendant seems to have insisted on his continued readiness to perform. The court found that there was no meeting of the minds on the ground that the memoranda did not specify any particular vehicles to be purchased or contain any mention of the prices to be paid for them or provide any method by which prices could be fixed. This lack of certainty under the facts of the case was, perhaps, a sufficient basis for holding the agreement unenforceable. But the opinion also expressed the view that since one or both of the parties by refusing to agree on a price for the new vehicles could defeat the agreement, both memoranda "contained a potestative condition" and were therefore *nudum pactum*. It is more or less common practice to refer to an unenforceable agreement as *nudum pactum* or as containing a potestative condition.³ Originally a nude pact was a pact not included within the four recognized consensual contracts and not clothed with the necessary formalities or supported by a performance rendered.⁴ More modernly the term has come to be used to express absence of consideration. As hereinabove indicated, a nullifying potestative condition is a condition that subjects the assumption of an obligation to a further simple exercise of will by the party who purports to assume it. In the present case the assumption of an

1. 4 AUBBY ET RAU, DROIT CIVIL FRANCAIS n. 24 (6th ed. 1946). If one says, "I will buy if I wish to," he does not then assume an obligation. If he says, "I will buy if I move to Paris," he does assume an obligation notwithstanding that its performance depends upon his will. Cf. LA. CIVIL CODE art. 2035 (1870), which makes the same distinction.

2. 136 So. 2d 101 (La. App. 3d Cir. 1962).

3. See *Martin v. Dutton Motors, Inc.*, 206 La. 154, 19 So. 2d 32 (1944), on which the court relied in the instant case.

4. 3 TOULLIER, DROIT CIVIL FRANCAIS, tit. III, n. 13 (6th ed. 1846).

obligation by neither party was in form subjected to a purely potestative condition. Although neither may have been bound to agree on a price for the new vehicles, it would appear better to say in cases of this kind that the agreement is simply too indefinite to be enforceable. To use potestative condition terminology to cover indefiniteness is to invite further confusion in this area. The seller made a positive promise supported by the delivery to him of two vehicles to give the buyer the stated credit on the purchase of new vehicles and the buyer may be considered, at least by implication, as having promised as positively to buy them. If, in a case of this kind, the purchaser should demand delivery of certain new vehicles at their ordinary retail price, it would be entirely possible as well as permissible to enforce the agreement against the seller. Consequently, it is not accurate to suggest that the seller made no promise at all, which is the case when a promise is subjected to a purely potestative condition. The modern tendency is toward more liberality in enforcing agreements wherein the parties have left gaps to be later filled, and this seems desirable.⁵

The instructive opinion of the Supreme Court in *Long v. Foster & Associates, Inc.*,⁶ wherein the provisions of the Civil Code dealing with potestative conditions and prior jurisprudence on the subject are examined with care, has been noted in another issue of this *Review*.⁷

It is established in the jurisprudence that a refusal or acknowledged inability to perform dispenses with the necessity for a formal putting in default. This view was followed in *Elliott v. Dupuy*,⁸ wherein the court held that a statement by the secretary of the seller's attorney over the telephone to the buyer's attorney, to the effect that the former could not appear at a stated time for the purpose of transferring the property covered by a contract to sell, amounted to a refusal to perform. Granting that the Civil Code requires a putting in default for the recovery of damages for nonperformance as well as for delay in performance, it seems doubtful that such a telephone conver-

5. See LA. CIVIL CODE art. 2470 (1870). Cf. UNIFORM COMMERCIAL CODE § 2-305. In the comment it is said, "This Article rejects in these instances the formula that 'An agreement to agree is unenforceable' if the case falls within subsection (1) of this section, and rejects also defeating such agreements on the ground of 'indefiniteness.'"

6. 242 La. 295, 136 So. 2d 48 (1961).

7. 22 LA. L. REV. 872 (1962).

