

# Louisiana Law Review

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Volume 25 | Number 2

*Symposium Issue: The Work of the Louisiana Appellate*

*Courts for the 1963-1964 Term*

*February 1965*

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## Private Law: Conventional Obligations

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### Repository Citation

J. Denson Smith, *Private Law: Conventional Obligations*, 25 La. L. Rev. (1965)

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to be received a community asset if it were to be actually received during marriage. The time for delivery or receipt of that bargained for, in other words, should not itself be relevant if that given for it is a performance during marriage under conditions which would render the acquisition during marriage a community asset. The rule could not be applied justly, however, to an asset received after divorce merely because it was received pursuant to a contract entered into during marriage; it would be incorrect, for example, to treat as a community asset the remuneration received after divorce for services rendered thereafter merely because the services had been rendered pursuant to a contract entered into during marriage.<sup>8</sup>

## CONVENTIONAL OBLIGATIONS

### *J. Denson Smith\**

The principle that a third party cannot accept an offer addressed to another is recognized by the provisions of our Civil Code.<sup>1</sup> The Code contains also a number of articles which deal with error as to the person. In the first case there is an absence of consent; in the other, consent is given but is based on error. The latter case arises when one deals with another under a mistaken belief in the other's identity or capacity. In *National Crankshaft Co. v. Natural Gas Industries, Inc.*,<sup>2</sup> the defendant ordered a crankshaft from one supplier and it was subsequently shipped by another who was a stranger to the trans-

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8. Other decisions applying recognized solutions in community property cases were: *Glassell v. Dickerson*, 159 So.2d 393 (La. App. 2d Cir. 1963) applying the rule that the purchase by the wife with separate funds becomes a community asset, unless she can prove she purchased the item with separate funds with intent to have it as separate asset; *Cormier v. Billeau*, 159 So.2d 780 (La. App. 3d Cir. 1964) affirming that a partition after divorce can be translatable of ownership between parties even for land not specifically described; *Harris v. Harris*, 160 So.2d 359 (La. App. 4th Cir. 1964) affirming that only net income from separate assets of husband falls into the community; *Vining v. Beatty*, 161 So.2d 298 (La. App. 2d Cir. 1964) applying the rule of article 2386 as amended by Acts 1944, No. 286 that fruits of the separate property of the wife fall into the community unless she declares in writing that she reserves them for her separate use and benefit; and *Acremont v. Acremont*, 162 So.2d 813 (La. App. 4th Cir. 1964) affirming that after divorce the community is dissolved and husband and wife become co-owners in indivision.

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1. See LA. CIVIL CODE arts. 1798, 1800 (1870).

2. 158 So.2d 370 (La. App. 2d Cir. 1963).

action. The court, finding that the crankshaft was installed by defendant in certain oil field machinery without knowledge of its source, and applying common law authority because the contract had been formed in Texas, found no liability on the defendant. There was one dissent on the basis of the articles of the Louisiana Civil Code dealing with error as to the person and also on the theory of unjust enrichment. If defendant never intended to contract with plaintiff and did nothing to lead or legally permit plaintiff so to believe, a contract would not arise, nor would the articles relating to error as to the person apply. Whether relief should have been granted on the theory of unjust enrichment is another matter. In any event, the Supreme Court granted certiorari and reversed the holding of the court of appeal. Contrary to the appellate court, it found that before the crankshaft was incorporated into the machinery an employee of the defendant and also its superintendent had received information disclosing the identity of the shipper. Because of this it was said that the "defendant had the choice either of accepting the goods, thereby implying a promise to pay and establishing a quasi contractual relationship, or of refusing them under the theory that it had no contract with plaintiff."<sup>3</sup> A finding of consent on the part of both parties, however, whether express or implied, establishes a contract and precludes the existence of a quasi contract which does not rest on agreement. If use with knowledge had not been found, quasi contractual recovery could have been properly allowed, pretermittting the possibility that defendant might have lost a right of set-off against the company to which the offer was given.<sup>4</sup>

The admissibility of verbal testimony to show agreements not contained in a writing signed by the contracting parties continues to be involved in much doubt. Article 2276 of the Civil Code, which is based on article 1341 of the Code Napoleon, is far-reaching. It precludes any resort to testimonial proof against or beyond the contents of a writing or of what may have been said before, or at the time the writing was prepared, or since. On the other hand, according to recognized common law authority, since a writing cannot prove its own completeness, parol evidence should always be admissible on the question of whether a writing was intended by the parties as a final and

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3. 246 La. 395, 165 So. 2d 1 (1964).

