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Susan Kelly

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PAYMENT OF THE DEBT OF ANOTHER: REIMBURSEMENT BY THE
DISCHARGED DEBTOR

In *Cox v. W.M. Heroman & Co.*,¹ an unpaid supplier of the plaintiff subcontractor threatened to lien a job unless the general contractor paid him the undisputed portion of his claim against the subcontractor. The subcontract agreement authorized the general contractor to withhold payments from the subcontractor if the suppliers were not paid. Despite the subcontractor's objection to a direct payment, the general contractor paid the materialman. When the subcontractor sued for the balance due on the subcontract, the general contractor claimed compensation had taken place in the amount paid directly to the supplier. The Louisiana supreme court held that although the general contractor could not claim reimbursement from the subcontractor for extinguishing his debt, he was entitled to compensation by reason of a conventional partial subrogation.

Payment, being performance of an obligation, generally extinguishes the principal obligation and its accessories.² The debtor himself can effect payment, as can an interested third party³ and, usually, even an uninterested party acting in the debtor's name or in his own name.⁴ There are several means by which one who pays the

1. 298 So. 2d 848 (La. 1974).

2. LA. CIV. CODE art. 2131.

3. An "interested third party" is one bound with or for the debtor, such as a co-obligor or a surety. LA. CIV. CODE art. 2134. This is a much narrower definition than that used at common law, which allows anyone who pays another's debt in order to protect his own interest to be equitably subrogated to the original creditor's claim. *E.g.*, *Hult v. Ebinger*, 222 Ore. 169, 352 P.2d 583 (1960). While the general contractor in *Cox* acted to protect his own interest since the unpaid supplier had threatened to lien the job, he was not at the time of payment a co-obligor with the subcontractor, nor was he the subcontractor's surety, and was therefore not one concerned in the debt within the meaning of article 2134.

The creditor may refuse performance of the obligation by any third party, whether interested or uninterested, if the creditor has an interest in the debtor's personal performance. LA. CIV. CODE arts. 2136-37; 4 AUBRY & RAU, DROIT CIVIL FRANÇAIS § 316 (6th ed. Bartin 1942) in 1 CIVIL LAW TRANSLATIONS 156 (La. St. L. Inst. transl. 1965) [hereinafter cited as AUBRY & RAU]; 2 PLANIOL, CIVIL LAW TREATISE pt. 1, no. 401, at 234 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as PLANIOL]. The creditor may also refuse payment by a third party if the payor's motive in exercising his right is to somehow harm the debtor. *See Comment*, 7 TUL. L. REV. 426 (1933), cited by the court in *Cox*. The third party's right to pay another's debt may also be affected by a contract between him and the debtor. *See Hardin v. Federal Rice Mill Co.*, 164 La. 49, 113 So. 760 (1927).

4. LA. CIV. CODE art. 2134 provides: "The obligation may even be discharged by a third person no way concerned in it, provided that person act in the name and for the discharge of the debtor, or that, if he act in his own name, he be not subrogated to

debt of another may recover the amount paid from the discharged debtor. The third party may claim reimbursement as a *negotiorum gestor*⁵ for ordinary and useful expenditures made on the debtor's behalf.⁶ However, not every third party who pays the debt of another is entitled to recover from him on this basis.⁷ Since *negotiorum gestio* is an implied mandate based upon the presumed consent of the party whose business is transacted, the debtor's objection to the third

the rights of the creditor." The right of the uninterested third party to extinguish the debtor's obligation is for the debtor's benefit, since it is based upon *negotiorum gestio*. See *Gernon v. McCan*, 23 La. Ann. 84 (1871); *Thompson v. Chretien*, 3 La. Ann. 116 (1848); *Standard Motor Car Co. v. State Farm Mut. Auto Ins. Co.*, 97 So. 2d 435 (La. App. 1st Cir. 1957). The Louisiana jurisprudence has been conflicting as to whether the third party may claim reimbursement as a *gestor* when he has acted primarily for his own benefit rather than that of the debtor, even though the debtor has in fact benefited from the discharge of his obligation. See *Pharr v. Broussard*, 106 La. 59, 30 So. 296 (1901); *Woodlief & Legendre v. Moncure*, 17 La. Ann. 241 (1865); *Tate v. Dupuis*, 195 So. 810 (La. App. 1st Cir. 1940). But see *State ex rel Klein & Co. v. Pilsbury*, 29 La. Ann. 787 (1877); *Gernon v. McCan*, 23 La. Ann. 84 (1871); *Standard Motor Car Co. v. State Farm Mut. Auto Ins. Co.*, 97 So. 2d 435, 439 (La. App. 1st Cir. 1957). Roman law clearly required that the *gestor's* acts be motivated by a desire to benefit the principal, and not with the intent of benefiting himself. See, e.g., DIGEST 3.5.6.3; 3 P. COLQUHOUN, SUMMARY OF THE ROMAN CIVIL LAW 105 (1854) [hereinafter cited as COLQUHOUN]; H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 533, 536 (1932) [hereinafter cited as JOLOWICZ].

5. *Negotiorum gestio* is a civil law institution which arises when one person, the *negotiorum gestor*, undertakes on his own initiative to manage the affairs of another. See LA. CIV. CODE arts. 2295-2300; DIGEST 3.5; COLQUHOUN 103-06; JOLOWICZ 530-36.

6. The Louisiana courts have not made clear the precise amount the *gestor* is entitled to recover. Two early cases allowed recovery for all amounts which the *gestor* expended, so long as they were useful and necessary at the time payment was made. *Roman & Kernion v. Forstall*, 11 La. Ann. 717 (1856); *Eylers v. Ruby Motors Co.*, 123 So. 477 (La. App. 2d Cir. 1929). Other cases, however, have limited the *gestor's* recovery from the debtor to the amount which actually inured to the debtor's benefit. *Smith v. Town of Vinton*, 216 La. 9, 43 So. 2d 18 (1949); *Fishel v. Mercier*, 37 La. Ann. 356 (1885); *Pierce v. Flower*, 5 Mart. (O.S.) 388 (La. 1818).

7. One who pays the debt of another and who cannot for some reason recover as a *negotiorum gestor* may nevertheless have an action against the debtor to recover the amount paid which benefited the debtor. Traditionally, Louisiana courts have been unreceptive to actions based on unjust enrichment, unless a tortious act was also committed by the person enriched. E.g., *Kramer v. Freeman*, 198 La. 244, 3 So. 2d 609 (1941); *Standard Oil Co. v. Sugar Prod. Co.*, 160 La. 763, 107 So. 566 (1926); *McWilliams v. Hagan*, 4 Rob. 374 (La. 1843); *Harvey v. Surles*, 228 So. 2d 167 (La. App. 2d Cir. 1969). Recently, however, Louisiana courts have entertained claims for unjustified enrichment in the form of the action *de in rem verso*. See *Edmonston v. A-Second Mtg. Co.*, 289 So. 2d 116 (La. 1974); *Minyard v. Curtis Prod., Inc.*, 251 La. 624, 205 So. 2d 422 (1967); *Joslyn v. Manship*, 238 So. 2d 20 (La. App. 1st Cir. 1970); *Nicholas, Unjustified Enrichment in the Civil Law and Louisiana Law* (pts. 1-2), 36 TUL. L. REV. 605, 37 TUL. L. REV. 49 (1962).

party's act in his behalf prevents the uninterested third party from recovering sums expended to discharge the obligation.⁸

An uninterested third party who has been subrogated to the rights of the original creditor, either conventionally⁹ or legally,¹⁰ may also claim reimbursement from the discharged obligor. If the subrogation by the creditor is conventional he must agree to it "at the same time" as the payment is made.¹¹ Louisiana cases reflect two interpretations of this requirement: some indicate that the agreement must be simultaneous with the payment,¹² while others assert that the creditor's consent may be given at any time prior to the payment.¹³ The creditor's consent to a conventional subrogation must always be expressly given,¹⁴ but since conventional subrogation by the creditor exists for his benefit, enabling him to offer a *quid pro quo* to a third party willing to pay him, the debtor's consent to total subrogation is not required.¹⁵ Some cases, however, analogizing partial subrogation to partial assignment, have indicated that where the subrogation is only partial, the debtor's consent is required.¹⁶ Payment with subro-

8. See *Succession of Mulligan v. Kenny*, 34 La. Ann. 50 (1882); *O'Hara v. Krantz*, 26 La. Ann. 504 (1874); *Woodlief & Legendre v. Moncure*, 17 La. Ann. 241 (1865); *Fox v. Sloo*, 10 La. Ann. 11 (1855); *Nicholls v. His Creditors*, 9 Rob. 476 (La. 1845); SPANISH CIV. CODE art. 1158; LAS SIETE PARTIDAS bk. 5, tit. 7, L. 26 (Scott transl. 1931); DIGEST 3.5.8.3; CODE 2.19.24; COLQUHOUN 106. *But see Gernon v. McCan*, 23 La. Ann. 84, 87 (1871).

9. LA. CIV. CODE art. 2160 provides for conventional subrogation both by the creditor and by the debtor.

10. Since legal subrogation arises by operation of law at the time payment is made, consent of the parties is unnecessary. LA. CIV. CODE arts. 1760, 2292, 2161. For instances in which legal subrogation arises in Louisiana, see LA. CIV. CODE art. 2161; LA. R.S. 6:42, 6:455, 7:175, 9:3903, 33:785, 47:2105 (1950); LA. R.S. 23:1162, as amended by La. Acts 1962, No. 457 § 1.

11. LA. CIV. CODE art. 2160(1).

12. See *Brice v. Watkins*, 30 La. Ann. 21 (1878); *Succession of Wilson*, 11 La. Ann. 294 (1856); *Harrison v. Bisland*, 5 Rob. 204 (La. 1843).

13. See *Forcum-James Co. v. Duke Transp. Co.*, 231 La. 953, 93 So. 2d 228 (1957); *Cooper v. Jennings Ref. