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## Private Law: Obligations

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## OBLIGATIONS

*J. Denson Smith\**

## GENERAL

The case of *Cox v. Aldrich & Co.*<sup>1</sup> involved an interesting problem concerning the existence of a stipulation pour autrui, its acceptance by the beneficiary, and the possibility of its revocation. On the original opinion the court held that the facts did not disclose such a stipulation. On rehearing, the court, assuming the existence of the stipulation, held that it had not been accepted by the beneficiary. In a concurring opinion, Judge Sanders took the position that the power of revocation had been reserved by the promisee by the terms of the contract and had been validly exercised. In a dissenting opinion, Judge Summers found that a stipulation pour autrui had been made, that it had been duly accepted by the plaintiff, and that it was not subject to revocation by the promisee. Delicate problems of interpretation were involved concerning which differences of opinion could reasonably be held. Without attempting a nice analysis of the facts, it is the opinion of this writer that a stipulation for the benefit of the plaintiff was contained in the contract between the highway department as promisee and the defendant contractor as promisor. This belief finds support in the fact that the department had promised plaintiff to render the performance in question, which involved structural changes in her filling station, in return for the grant of a right of way, thus making the department her debtor. In turn, the department contracted with the defendant for the fulfillment or discharge of its obligation to plaintiff. Inasmuch as it appears that the performance by defendant was to be given and received in discharge of the department's obligation to plaintiff, ample justification would exist for recognizing a right of action in plaintiff, thereby avoiding circuitry of action. No more explicit intention to benefit the plaintiff should be necessary. This view is further supported by the fact that defendant recognized an obligation on its part to plaintiff to do the work and would have done it except for the fact that a dispute developed when its agents approached plaintiff to carry out the obligation. The writer is in favor of the

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1. 247 La. 797, 174 So.2d 634 (1964).

liberal approach of Justice Summers in dealing with the question of consent by the beneficiary to avail himself of the stipulation. Although the instant beneficiary's demands may have gone beyond the obligation assumed by the defendant, it does not seem justifiable to say that she had rejected the benefit. She was merely disputing its extent. In contending that the right of the beneficiary can rise no higher than its source and that a power of revocation reserved by the promisee should be given effect, the concurring opinion was on solid ground from the standpoint of legal principle. The reservation of a right to change the beneficiary in a life insurance policy is a generally recognized example of this rule. Whether the contract language in question amounted to such a reservation is another question. The fact that the beneficiary's consent to enter upon her property had been secured in return for the undertaking to perform upon it the work in question raises a substantial doubt that a power of revocation had been reserved as to her situation.

A case bearing some resemblance to the foregoing is *Ordo-neaux v. Koller Constr. Co.*<sup>2</sup> The court found the plaintiff to be the beneficiary of a stipulation pour autrui stemming from a promise by a road contractor to remove a quantity of rocks placed during the course of highway construction upon property acquired by plaintiff. The opinion indicates that defendant had made a direct promise to plaintiff to remove the rocks. If so, the case might have been disposed of on this basis. The facts suggest also that the cause of defendant's promise might have been treated as illicit, inasmuch as it was given by him to induce the engineers to cease a possibly wrongful withholding of their approval of work done by the contractor, but this possibility, presumably, was not considered.

In 1962, R.S. 23:921 was amended so as to provide that where an employer incurs expense in training an employee or in advertising the business in which the employer is engaged, the employee may bind himself not to enter into the same business as that of the employer or over the same route or in the same territory for a period of two years. In *Aetna Fin. Co. v. Adams*<sup>3</sup> the plaintiff employer was seeking to enforce, by way of an injunction and a claim for stipulated damages, such a contract against an employee who had served as manager of

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2. 166 So. 2d 1 (La. App. 3d Cir. 1964).

3. 170 So. 2d 740 (La. App. 1st Cir. 1964).

the Baton Rouge office of plaintiff. The court found that immediately after his resignation as manager, the defendant had formed a finance company of his own, the office of which was eight blocks distant from that of plaintiff, and that many of his customers had previously borrowed from plaintiff. It also found that during his employment by plaintiff, defendant was undergoing training at all times, even as manager, that he was supervised directly by an officer of the company and furnished with various instructional manuals, and that the company had expended substantial sums in advertising the business. Since the contract period of more than a year had expired at the time of the hearing, the court found that the question of issuance of an injunction had become moot, but awarded plaintiff the stipulated damages. It treated as unimportant the fact that defendant was already employed at the time the contract in question was signed, and rejected defendant's claim that the contract was opposed to public policy, saying that the legislature had spoken in clear and unambiguous language. The Supreme Court rejected the application for a writ of review.<sup>4</sup>