4. See 3 CORBIN, CONTRACTS § 601 (1952 and Supp. 1964); 1 WILLISTON, CONTRACTS § 80 (1938).

complete integration of their agreement.<sup>5</sup> If this is affirmatively established, proof of any other agreement would be irrelevant; but if a contrary intention is proved, a collateral agreement, whether made prior to or contemporaneously with the agreement in writing, should be provable by writing or even by oral testimony if a verbal agreement of the kind would be enforceable. Our courts, understandably enough, have been consistently inconsistent in dealing with the admissibility of parol evidence beyond a written act. This is probably traceable to the influence of the common law, the disquieting breadth of article 2276, and a softening attitude toward oral testimony. Although the French rule reflects a grave distrust of testimony, it is difficult for a court to shut its eyes to the fact that in many cases contracting parties do orally make agreements that go beyond their written contract. Unless written proof is required in the particular case, the urge to see justice done may turn the scale in favor of giving recognition to a supplementary oral agreement. Quite likely article 2276 is entirely too rigid to win sympathetic application. Literally applied, it would preclude proof of any verbal modification of an existing contract in writing. Yet the Supreme Court succeeded in avoiding the adoption of this view.<sup>6</sup> Likewise, the number of cases in which oral testimony has been received to prove agreements going beyond the contents of a writing continues to mount.<sup>7</sup> Since in apparent disregard of article 2276 we have often permitted testimonial proof of collateral agreements, it may be that we should unequivocally align ourselves in favor of this approach and adopt the view that whenever it sufficiently appears the contracting parties did not undertake to reduce their agreement in its entirety to written form, testimonial proof of any supplementary agreement would be admissible. Its sufficiency, of course, would be a separate question to be resolved with proper regard for the silence of the writing.<sup>8</sup> Two recent cases emphasize the

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5. 3 CORBIN, CONTRACTS §§ 582-584 (1952); WIGMORE, EVIDENCE §§ 2413, 2430, 2431 (3d ed. 1940).

6. *Salley v. Louviere*, 183 La. 92, 162 So. 811 (1935).

7. *Burton v. Lumbermens Mutual Casualty Co.*, 152 So.2d 235 (La. App. 4th Cir. 1963), *writ refused*, 244 La. 895, 154 So.2d 767 (1963); *Tsoi v. Ebenezer Baptist Church*, 153 So.2d 592 (La. App. 4th Cir. 1963). Civil Code article 2276 prohibits "parol evidence." It does not preclude proof of collateral agreements in writing. *Collins v. Brunet*, 239 La. 402, 118 So.2d 454 (1960). Yet in both cases there must be proof that the principal writing was not intended to constitute the entire agreement. See 3 CORBIN, CONTRACTS § 576 (1960).

8. "Have the parties, in assenting to it [the writing], excluded additional terms even though they are not contradictory or inconsistent? Once more, the

problem. The common law approach was taken in *Carbo v. Maison Jolie, Inc.*,<sup>9</sup> and the court permitted verbal proof of a contractor's agreement to pay a balance due on a lot upon which the contractor had agreed in writing to build a home for the owner. On the other hand, in *Terrell v. Wright*,<sup>10</sup> verbal proof of an undertaking by the vendor of a lot to landscape it was rejected. The former case relied on *Davies v. Bierce*<sup>11</sup> and the latter case on *Davis v. Dees*.<sup>12</sup> *Davies v. Bierce* relied on common law authority; *Davis v. Dees* on article 2276. To follow the common law may be more difficult than to stay within the French tradition, but the approach is better designed to give effect to the whole agreement as consented to by the parties often in a spirit of mutual trust and confidence which it might be better to defend than to abuse.

In keeping with the recent decision of the Supreme Court in *Smith v. Smith*,<sup>13</sup> the Third Circuit in *Foster v. Smith*<sup>14</sup> permitted a husband who had transferred property to his wife by way of *dation en paiement* to set the transfer aside on the basis of parol evidence which established the absence of any indebtedness. It would appear to be not contrary to established principles to sustain such a transfer, as far as the transferor is concerned, as a donation, assuming compliance with the formal requirements and no other cause of nullity.<sup>15</sup> A donation between husband and wife is not a fraud on the law, and upholding on this basis, as against the former, a transfer such as here made would discourage resort to the *dation en paiement* device which, as contrived, is in fraud of the law and may subsist as such if it suits the husband's pleasure. The law adequately protects third parties and could well afford to withhold its protection to a party engaged in deceit.

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document does not answer this question. But it may be answered with a high degree of probability by the terms of the writing, the nature of the subject matter, the customs of men in such cases, and the testimony of witnesses. It is a question of fact; no relevant evidence should be declared inadmissible, but the flimsy and improbable should be treated as flimsy and improbable." 3 CORBIN, CONTRACTS 474-75 (1952).

9. 155 So. 2d 238 (La. App. 4th Cir. 1963).

10. 161 So. 2d 103 (La. App. 2d Cir. 1964).

11. 114 La. 663, 38 So. 488 (1905).

12. 211 La. 229, 29 So. 2d 774 (1947).

13. 239 La. 688, 119 So. 2d 827 (1960).

14. 159 So. 2d 523 (La. App. 3d Cir. 1964).

15. See Notes, 21 LA. L. REV. 680 (1961), 1 LA. L. REV. 213 (1938).

The cases of *Hayes v. Muller*<sup>16</sup> and *Little v. Haik*<sup>17</sup> held parol evidence inadmissible to prove a joint adventure contemplating the acquisition of mineral interests, for the purpose of demanding an accounting of proceeds so derived, but admissible in support of a claim for the recovery of funds advanced or on *quantum meruit* for services rendered.<sup>18</sup>

The proper classification of promises given in recognition of services rendered by children to their parents is troublesome. Jurisprudence of the Supreme Court has established that there is always a presumption when such services are rendered by a son or daughter to a parent that they are gratuitous and the law will not allow compensation without proof of a promise or expressed intention on the part of the parent to pay for them.<sup>19</sup> In *Laborde v. Dauzat*<sup>20</sup> a father gave his daughter a note in the amount of \$2,000.00 secured by a mortgage on an immovable he owned. The court, finding that the services rendered by the daughter were worth at least \$1,000.00, said "the conclusion must be reached that decedent received adequate consideration for the note and mortgage."<sup>21</sup> There was no discussion of the possibility that the note might have constituted a remunerative donation.<sup>22</sup> If, instead of the note secured by a mortgage, the father had given the land itself, valued at \$2,000.00, the problem here mentioned would clearly have arisen. Does the holding afford an opportunity to give, beyond the reach of the rules applicable to donations?<sup>23</sup>

Largely on the authority of *Equitable Real Estate Co. v. National Surety Co.*,<sup>24</sup> the Third Circuit in *Meaux v. Southern Constr. Corp.*<sup>25</sup> gave judgment against a painting sub-contractor for liquidated damages of \$50.00 per day because the sub-contractor had failed to give notice to the general contractor of the cause of the delay within forty-eight hours as provided by the

16. 245 La. 356, 158 So. 2d 191 (1963). This case is noted in this Review at 25 LA. L. REV. 277 (1964).

17. 246 La. 121, 163 So. 2d 558 (1964).

18. See also *Pique v. Ingolia*, 162 So. 2d 146 (La. App. 4th Cir. 1964), *writ refused*, 164 So. 2d 361.

19. *Farrar v. Johnson*, 172 La. 30, 133 So. 352 (1931).

20. 158 So. 2d 637 (La. App. 3d Cir. 1963), *writ refused*, 245 La. 731, 160 So. 2d 595 (1964).

21. *Id.* at 644.

22. See *Heirs of Cole v. Cole's Executors*, 7 Mart.(N.S.) 414 (La. 1829).

23. See Comment, *Personal Services About the Home*, 23 LA. L. REV. 416, 446 (1963).

24. 133 La. 448, 63 So. 104 (1913).

