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Remission of Debt - Donation Not in Authentic Form

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The necessity for resorting to state wrongful death statutes is eliminated by this decision, although plaintiffs will probably still be allowed to take advantage of their provisions.[45] Moreover, Jones Act seamen's representatives can use the doctrine of unseaworthiness in wrongful death actions arising in territorial waters,[46] thereby increasing their chances for recovery. The practical obsolescence of state statutes removes the dilemma of trying to "accommodate state remedial statutes to exclusively maritime . . . concepts,"[47] and the resultant uniformity would "give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.' "[48]

The Court chose to await further litigation on the question of damage computation. State statutes and the Death on the High Seas Act were suggested as possible criteria for measuring damages.[49] The Death on the High Seas Act seems more appropriate as it is designed exclusively for maritime wrongful deaths. In addition, the use of this act would foster uniformity more than the application of state statutes.

The issues settled by this case are obviously outnumbered by the ones left unsettled. Admiralty courts are faced with the unenviable task of fashioning a uniform body of law to govern maritime wrongful deaths. In order to save the federal courts the years of effort required to fully implement the *Moragne* decision, it would seem that the time is ripe for Congress to enact a comprehensive regime of law to govern that segment of society which looks to the water as a mode of income, pleasure and transportation.

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REMISSION OF DEBT—DONATION NOT IN AUTHENTIC FORM

The sole heirs and legatees of the owner of a mortgage note brought suit against the maker of the note and against the Clerk of Court to have themselves declared owners of the note and to

45. *E.g.*, Admiralty courts traditionally have not followed the common law custom of jury trials. However, if plaintiffs choose to bring actions in state courts, a jury trial would seem to be available.
46. *See* note 21 *supra* and accompanying text.
47. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).
48. *Id.* at .....
49. *Id.* at .....

have the cancellation of the mortgage note erased from the parish records. The note in question was not found among the decedent's effects after his death, but plaintiff's attorney was advised by defendant's attorney that the note had been left with the latter to be delivered to defendant in the event decedent died first and to be returned if not. However, on trial of the case, the attorney testified that this plan was not carried out and that decedent had recovered the note and had, three days prior to his death, delivered it to the defendant. The trial judge held that it was unnecessary to make a factual determination as to how the defendant had obtained the note since the result would be the same either way because, if the note was given to the defendant after decedent's death, it was an attempted disposition *mortis causa* and not in testamentary form; and if given by decedent prior to his death it was an attempt to make a donation *inter vivos* not in proper form and therefore invalid. The First Circuit Court of Appeal affirmed this decision. *McLaughlin v. Knox*, 224 So.2d 491 (La. App. 1st Cir. 1969).

There was no discussion in the court's opinion as to the effect to be given to Louisiana Civil Code articles 2199 through 2206 dealing with remission of debt, but a careful consideration of these articles seems essential to a correct resolution of this case. Remission is prescribed as one method of extinguishing obligations by both the French Civil Code and Louisiana Civil Code.[1] According to the French doctrinal writers remission is simply the renunciation by the creditor of his right to enforce the obligation and is by its nature a voluntary act on his part.[2] Remission is, however, a contractual act and not simply unilateral on the part of the creditor.[3] The contractual nature of remission is evidenced by the fact that it requires concurrence of the wills of the creditor and debtor. That is, the remission by the creditor and the acceptance of that remission by the debtor. This concurrence of wills leads to extinguishment of the obligation, whereas the unilateral act by the creditor of refraining from enforcing his rights under the obligation only serves to allow the procedural bar of prescription to arise.[4]

1. LA. CIV. CODE art. 2130; FRENCH CIV. CODE art. 1234.

2. 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS § 323B at 219 (La. St. L. Inst. transl. 1965); 2 PLANIOL, CIVIL LAW TREATISE no. 604 (La. St. L. Inst. transl. 1959).

3. S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS § 395 (1969); 2 PLANIOL, CIVIL LAW TREATISE no. 605 (La. St. L. Inst. transl. 1959).