8. 242 La. 173, 135 So. 2d 54 (1961).

sation should be held sufficient to satisfy the minimum requirement of an oral demand made in the presence of two witnesses. In addition, a statement by a party that he cannot appear at a certain time to perform an act is not a statement that he will not perform it, but is, at most, a statement that he will not perform it at that time. If such a statement by a client's attorney should properly be considered sufficient to initiate the running of delay damages against the client, it is nevertheless doubtful that it should be counted as legally sufficient to support an award of damages designed to compensate for nonperformance. However, if the seller had offered to perform in response to the suit, it appears that the court would have had the power to grant additional time,⁹ and since he did not do so, judgment declaring a forfeiture of the earnest money was in order.

The court's approval in *Wimbush v. Jones*¹⁰ of the admissibility of parol evidence to show that a price of \$800 was paid for certain property, instead of the recited \$250, by way of defense to a claim of lesion beyond moiety is difficult to reconcile with earlier cases¹¹ or with the French treatment of the problem.¹² While it is true that Article 1900 of the Civil Code permits the use of extrinsic evidence to sustain a contract where the cause expressed in the contract does not exist, generally speaking the jurisprudence has restricted the application of this principle to cases where the stated cause or consideration has been disproved by legally admissible evidence, *e.g.*, when a third party attacks an act as a simulation. Such a case was *Love v. Dedon*,¹³ which was cited in support of the court's opinion. Cases of the latter kind frequently contain statements to the effect that parol evidence is admissible to sustain a contract, although not to destroy it. Applied to a case where the stated cause has been properly disproved and the parties then seek to show the true cause, the statement is correct, but the propriety of the application of the rule to the facts before the court in the instant case seems questionable. It well may be, however, that the basic rule is too stringent.

SALES

Most of the cases decided during this period which presented problems in the law of sales involved questions of redhibition.

9. LA. CIVIL CODE art. 2047 (1870).

10. 136 So. 2d 704 (La. App. 2d Cir. 1962).

11. See *Brewer v. New Orleans Land Co.*, 154 La. 446, 97 So. 605 (1923).

12. See Comment, 3 LA. L. REV. 427 (1941).

13. 239 La. 109, 118 So. 2d 122 (1960).

Such a case was *Hermeling v. Whitmore*,¹⁴ where the thing sold was a house. The claims of the plaintiff plus calls in warranty went back to the seller of the lot in question. Some of the issues in the case were disposed of on the basis of prescription. Of interest was the court's holding that where the seller is the builder and undertakes, subsequently to the sale, to make needed repairs, prescription does not begin to run again until the buyer rediscovers that the defects have not been remedied. This is a sound reflection of the rule that the prescriptive period runs from the date of discovery rather than the sale where the seller is chargeable with knowledge of the vice. Although this and earlier cases do not make it clear whether attempts by a seller to make needed repairs will constitute an interruption rather than a suspension of prescription, the former appears to be the sense of the jurisprudence. Where a seller does undertake to repair the thing sold, the buyer who would rely on this action for the purpose of overcoming a plea of prescription carries the burden of showing that the repairs made by the seller were occasioned by the defect on which he relies to support his claim in redhibition. In *Delahoussaye v. Domingues Chevrolet, Inc.*,¹⁵ the buyer failed to do this.

Cases involving termite damage have been consistent in treating the presence of termites as a redhibitory defect. The same view is held in France.¹⁶ In *Fitzmorris v. Kelly*,¹⁷ the court took the justifiable view that the purchaser of a fifty-year old building, the walls of which were observably out of plumb and which contained slanting and unsteady floors, was so put on notice of the questionable condition of the building as to be precluded from claiming relief for termite damage within the walls notwithstanding that the damage was not discoverable on simple inspection. This disposition of the case seems to be consistent with the basic theory that a purchaser who knowingly assumes the risk of defects in the thing he buys is in no position to claim that his consent was given in error.

In *Fink v. Bihm*¹⁸ the court treated an action by a buyer of an immovable to recover from the seller a portion of the purchase price which covered a paving lien, subsequently refunded

14. 140 So. 2d 257 (La. App. 1st Cir. 1961).

15. 137 So. 2d 356 (La. App. 3d Cir. 1962).

16. See 11. BEUDANT, COURS DE DROIT CIVIL FRANCAIS 257 (1938).

17. 139 So. 2d 12 (La. App. 4th Cir. 1962).

18. 137 So. 2d 122 (La. App. 4th Cir. 1962).

to the seller by the parish following a revocation of the lien, as an action in redhibition or *quanti minoris* which had prescribed one year from the date of the sale. Accepting the basic soundness of the plaintiff's claim, the decision seems questionable. In the first place, the action was brought well within a year from the date the refund was made, and, in the second, the existence of a lien does not appear to constitute a redhibitory defect which would give rise to an action in redhibition or for a reduction of the price but rather a charge against the property affecting title or ownership. A proper basis for permitting recovery might well have been quasi-contract.¹⁹

The effect of the buyer's viewing the property before the sale on the question of whether the sale should be counted as *per aversionem* was considered by the court in *Scurria v. Russo*.²⁰ Prior cases wherein this fact was, on the one hand, disregarded, and on the other, counted as controlling, are not easily reconcilable. The justification for allowing neither an increase nor a diminution of the price where the property is described by the adjoining tenements and sold from boundary to boundary lies in the conclusion that in such a case the buyer is not attaching importance to whatever mention of quantity may be contained in the act. If the property sold is, say, a lot in a subdivision, a conclusion that the recited measurements meant nothing to the purchaser, that he turned his face away from them (*per aversionem*) merely because he could see the limits of the lot by a fence or hedge line or the way the grass was cut, is surely debatable. The Civil Code is rather specific in indicating what sales are to be treated as *per aversionem* and the advisability of adopting an additional and unvoiced factor is not clear. However, the decision in the instant case resolved the issue in favor of the buyer.

LEASE

The Civil Code provides for the continuation of leases of immovables on an indefinite basis where the tenant holds over for a stated period after the expiration of the stipulated term. However, the Code makes no mention of the principle of tacit reconduction with respect to leases of movables.

In *Southern Fleet Leasing Corp. v. Airline Builders Service*,

19. LA. CIVIL CODE arts. 2301, 2302, 2304 (1870).
20. 134 So. 2d 679 (La. App. 4th Cir. 1961).

Inc.,²¹ it was held that the sureties on a lease of motor vehicles were discharged by the continuation of the lease on a month-to-month basis after the initial period of one year had expired. The prolongation of the lease was provided for by the contract itself but on the basis of two similar cases involving immovables the court counted this fact as unimportant. This jurisprudence is consistent with Article 2690 of the Code and the basic principle that a contract of suretyship is *strictissimi juris*. No reason appears for drawing a distinction between leases of immovables and leases of movables.

In *Frugé v. Muffoletto*,²² the Supreme Court, answering a question certified by the Third Circuit Court of Appeal, held that where a tenant makes repairs and improvements to the leased premises in keeping with authority granted by the lease but at his own expense, laborers and furnishers of materials do not have a privilege on the structure under R.S. 9:4801-17, but their sole privilege is against the leasehold rights of the lessee under R.S. 9:4811. Support for this conclusion was found also in Article 3249 of the Civil Code.

TORTS

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INTERVENING NEGLIGENCE—PROXIMATE CAUSE

It would perhaps not be too grotesque an oversimplification of the theory of tort liability to state that when defendant has been guilty of a breach of a duty owed plaintiff, and that breach has in fact caused some harm to plaintiff, then defendant will be liable for the resultant loss. This statement's consistency with fact may be preserved in all cases—even the most exceptional—by manipulation within the meaning of the term duty. Thus, cases where defendant has been guilty of wrongdoing causing plaintiff harm which the law deems unredressable can be handled by stating that defendant owed no duty to plaintiff. More often, however, such situations will be handled by the courts in terms of proximate causation. It will be stated that while defendant has been a wrongdoer and plaintiff has suf-

21. 136 So. 2d 458 (La. App. 1st Cir. 1961).

22. 137 So. 2d 333 (La. App. 3d Cir. 1961).

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