25. 159 So. 2d 156 (1964), *cert. denied*, 245 La. 953, 162 So. 2d 9.

sub-contract. The basis of decision seems undesirably rigid. Although the Civil Code requires the courts to give the effect of law to contracts as agreed upon by the parties, this principle should not prevent proof of a subsequent waiver of such a notice provision. The delays in question appear to have been caused by other subcontractors, plus lack of supervision by the general contractor. Indeed, it appears that the subcontractor could not even begin some of the required work by the date stipulated for completion. In addition, the failure to give notice was not relied on in the contractor's brief in the trial court or when the appeal was heard. The court reserved opinion on the question of whether parol evidence is admissible in support of a claim for extras not supported by written orders as provided in the written contract. It was found that the plaintiff had failed to establish any such claim. In the later case of *Roff v. Southern Constr. Co.*<sup>26</sup> the same court properly recognized the admissibility of such evidence.

In *Great American Indem. Co. v. Dauzat*,<sup>27</sup> a case of first impression, it was held that the husband and the attorney of a judgment creditor who received payment pending appeal were not responsible to the judgment debtor for an overpayment resulting from the reduction of the amount of the judgment on appeal. The opinion contains a lengthy examination of Planiol's Civil Law Treatise and follows the view therein expressed that in such a case recovery should be allowed against only the party to the suit which resulted in the judgment.

In *Davis-Delcambre Motors, Inc. v. Simon*<sup>28</sup> the Supreme Court, reversing the court of appeal,<sup>29</sup> found enforceable a promissory note given by an employer to cover a worthless check issued by his employee against the contention that it had been given because of a threat of criminal prosecution. The court found that the holder did not make a promise to suppress the prosecution of the employee and that no threats, violence, or pressure were exerted upon the employer. In addition, no evidence was found to establish an intent by the employee to defraud.

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26. 163 So. 2d 112 (La. App. 3d Cir. 1964).

27. 157 So. 2d 308 (La. App. 3d Cir. 1963).

28. 246 La. 105, 163 So. 2d 553 (1964).

29. See 154 So. 2d 775 (La. App. 3d Cir. 1963).

The practice of law is defined in La. R.S. 37:212. In *Andrus v. Guillot*,<sup>30</sup> a collection agency that engaged in the practice of sending out notices to debtors and referring accounts to attorneys for collection on a split fee basis, was held to be practising law in violation of this provision and not entitled to recover the promised fee. In passing, the court observed that it was not undertaking to "outlaw" collection agencies and indicated that, although "peaceful collection or friendly adjustment" would not constitute the practice of law, the collector cannot threaten with legal proceedings or represent a creditor in court proceedings either directly, or indirectly through an attorney engaged by him.

To like effect, recovery was denied to an unlicensed person who had engaged in a series of real estate transactions for others on a fee basis over a period of time.<sup>31</sup> The court distinguished *Sheppard v. Hulseberg*,<sup>32</sup> where recovery was granted to one who on an isolated occasion sold property for another for a \$100.00 fee. The court relied on La. R.S. 14:37 and 14:50.

In *Abry Brothers v. Tillman*<sup>33</sup> the plaintiff contractor's acceptance of a post-dated check of a third party was held not to constitute payment of the debt owed. The court found no agreement, express or implied, to accept the checks in payment. Indeed, there was clear evidence negating any such intent. The French are in accord.<sup>34</sup>

## PARTICULAR CONTRACTS

### SALES

#### *J. Denson Smith\**

The Supreme Court has granted a writ of certiorari in the case of *Womack v. Sternberg*.<sup>1</sup> The parties to an agreement for an exchange of properties had affixed their signatures to two

30. 160 So.2d 804 (La. App. 3d Cir. 1964).

31. *Maniscalco v. Glass*, 163 So.2d 438 (La. App. 2d Cir. 1964), *writ refused*, 165 So.2d 479.

32. 171 La. 659, 131 So. 840 (1930).

33. 245 La. 1017, 162 So.2d 346 (1964).

34. See 12 HENRI, LÉON & JEAN MAZEAUD, *LEÇONS DE DROIT CIVIL, OBLIGATIONS* n° 1225 (1962).

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1. 162 So.2d 119 (La. App. 1st Cir. 1964).