**Louisiana Law Review**

Volume 25 | Number 2
*Symposium Issue: The Work of the Louisiana Appellate Courts for the 1963-1964 Term*
*February 1965*

# Obligations - Illegal Cause - Note Given to Suppress Criminal Prosecution

Howard W. L'Enfant
*Louisiana State University Law Center*

OBLIGATIONS — ILLEGAL CAUSE — NOTE GIVEN TO SUPPRESS CRIMINAL PROSECUTION

Defendant's employee purchased an automobile from plaintiff with two checks drawn on a non-existent account. Subsequent to the bank's refusal to honor the checks, plaintiff notified the employee and threatened to have him arrested for issuing worthless checks. Defendant gave his promissory note in the exact amount of the checks but later refused to pay, alleging in defense that the note was given for illegal consideration[1] — plaintiff's forbearance to prosecute defendant's employee for issuing bad checks. The trial court rendered judgment for plaintiff and held that the note had been given for a valid consideration. This judgment was reversed by the Third Circuit Court of Appeal which held that the note was unenforceable for lack of legal consideration. On certiorari the Louisiana Supreme Court reversed, holding that the note was given to pay the debt of a third person and was therefore enforceable. *Davis-Delcambre Motors v. Simon*, 163 So. 2d 553 (La. 1964).

Under the Louisiana Civil Code all obligations must be supported by a lawful cause, for if the cause is forbidden by law, contrary to moral conduct or contrary to public order,[2] the obligation can have no effect.[3] An example of an obligation with an unlawful cause is an agreement made for the purpose of suppressing criminal proceedings. But in determining the lawfulness of the cause in situations where both civil and criminal liability existed, the courts have had to distinguish those cases in which the cause was the suppression of the criminal prosecution from those in which the cause was a personal debt or the debt of a third person. In all cases where the creditor expressly promised to suppress or to dismiss criminal proceedings, the courts have consistently held such obligations invalid.[4] In cases where there was no express promise and the maker of the note had an independent civil liability, the courts have held the notes

1. Although the term "consideration" is used, the court seems to be referring to the civil law concept of cause, defined in LA. CIVIL CODE art. 1896 (1870) as the motive for making the contract, rather than to the common law concept of consideration.

2. *Id.* art. 1895.

3. *Id.* art. 1893.

4. See Ozanne v. Haber, 30 La. Ann. 1384 (1878) (note given in exchange for payee's promise to dismiss criminal proceedings against maker); Field v. Rogers, 26 La. Ann. 574 (1874) (note given in exchange for express promise to discontinue prosecution of maker for embezzlement).

to be valid, considering the cause of the obligation to be payment of the personal obligation.[5] But where there was neither an express promise to forbear from initiating criminal prosecution nor independent civil liability, the courts have required strong proof to defeat the presumption in favor of legality, and notes have been held valid when the facts failed to show either threats of prosecution or an agreement to forbear.[6] Likewise, when the facts failed to establish threats to prosecute and even raised the strong probability that there might not have been any crime, the obligation has been upheld.[7] In the cases in which agreements have been struck down, the circumstances showed threats of prosecution and strongly indicated an agreement to suppress criminal proceedings.[8]

The evidence in the instant case raised the close question whether the note was given by defendant to suppress criminal prosecution against defendant's employee, Mitchel. The plaintiff admitted that if the defendant had not given him the note, he would have had Mitchel arrested on criminal charges of issuing worthless checks. Moreover, no action was taken against Mitchel after the note was given. The defendant testified that he did not know of the bad checks or that his employee might have to go to jail. He also denied signing the note. The Court of Appeal for the Third Circuit concluded that Mitchel was guilty of issuing worthless checks and that "the obvious consideration for the note in question was the forbearance to prosecute Mitchel for issuing a worthless check."[9] The Supreme Court found that there was no proof of an intent to defraud, a necessary element of the crime of issuing worthless checks, and that Mitchel, therefore, was not guilty of any crime. It also found that the plaintiff had not threatened the defendant and had not made a promise to suppress the prosecution of Mitchel. The Court concluded

5. See Morgan v. Knox, 15 La. Ann. 176 (1860) (note given by maker whose slave was accused of arson); Butterly v. Blanchard, 1 Rob. 340 (La. 1842) (note given by maker accused of assault and battery).

6. See Yowell & Williams v. Walker, 118 La. 28, 42 So. 635 (1906).

7. Schafter v. Irwin, 139 La. 92, 71 So. 241 (1916) (note given for third person possibly guilty of forgery).

8. See D'Agostino v. Vivirito, 130 So. 120 (La. App. 1st Cir. 1930), where the note was given to avoid prosecution of a son for theft. The evidence showed that defendant did not intend his check to be cashed but rather to be used to influence a third person to pay for stolen goods. See also Perry v. Frilot, 6 Mart. (N.S.) 217 (La. 1827), where a note was given to a creditor who threatened to prosecute the maker's son for fraud. The evidence raised a strong possibility that the promisee was guilty of fraud.

9. 163 So. 2d at 557.

that the consideration (cause) for the note was the debt of Mitchel and that this consideration was sufficient to render the note enforceable.

In reaching this decision the court indicated that it favors the policy of enforcing obligations in the absence of strong proof that the cause of the obligation was an agreement, or at least a promise, to suppress criminal proceedings. Thus, even if the circumstances indicate that there was strong belief on the part of the maker of the note that no criminal prosecution would follow, the note will be enforceable because the court requires proof of a promise or of an agreement to suppress prosecution. It could be argued that the restrictive approach followed by the court of appeal is preferable in order to eliminate any use of the threat of criminal prosecution to enforce civil obligations. But it is submitted that the approach of the Supreme Court is the better policy for it is more in keeping with the civil law tradition of allowing the individual the greatest freedom of contract, provided he does not violate law, good morals or public policy. The requirement of a lawful cause is a restraint imposed upon this freedom and as such should be narrowly construed. In cases of doubt the presumption should be in favor of freedom of contract. In addition, if the restrictive approach of the court of appeal is followed, there would be an unnecessary restriction on the ability of an individual to satisfy a natural obligation by voluntary transactions. In many of the cases dealing with attempts of the maker to satisfy the obligations of close relatives or friends, the circumstances indicate that one of the primary motives for executing the note might have been the feeling of a natural obligation to do so.[10]

When the obligations are clearly contrary to law, good morals or public policy, the courts possess the power to strike them down; but in the absence of persuasive proof of such opposition, the freedom of the contractual will should prevail.

*Howard W. L'Enfant*

10. See Schafter v. Irwin, 139 La. 92, 71 So. 241 (1916) (friend); Yowell & Williams v. Walker, 118 La. 28, 42 So. 635 (1907) (brother); Field v. Rogers, 26 La. Ann. 574 (1874) (brother); Perry v. Frilot, 6 Mart.(N.S.) 217 (La. 1827) (son); D'Agostino v. Vivirito, 130 So. 120 (La. App. 1st Cir. 1930) (son).