Subsequently, a similar problem was presented to the Third Circuit Court of Appeal in the case of *National Motor Club of La. v. Conque*.<sup>5</sup> The employer sued to enforce the employee's agreement not to compete. It covered a period of five years. The district court granted a permanent injunction prohibiting competition for a period of two years, the allowable period under R.S. 23:921. The court of appeal reversed. It found that sums spent by the employer in advertising his business, as distinguished from advertising the employee's connection with it, did not constitute "expense in advertisement" within the meaning of the statutory provision, and that the employer had not afforded special training of a substantial nature to the employee. Its conclusion was, in consequence, that the agreement was contrary to public policy. In the course of its opinion the court acknowledged that its decision was "to some extent conflicting" with the *Aetna* case,<sup>6</sup> the reasoning of which it did not approve. Judge Hood dissented in an opinion concurred in by Judge Savoy. An application for a writ of certiorari was denied by the Supreme Court on the ground that, "According to the facts of this case the result reached by the Court of Appeal is cor-

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4. 247 La. 489, 172 So. 2d 294 (1965).

5. 173 So. 2d 238 (La. App. 3d Cir. 1965).

6. 170 So. 2d 740 (La. App. 1st Cir. 1964).

rect." It is to be regretted that, in view of the fundamentally diverse holdings in the *Aetna Fin. Co.*<sup>7</sup> and *National Motor Club*<sup>8</sup> cases, the Supreme Court did not take the opportunity to save the law in this area from a lack of clarity which has proved to be troublesome.<sup>9</sup> Although the 1962 amendment to R.S. 23:921 is not as specific as might have been desirable in dealing with "those cases where the employer incurs an expense in the training of the employee or incurs an expense in the advertisement of the business that the employer is engaged in," it does reflect a legislative determination which appears to be in conflict with the view of the majority of the court in the *National Motor Club* case.<sup>10</sup> The Supreme Court might have concluded that since the agreement of the employee covered a period of five years, it would have to be counted as wholly unauthorized and consequently not valid for even the permitted period of two years, but this explanation is not necessarily supportable by the language of the denial of the application for the writ. The court of appeal specifically declined to pass upon this point.

It is established that a voluntary remission may be made of a part as well as the whole of an indebtedness.<sup>11</sup> The existence of a dispute concerning the indebtedness or the amount thereof is not necessary to its effectiveness. In *Pontchartrain Park Homes v. Sewerage & Water Board*,<sup>12</sup> plaintiff had secured a judgment including interest and costs against the defendant in a third party proceeding and the Supreme Court had affirmed it.<sup>13</sup> Thereafter defendant paid plaintiff only the principal amount of the judgment, claiming that it was not liable for the interest and costs. Presumably, plaintiff did not undertake expressly to reserve its right to claim the latter, although it seemingly insisted upon full payment. By way of defense to the present suit to establish plaintiff's right to the interest and costs, defendant claimed an "accord and satisfaction" of the judgment. In disposing of this defense, the court said that plaintiff's claim after final judgment was no longer an unliquidated one and could not serve, therefore, as the basis for an accord and satisfaction.

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7. *Ibid.*

8. 173 So.2d 238 (La. App. 3d Cir. 1965).

9. See *Blanchard v. Haber*, 166 La. 1014, 118 So. 117 (1923).

10. 173 So.2d 238 (La. App. 3d Cir. 1965).

11. *Johnson v. Boice*, 40 La. Ann. 273, 4 So. 163 (1888).

12. 246 La. 893, 168 So.2d 595 (1964).

13. *Keller Const. Corp. v. George W. McCoy & Co.*, 239 La. 522, 119 So.2d 450 (1960).

Both the claim of accord and satisfaction and the reason for its rejection are suggestive of the common law doctrine of consideration rather than the civilian theory of cause. Under the common law theory, the significance of a dispute lies in the fact that in its absence the receipt by a creditor of less than the whole amount due will not serve as consideration to support an agreement by him to discharge the remainder. In our civilian system, however, although a disputed claim may be compromised by way of settlement, an undisputed claim may be discharged, in whole or in part, by voluntary remission. No consideration is required and the absence of a dispute is wholly unimportant. To sustain the latter defense it would be necessary to find that plaintiff intended to remit his claim to interests and costs or that he had estopped himself to claim the contrary. The facts, however, would not have supported either finding.<sup>14</sup> In consequence, the result seems to be clearly correct under a theory either of compromise or remission.<sup>15</sup>

In the case of *Levy v. Southern Bell Tel. & Tel. Co.*,<sup>16</sup> the court, upon finding no proof of actual damages resulting from defendant's failure to list the business phone of plaintiff attorney in its directory, awarded nominal damages in the amount of \$500. Plaintiff had prayed for an award of \$50,000, which included \$15,000 for embarrassment, humiliation, and mental anguish. It is doubtful that article 1934(3) of the Civil Code affords any authority for the latter claim. This provision seems to authorize a departure from direct pecuniary loss as the measure of recovery in actions for breach of contract only where "the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste or some convenience or other legal gratification." Although the meaning of these words is not free from doubt, the design of the provision seems to be to reach contracts other than those of a commercial nature where pecuniary loss is the measure.

In a similar case,<sup>17</sup> another, but overlapping, panel of the same court said that the provision contained in article 1934(3)

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14. See 1 POTHIER, OBLIGATIONS, Part I, c. I, § 6 (1861).

15. Clear and convincing intent to remit is required. LA. CIVIL CODE art. 2232 (1870); *Commercial & Savings Bank v. Quality Shop*, 141 So. 498 (La. App. 1st Cir. 1932); *C. O. Black Improvement Co. v. Swink*, 197 So. 693 (La. App. 2d Cir. 1940).

16. 172 So. 2d 371 (La. App. 4th Cir. 1965).

17. *Loridans v. Southern Bell Tel. & Tel. Co.*, 172 So. 2d 323 (La. App. 4th Cir. 1965).

"affords broad latitude to the trial judge in determining the amount of the award." Perhaps, however, the court's discretion or latitude should be limited to the kind of contract described in the provision, not one merely of a commercial nature. An obligation to list a person's name for business purposes in a telephone directory is an obligation having a commercial purpose. Mental anguish and humiliation may be but are usually not within the contemplation of the parties to contracts of this nature, and the test of foreseeability is applicable to such damages not only by French civilian law but by the common law as well.<sup>18</sup> Indeed, article 1150 of the Code Napoleon, which requires that damages recoverable for a good faith breach be within the contemplation of the parties, was used in argument in the leading English case and has been credited with influencing the English court to adopt the same principle.<sup>19</sup> Where damages are properly limited to pecuniary loss, an award of damages in a purely nominal amount may be justified if it clearly appears that some damage may have occurred but there is no showing of the extent of the loss. But damages for mental pain and suffering are not to be confused with nominal damages to compensate for a pecuniary loss.

The case of *Jones v. Whittington*<sup>20</sup> applied the measure of recovery approved in *Fite v. Miller*<sup>21</sup> for breach of an obligation to drill an oil well, *i.e.*, the cost of drilling. Certiorari was denied.<sup>22</sup>

In holding that defendant was not guilty of exacting usurious interest by taking a note for \$3,744 to cover a loan of \$2,000, the court in *Clasen v. Excel Fin. Causeway, Inc.*<sup>23</sup> took occasion to remark on the unsatisfactory state of the law and to suggest the need for statutory correction. The writer shares this view. A similar case was *Soab v. Murphy*,<sup>24</sup> where interest in the amount of \$1,000 was capitalized in a note covering an advance of \$1,140.

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18. See *Hadley v. Baxendale*, 9 Exch. 341 (1854); *RESTATEMENT, CONTRACTS*, § 341 (1950). For a leading case holding damages for mental suffering within the contemplation of the parties to a contract to deliver a message concerning death, see *Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 So. 91 (1903).

19. 5 *CORBIN, CONTRACTS* 1076, nn. 1-5, §§ 1007, 1076 (1950).

20. 171 So. 2d 764 (La. App. 2d Cir. 1965).

21. 196 La. 876, 200 So. 285 (1940).

22. 247 La. 624, 172 So. 2d 703 (1965).

23. 170 So. 2d 924 (La. App. 4th Cir. 1965), applying LA. CIVIL CODE art. 2924 (1870).

24. 174 So. 2d 157 (La. App. 4th Cir. 1965).

In *Pittman Constr. Co. v. Housing Authority of New Orleans*,<sup>25</sup> the court concluded that the 1960 revision of section 35 of article III of the Constitution rendered defendant agency liable for interest on all amounts awarded from the time they became due until paid.

It was held in *Granger v. General Motors Corp.*<sup>26</sup> that the satisfaction of a judgment obtained against an automobile liability insurer of a car which struck plaintiff's car from the rear precluded suit against the dealer who sold the offending car, alleged to have had faulty brakes, and its manufacturer, based on a theory of warranty. The basis of the decision was that an imperfect solidarity existed between the tortfeasor, the dealer, and the manufacturer by virtue of the fact that, assuming liability, each would be responsible for the whole of the damage, and that, in consequence, payment by the tortfeasor operated to exonerate the dealer and the manufacturer. The court observed that the remedy of plaintiff for an inadequate award in his suit against the liability insurer was by way of appeal, which remedy had not been sought. In passing, it should be noted that there is some doubt as to whether a third party damaged in consequence of a defect in an automobile would have a cause of action in warranty against the manufacturer and the dealer.<sup>27</sup>

The case of *Smith v. Southern Farm Bureau Cas. Ins. Co.*<sup>28</sup> raised the question of whether a husband's immunity to suit by his wife for personal injuries occasioned by his negligence jointly with that of a third party was a bar to a claim by the third party by way of contribution for damages recovered by the wife. The Supreme Court, reversing the court of appeal, held that it was not. Its position was that the wife had a substantive cause of action against the husband, although not permitted to sue him. It declined to broaden R.S. 9:291 so as to permit the husband to invoke against a third party his claim of immunity. Justice Sanders dissented. His position was that the court's decision was contrary to earlier lower court decisions which denied contribution against a parent with respect to damages recovered by his child. He also considered it contrary to the principle that a

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25. 169 So. 2d 122 (La. App. 4th Cir. 1964).

26. 171 So. 2d 720 (La. App. 3d Cir. 1965).

27. See *LeBlanc v. La. Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952), and *Gordon v. Bates-Crumley Chevrolet Co.*, 182 La. 795, 162 So. 624 (1935); Comment, 22 LA. L. REV. 435 (1962); Mazeaud, *La Responsabilité Civile du Vendeur-Fabricant*, REVUE TRIMESTRIELLE, no. 4, at 611 (Oct.-Dec. 1955).

28. 247 La. 695, 174 So. 2d 122 (1965).

wrongdoer cannot have a greater right than the victim has against a co-tortfeasor and thus profit by his own wrong. He pointed out that the court's decision had the effect of imposing on an uninsured husband a loss amounting to one-half of the amount recovered by his wife, thus placing him in an undesirable adversary position. One might wish that the majority opinion had dealt with the cases cited by the dissenting judge. Jurisprudence to the effect that the victim of tortious conduct may sue the insurer of the wrongdoer although the latter would be immune to suit do not seem clearly analogous. Such a rule benefits the victim and denies to the insurer an immunity meant for another. The rule applied by the court operates to the ultimate disadvantage of the victim and to that of the beneficiary of the immunity. Perhaps the answer to the instant decision may lie in doubling the amount of the wife's recovery, which would be undesirable, or in legislation.

The problem of contribution was also involved in *Stewart v. Roosevelt Hotel*.<sup>29</sup> It was held that a release of the active tortfeasor under a reservation did not deprive the defendant hotel, which was constructively liable, of its right to claim contribution from him.

In *Richardson v. Cole*,<sup>30</sup> plaintiff was seeking partial recovery of a considerable sum paid for dancing lessons. The claim was based on the ground that plaintiff had become physically incapable of continuing the lessons. The court held for the plaintiff, relying on article 2001 of the Civil Code and holding that the obligation was personal to the obligee. Article 2003, which permits recovery by the heirs where such an obligee dies, seems to provide clear analogical support for the decision.

The case of *Jenkins v. Lee*<sup>31</sup> affirmed a ruling made earlier by the Supreme Court<sup>32</sup> that under Civil Code article 2245 a signature in the form of an "X," if disavowed, cannot be proved merely by the testimony of one witness.

In *Montelepre Memorial Hospital v. Kambur*,<sup>33</sup> the court properly held that an oral promise by defendants to pay for hospital services which they were undertaking to engage

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29. 170 So. 2d 681 (La. App. 4th Cir. 1965).

30. 173 So. 2d 336 (La. App. 2d Cir. 1965).

31. 166 So. 2d 645 (La. App. 1st Cir. 1964).

32. *Watts v. Collier*, 140 La. 99, 72 So. 2d 822 (1916).

33. 170 So. 2d 214 (La. App. 4th Cir. 1964).

for a third party gave rise to a direct primary obligation which did not have to be in writing to be enforceable.

A problem of unjust enrichment was presented in *Martin v. Bozeman*.<sup>34</sup> An aunt, deceased, of plaintiff's wife lived at the matrimonial domicile from the time of the marriage until the death of the wife, a period of over ten years. During this time she was treated as a member of the household. After the death of the wife the aunt continued to live in plaintiff's home for an additional number of years, during which time she stated on several occasions that she would take care of plaintiff in her will. Plaintiff filed a claim against her succession. The court found that he was entitled to recover on the basis of a contract implied in fact during the period following the wife's death, but rejected his claim based on unjust enrichment covering the former period. The rejection was placed on the ground that during this period a gratuity was intended. Such a finding amounts to the holding that the enrichment resulting from the gratuity was not unjustified.

The case of *Wilson v. Grunwald*<sup>35</sup> is being noted in this *Review*. It held that a payment by a fire insurer to a mortgagee under a mortgage clause, followed by the delivery of the mortgage note to the insurer, at its request, endorsed "to any future holder" constituted a purchase of the note. It is true that the payment of a note by a stranger will be held a purchase in the absence of a showing of intention to discharge the note by payment,<sup>36</sup> but the question remains as to whether the insurer in the instant case should have been counted as a stranger.

The case of *Willis v. Allied Insulation Co.*<sup>37</sup> is also being noted in this *Review*. It involved the question of whether a stated guarantee of a monthly income "if qualified" contained in a "Help Wanted" advertisement became part of a contract of employment to which the advertisement led.

#### SALES

In the case of *Womack v. Sternberg*,<sup>38</sup> certiorari was granted for the limited purpose of considering the award of damages

34. 173 So. 2d 382 (La. App. 1st Cir. 1965).

35. 169 So. 2d 617 (La. App. 2d Cir. 1964).

36. *Cason v. Cecil*, 194 La. 41, 193 So. 362 (1940); and also *Dixie Land Co. v. Blythe*, 227 La. 889, 80 So. 2d 853 (1955).

37. 174 So. 2d 858 (La. App. 1st Cir. 1965).

38. 247 La. 566, 172 So. 2d 683 (1965).

stemming from nonperformance by one of the parties to a contract of exchange. It was held that the plaintiff was entitled to damages based on the difference in value, if any, of the property to be transferred by him and the property to be received by him in return, measured as of the time of the breach. In a well-documented dissenting opinion, Justice Hawthorne expressed the view that it was erroneous to determine the value of the respective performances as of the time of the breach, that such values should be determined as of the time of the trial in the lower court. A thorough examination of these opposing positions would require more space than is allotted for this review. Suffice it to say that this writer favors the view of the majority. It appears to be in accord with article 2152 of the Civil Code,<sup>39</sup> and also with the common law, which, if we take the word of Judge Preston for it,<sup>40</sup> our draftsmen intended to adopt in lieu of the rule reflected in article 1633 of the French Civil Code.

It is well established by our cases that an out-of-state conditional vendor is entitled to assert ownership of the thing conditionally sold if it is removed to Louisiana without his knowledge or consent. In *Cooper v. Farr*,<sup>41</sup> certain drilling equipment conditionally sold in Arkansas was removed to Louisiana without the knowledge or consent of the conditional vendor and was here employed in the drilling of an oil well. When this was discovered, the vendor recorded the conditional sales contract in the mortgage records of the parish where the equipment was then located. Thereafter he claimed priority over the statutory privileges of laborers and materialmen. It was held that, by virtue of the wording of the statute granting the claimed privileges, the conditional vendor's claim of ownership could not be asserted to their prejudice. The opinion also rejected the vendor's claim that, by suing in Louisiana for the price of the equipment, he acquired a vendor's lien under Louisiana law.

The courts have been commendably liberal in rescinding the sale of automobiles for redhibitory vices where substantial defects have been present. If past cases have encouraged buyers

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39. "In the case provided for in the last preceding article, and in all other cases where the value of the thing to be delivered, enters into the measure of damages, its price, or that sum for which others of the like quality could have been purchased at the time agreed on for the delivery, is to be the rule for calculating the value; or, if no time was stipulated, then the price, at the time of the demand, must be referred to."

40. See *Burrows v. Peirce*, 6 La. Ann. 297 (1851).

41. 165 So. 2d 605 (La. App. 2d Cir. 1964).

to expect too much, the decision in *Leson Chevrolet Co. v. Barbier*<sup>42</sup> may serve as an appropriate warning. Its rejection of a claim for redhibition was entirely justified by the showing that the vendee had continued to use the car two years after discovering that the engine block was cracked.

The First Circuit Court of Appeal seems to have been on solid ground in rejecting a claim of \$500.00 for worry and annoyance based on Civil Code article 1934(3) in connection with its judgment rescinding the sale of an automobile for redhibitory vices.<sup>43</sup> Although paragraph 3 of article 1934 has been applied very broadly, sometimes perhaps with dubious propriety, the present contract could hardly be counted as one involving some intellectual enjoyment or legal gratification.

In a well-reasoned opinion, the Supreme Court in *Stack v. Irwin*<sup>44</sup> granted rescission, on the ground of error relating to the principal cause, of a contract to purchase a house and lot. When the purchaser discovered a break in the concrete slab supporting the structure which, unknown to him, existed at the time of contracting, he refused to consummate the sale. In concurring, Justice Hamiter relied on *Bornemann v. Richards*.<sup>45</sup> The damage in the *Bornemann* case occurred, however, after a conditional contract to sell had been entered into and before the agreement had been consummated by an act of sale, a situation which seems to be expressly dealt with in the Civil Code.<sup>46</sup>

Some years ago the Supreme Court adopted the view that one who sustains injury through the consumption of deleterious foreign matter in a bottled beverage is entitled to rely on an implied warranty of wholesomeness by the manufacturer.<sup>47</sup> In consequence, unless the manufacturer can show positively that the foreign matter got into the beverage after it left his hands, his responsibility is established. In *Love v. New Amsterdam Cas. Co.*,<sup>48</sup> the plaintiff, although suing the manufacturer of ice cream on the basis of negligence, relied on the *LeBlanc*<sup>49</sup> case as authority for the proposition that she had to show only

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42. 173 So. 2d 50 (La. App. 4th Cir. 1965).