4. S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS § 359 (1969).

The Louisiana Civil Code contains an additional provision not found in the French code which provides that the acceptance of the debtor is always presumed.[5] This does not change the essential characteristic of remission as being contractual in nature by making it a unilateral act. It only provides for a legal presumption of acceptance thereby making the remission immediately effective. Once made, under Louisiana law, a remission is not subject to revocation for non-acceptance.[6] This would not be true in France, and a remission clearly made could be revoked at any time prior to express or implied acceptance by the debtor.[7]

Although there is some authority for the proposition that remission can be an onerous act[8] as when there is a partial remission coupled with a novation or compromise of the remainder, it seems preferable to restrict remission to an act that is gratuitous in nature. This is in keeping with the general treatment of remission by the French writers.[9] The Louisiana view should be no different. If remission of the debt was arrived at by a bargain process or exchange of equivalents it would be classed as simply another commutative contract designed to modify or put at an end the obligation which existed under the original contract.[10]

Although remission is a gratuitous act, hence a donation, no particular form is required for a remission to be effective. The authentic act required for donations *inter vivos* is not necessary when the donation takes the form of a remission of debt.[11] Article 2199 then should be viewed as an exception to article 1536[12] in that it does away with the requirements of form for a donation *inter vivos* but does not alter the essential characteristics of the

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5. LA. CIV. CODE art. 2201.

6. S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS § 369 at 633 (1969).

7. 2 PLANIOL, CIVIL LAW TREATISE no. 605 (La. St. L. Inst. transl. 1959).

8. *Id* at no. 606.

9. 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS § 323B at 222 (La. St. L. Inst. transl. 1965); 2 PLANIOL, CIVIL LAW TREATISE no. 606 (La. St. L. Inst. transl. 1959).

10. S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS § 360 (1969).

11. 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS § 323B at 223 (La. St. L. Inst. transl. 1965); S LITVINOFF, LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS § 371 (1969); 2 PLANIOL, CIVIL LAW TREATISE no. 608 (La. St. L. Inst. transl. 1959).

12. "An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights or actions, under the penalty of nullity."

transaction as being a pure liberality.[13] However, if the remission of debt is intended to be effective upon the death of the grantor it must be made in testamentary form. The remission itself need not be in any particular form but only included in a testamentary document.[14]

Under the French view, remission can be either express or tacit.[15] The Louisiana Civil Code in article 2199 provides for either conventional or tacit remission. Conventional remission is defined as being expressly granted by the creditor while tacit is the voluntary surrender of the original title evidencing the debt.[16] According to Planiol, proof of remission of debt is the same as proof for any other juridical act.[17] So if remission was expressly granted in France, the debtor desiring to show this would have to produce either witnesses or written evidence, depending on the size of the debt,[18] to show the fact of an express remission by the creditor. As to tacit remission, article 1282 of the French Civil Code provides that the voluntary surrender of the original title under private signature is considered absolute proof of the discharge of the debt.[19]

Article 2199 of the Louisiana Civil Code does not, in the same unequivocal language, provide that the voluntary surrender of the original title constitutes proof of the extinguishment of the debt. It does provide though, that remission of the debt is accomplished in one of two ways,[20] and the second para-

13. Therefore, other than form, the gratuitous remission would be subject to all the usual rules for donations inter vivos such as reduction by the forced heirs, collation or revocation for any of the causes listed in article 1559 of the Louisiana Civil Code. *See* LA. CIV. CODE arts. 1493, 1502; *see also* 2 PLANIOL, CIVIL LAW TREATISE no. 619 (La. St. L. Inst. transl. 1959) for the treatment of this aspect of the problem in France.

14. S. LITVINOFF, LOUISIANA CIVIL LAW TREATISE, OBLIGATIONS § 371 at 635 (1969); 2 PLANIOL, CIVIL LAW TREATISE no. 609 (La. St. L. Inst. transl. 1959); Succession of Mathews, 158 So. 233 (La. App. Orl. Cir. 1935). *See* Note, 9 TUL. L. REV. 615 (1935) criticizing the holding in this case.

15. 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS § 323B at 223 (La. St. L. Inst. transl. 1965); 2 PLANIOL, CIVIL LAW TREATISE no. 607 (La. St. L. Inst. transl. 1959).

16. *See* Hall v. Allen Mfg. Co., 133 La. 1079, 1080, 63 So. 591, 592 (1913).

17. 2 PLANIOL, CIVIL LAW TREATISE no. 610 (La. St. L. Inst. transl. 1959).

18. A contract for less than 500 francs is provable by oral testimony, whereas one in excess of that amount requires a writing. 2 PLANIOL, CIVIL LAW TREATISE no. 610 (La. St. L. Inst. transl. 1959).

19. 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS § 323B at 224 (La. St. L. Inst. transl. 1965); 2 PLANIOL, CIVIL LAW TREATISE nos. 611, 612 (La. St. L. Inst. transl. 1959).

20. "The remission of the debt is either conventional, when it is expressly granted to the debtor by a creditor either having a capacity to alienate; or tacit, when the creditor voluntarily surrenders to his debtor the original title under private signature which establishes the obligation."

graph of the article contains no qualifying language which suggests that any other proof than the voluntary surrender of the original act is necessary. On the other hand, Article 2202 states plainly that delivery of an authenticated copy of the original act does not in itself create a presumption that the debt is extinguished but can be used in conjunction with other evidence to establish such a presumption. This article follows substantially article 1283 of the French Code. Therefore, it would seem that the redactors of our Code were following the French scheme by differentiating between surrender of the original title and surrender of an authenticated copy. In the first case the surrender alone is a fact constituting proof of the discharge of the debtor. In the second case surrender of the copy is only one element of proof that is necessary to show remission.

An interpretation of the Louisiana Civil Code consistent with that of the French commentators' interpretion of their Code seems to require that voluntary surrender of the original title evidencing a debt be considered proof that the debt has been remitted. This approach seems to be the one envisioned by the redactors of our Code and is commendable in its simplicity.[21] Our courts have followed this view on several occasions.[22]

In the instant case, the court failed to make a finding of fact as to the method by which the note was transferred into the hands of the maker. It thereby bypassed the foundation upon which a correct decision must be based. Under the view prevailing in the French doctrinal materials and the proper view in Louisiana, the creditor's case would have stood or fallen on a resolution of the factual dispute. There is no question in either French or Louisiana law that if the note had been left with the attorney for delivery after death, and had been so delivered, it would have constituted an attempted disposition *mortis causa* and would have been invalid because not in testamentary form.[23] The contention of the defendant, though, that the note was personally delivered by the creditor to the debtor prior to the death of the former, if sustained as a factual finding, should

21. 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS § 323B at 225, particularly n.33 (La. St. L. Inst. transl. 1965); 2 PLANIOL, CIVIL LAW TREATISE nos. 611, 615, 616 (La. St. L. Inst. transl. 1959).

22. Hicks v. Hicks, 145 La. 465, 82 So. 415 (1919); DeL'Homme v. De Keregand, 4 La. Ann. 353 (1832); Doucet v. Dugas, 165 So. 754 (La. App. 1st Cir. 1936); *See also* concurring opinion in Sciambra v. Emblem, Inc., 46 So.2d 631 (La. App. Orl. Cir. 1950) for a discussion of remission generally.

23. *See* note 12 *supra*.

have been considered proof that there was a remission of the debt. The Louisiana jurisprudence supports this view. In perhaps the leading case on this problem, the Louisiana Supreme Court held that the fact that a mother had given her son several of a series of mortgage notes prior to her death constituted a remission of the debt.[24] No other proof was deemed necessary. In other cases where payment of the note has been at issue, the court has ruled that when the note evidencing the debt is in the possession of the maker, a presumption of payment is formed that the payee must overcome.[25] However, where the note is still in the possession of the creditor, the court has properly applied article 2232 and required proof of the alleged payment or exoneration from the maker.[26]

In the case of *Doucet v. Dugas*, the court properly stated: "The question here presented is one of fact: that is whether or not plaintiff remitted the debt by voluntarily returning the note."[27] Defendant's case failed for lack of proof that the note had been voluntarily returned. Such a holding is not inconsistent with the requirement of article 2232 that "he who contends that he is exonerated must prove the payment or the fact which has produced the extinction of the obligation." The very fact that the debtor has the title which established the obligation in his possession should be regarded as the fact which has produced the extinction of the obligation, reserving always to the creditor the opportunity of proving that delivery was not voluntary.[28] Nor is this interpretation incompatible with Louisiana's negotiable instruments law, as one of the modes of discharging instruments provided therein is, "any other act which will discharge a simple contract for the payment of money."[29] It seems that a remission of debt under the Civil Code should be such an act.

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24. Hicks v. Hicks, 145 La. 465, 82 So. 415 (1919).
25. Hughes v. Hughes, 170 So.2d 251 (La. App. 4th Cir. 1964).
26. Gulf States Fin. Co. v. Moses, 56 So.2d 221 (La. App. 2d Cir. 1951).
27. 165 So. 754 (La. App. 1st Cir. 1936).
28. 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS § 323B at 225 (La. St. L. Inst. transl. 1965).
29. LA. R.S. 7:119(4) (1950).