43. *Aiken v. Moran Motor Co.*, 165 So. 2d 662 (La. App. 1st Cir. 1964).

44. 246 La. 777, 167 So. 2d 363 (1964).

45. 245 La. 851, 161 So. 2d 741 (1964).

46. LA. CIVIL CODE arts. 2044, 2471 (1870).

47. *LeBlanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952).

48. 175 So. 2d 398 (La. App. 4th Cir. 1965).

49. 221 La. 919, 60 So. 2d 873 (1952).

that the ice cream she consumed in a cone and which had been taken from a half-empty container in a freezing chest contained some foreign substance which resulted in injury to her and that the burden would then shift to the manufacturer to show freedom from negligence. The court rejected this theory. It took the view that the *LeBlanc*<sup>50</sup> case could not be so extended. It also found that, since the ice cream had been taken from a half-empty container, the case was not one calling for an application against the manufacturer of the principle *res ipsa loquitur*.

The Louisiana Civil Code clearly indicates that a purported sale lacking a price may stand, on proper proof, as another kind of contract.<sup>51</sup> This principle, which seems sometimes to be overlooked, was correctly applied by the First Circuit Court of Appeal in *Giuffria Realty Co. v. Kathman-Landry, Inc.*<sup>52</sup> It refused to hold as an absolute nullity a transfer for a recited price followed by a correction deed recognizing that no price had been paid. The decision of the same court, although a different panel, in the case of *Bolding v. Eason Oil Co.*,<sup>53</sup> which reflects a different approach, has been reversed by the Supreme Court.<sup>54</sup>

In *State, Dep't of Highways v. Tucker*,<sup>55</sup> the Supreme Court affirmed a view recognized in earlier lower appellate decisions that, where a sale per aversionem designates a railroad right of way as a boundary, the transfer does not convey any interest in the property underlying the railroad servitude.

The principle that title to real estate cannot be proved by parol was urged upon the court in *Elmore v. Butler*,<sup>56</sup> where a notary public signed an authentic act of sale for the vendor. The evidence showed that the vendor was shaking so much he could not affix his signature to the document, whereupon he authorized the notary to do it for him. The case has been noted with approval in this *Review*.<sup>57</sup> The particular point was *res nova*.

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50. *Ibid.*

51. LA. CIVIL CODE arts. 1894, 1900, 2464 (1870).

52. 173 So. 2d 329 (La. App. 4th Cir. 1965).

53. 170 So. 2d 883 (La. App. 4th Cir. 1965).

54. 248 La. 269, 178 So. 2d 246 (1965).

55. 247 La. 188, 170 So. 2d 371 (1964).

56. 169 So. 2d 717 (La. App. 2d Cir. 1964).

57. Note, 25 LA. L. REV. 977 (1965).

In *S & W Investment Co. v. Otis W. Sharp & Son*,<sup>58</sup> the Supreme Court held that the risk of loss of the shell of an incomplete swimming pool remained on the undertaker despite a progress payment of \$3,000, due by the terms of the contract upon the completion of the shell. It found article 2761 of the Civil Code not applicable inasmuch as defendant's obligation was "not divisible, i.e., it was not for work composed of 'detached pieces.'" Under the Code, divisibility of an obligation is applicable only to the heirs of the creditor and debtor.<sup>59</sup> As between the parties the obligation must be "executed as if it were indivisible." The sense in which the court used the term "divisible" is better known to the common law than to the civil. Even so, its use in the former system has been exposed as being more confusing than illuminating.<sup>60</sup> The terms "divisibility" and "indivisibility" may have different meanings and different applications depending upon the precise issue to be resolved. A contract may well be counted as divisible in one respect and indivisible in another.<sup>61</sup> It is helpful, therefore, that the court explained its position by pointing out that the various portions of the work were totally interdependent, that the absence of one portion would render the other portions virtually useless or without value, and that the contractor was obligated to construct and deliver a completed swimming pool consisting of not only the shell but of all of the finishing work as well. The court's expression of doubt concerning the dictum in *Industrial Homestead Ass'n v. Junker*<sup>62</sup> dealing with the effect of progress payments on risk and its explanation of the rejection of a petition for certiorari in that case must be counted as timely. The language of article 2761 is undesirably indefinite. Perhaps its application should be restricted to cases where it is manifest the parties intended to make a positive apportionment of prices and installments into equivalent pairs and to provide for definitive acceptance of each portion as completed in discharge of the contractor's obligation with respect to that portion. This would seldom, if ever, be the case in contracts calling for the construction of some integrated unit like a building or a swimming

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58. 247 La. 158, 170 So. 2d 360 (1964).

59. LA. CIVIL CODE art. 2111 (1870).

60. 3A CORBIN, CONTRACTS §§ 695, 697 (1960); 4 *id.* § 949.

61. 3A CORBIN, CONTRACTS § 695 (1960) where fourteen different problems are listed as possibilities and the statement is made, "The mere statement of these questions is enough to show that they cannot be answered by the application of some simple and uniform test of divisibility."

62. Orl. App. no. 7402, Unreported.

pool.<sup>63</sup> Of course, the ultimate question in the instant case was which party bore the risk of loss. The basic provision of the Code places it on the undertaker when he furnishes the materials. If this disposition is just, it would seem better to adhere to it as long as the contractor remains in control of the job unless there is a clear showing that the contrary was contemplated by the parties.

In the case of *McRoberts v. Hayes*,<sup>64</sup> where the plaintiff was seeking primarily to obtain an interest in certain oil leases, the court, relying on *Hayes v. Muller*,<sup>65</sup> rejected parol evidence of an alleged agreement of partnership or joint adventure for the purpose of securing such leases and engaging in the oil and gas business. In an effort to avoid the ruling of the Supreme Court in the earlier case, the plaintiff claimed alternatively a right to stock in a corporation formed by the defendant joint adventurer, which claim was asserted to be one of ownership in an incorporeal movable. The view of the court was, however, that, since the sole asset of the corporation was an interest in mineral leases acquired by it, the demand for the stock was in substance a demand for a beneficial interest in the revenues or profits produced by immovable property. The Supreme Court has granted certiorari limited to the alternative demand.

In *Brooks v. Neyrey*,<sup>66</sup> plaintiff's suit for the return of double the amount of a deposit made under a construction contract was rejected on the ground of a failure to put the contractor in default. A letter written by plaintiff demanding a return of the deposit plus an additional like amount was said to be not a putting in default because the letter contained no offer by plaintiff to perform as required presumably by article 1913 of the Civil Code. This writer has commented on the uncertainties surrounding the requirement of a putting in default and will refrain from doing so further except to repeat that if article 1913 is to be reconciled with other provisions of the Code, its application should be restricted to a claim for delay damages.<sup>67</sup>

In *Coen v. Toups*,<sup>68</sup> plaintiff alleged that when, at his instance, property was being sold by the sheriff by way of fore-

63. Cf. 5 AUBRY & RAU, DROIT CIVIL FRANÇAIS, DU LOUAGE no. 374, n. 9 (6th ed. 1941).

64. 173 So. 2d 27 (La. App. 4th Cir. 1965).

65. 245 La. 356, 158 So. 2d 191 (1963).

66. 167 So. 2d 400 (La. App. 4th Cir. 1964).

67. Cf. LA. CIVIL CODE arts. 1911(2), 2046-2047 (1870).

68. 168 So. 2d 893 (La. App. 2d Cir. 1964).

closure of a mortgage, defendant caused him to cease bidding for the property by stating that he intended to pay off the mortgage indebtedness, in consequence of which the property was adjudicated to defendant for only a fraction of the indebtedness secured by the mortgage. There had been no appraisalment. Plaintiff's claim was rejected. The gist of plaintiff's action appears to have been that defendant had made a promise for the purpose of inducing the plaintiff to cease bidding on the property, but since the evidence did not support this claim the holding was undoubtedly appropriate.

The case of *Diesel Equip. Corp. v. Epstein*,<sup>69</sup> in which the Supreme Court held that a dation en paiement of property held by a consignee for sale was not binding on the consignor, is being noted in this *Review*.

#### LEASE

Previous cases have held that a person who, with the consent of a lessee, places vending machines on the leased premises under an agreement to divide the profits with the lessee, is not a sublessee.<sup>70</sup> These cases expressed the view that since the use and control of no particular space was granted to the owner of the vending machines, there was no "thing," which is required for a lease. In the case of *Riverside Realty Co. v. Southern Bowling Corp.*,<sup>71</sup> the lessee of a bowling alley subleased space therein for the operation of a snack bar and lounge and, in connection therewith, gave the sublessee the privilege of placing vending machines anywhere on the premises. The owner of the machines opposed their seizure by the lessor for unpaid rent by the lessee, and the court, finding that the sublessee owed no rent to the lessee at the time of the seizure, sustained the opposition. Pretermittting consideration of the validity of the prior cases, the instant case is clearly distinguishable in that the vending machines were the property of a sublessee on the leased premises.

The Code provides for tacit reconduction where a term lessee continues to occupy the premises without objection by the lessor upon the termination of the lease. In *Jacobi v.*

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69. 246 La. 953, 169 So.2d 61 (1964).

70. *Columbia Theatres v. Menuet*, 169 So. 809 (La. App. 1st Cir. 1936); *Pelican State Bank v. Webb*, 175 So. 855 (La. App. 2d Cir. 1937).

71. 169 So.2d 228 (La. App. 4th Cir. 1964). Writ refused.

*Toomer*,<sup>72</sup> the court held that the parties were free to provide against reconduction if they saw fit to do so.

Under our Code, the burden is on the lessor to prove that fire damage to the leased premises was caused by the negligence of the lessee. The lessor failed to discharge this burden in *American Cas. Co. v. Lennox*.<sup>73</sup> It was claimed that the lessee's negligence in leaving a burning cigarette in the bedroom of his French Quarter apartment caused the fire. The proof was insufficient, however, to sustain the claim, and the court held that the doctrine of *res ipsa loquitur* was not applicable.

The case of *Riverside Realty Co. v. National Food Stores*<sup>74</sup> was concerned with the obligation of a lessee under a lease calling for a fixed rental plus a percentage of gross earnings. After sustaining very serious losses over a period of months, the lessee closed the supermarket it was operating on the leased premises but continued to pay the fixed rental. The court found that since the supermarket was a "total loss," no harm was done to the lessor by its closing. It did not rule definitively on the question of whether an implied obligation to operate continuously would exist in the absence of an express stipulation. The cases of *Selber Bros., Inc. v. Newstadt's Shoe Stores*<sup>75</sup> and *Rials v. Davis*<sup>76</sup> were distinguished.

The privilege of a lessee to withhold rent to cover necessary repairs was at issue in the case of *Leggio v. Manion*.<sup>77</sup> Claiming inadequate air conditioning, the lessee paid no rent from the beginning of occupancy in December 1963 to February 1965, when his summary eviction was sought, based on the failure to pay rent. The court held that although the lessee was entitled to oppose the summary eviction proceedings on the ground that the rent claimed had been properly withheld, he was not privileged to withhold rent and yet not undertake the necessary repairs within a reasonable time. Summary eviction was, therefore, ordered. Although the court had no previous authority to guide it on these issues, the views taken seem realistic and supportable.

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72. 164 So.2d 610 (La. App. 3d Cir. 1964).

73. 169 So.2d 707 (La. App. 4th Cir. 1964).

74. 174 So.2d 229 (La. App. 4th Cir. 1965). Writ denied.

75. 194 La. 654, 194 So. 579 (1940); *id.*, 203 La. 316, 14 So.2d 10 (1943).

76. 212 La. 161, 31 So.2d 726 (1947).

77. 172 So.2d 748 (La. App. 4th Cir. 1965).

Article 4701 of the Code of Civil Procedure was designed to clarify the problem of notice in support of summary ejectment proceedings. In *Maxwell, Inc. v. Mack Trucks, Inc.*,<sup>78</sup> the court held that only a five-day period of notice is required in the case of a lease having a definite term. This holding appears to be entirely in accord with the intention of the draftsmen.

## TORTS

*Wex S. Malone\**

The Louisiana appellate courts handed down several hundred torts cases during the past term. Any attempt to select a manageable group of decisions for discussion can prove to be embarrassing as well as difficult for the reviewer. As I reread the pages that follow I am struck by the unseemly critical tone of many of my comments. But the reason for this is fairly obvious. The bulk of the cases, which are clear and sound, escape discussion for the very reason that they *are* well decided and present issues upon which the Louisiana law may be regarded as fairly well settled. Spectators do not throw pop bottles at the umpire until he calls a close one.

## DUTY

The recently decided case, *Lee v. Peerless Ins. Co.*,<sup>1</sup> presents a picture that is attracting increased attention throughout the nation. Lee, the deceased, following a few social drinks, drove at night to Sak's Lounge, defendant's insured, a bar located on congested Highway 80 in Bossier City. The petition alleged that the deceased was continuously coaxed to drink by Sak's waitresses, who were employed for the purpose of encouraging customers, until he had consumed "thirty-forty drinks," had grown helpless, and had fallen a number of times to the knowledge of all present. The establishment was closed several hours after midnight and deceased was required to leave the premises by employees who were aware of the danger involved in his exposure to the traffic of the four-lane transcontinental high-

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78. 172 So.2d 297 (La. App. 4th Cir. 1965). Writ refused.

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1. 175 So.2d 381 (La. App. 2d Cir. 1965).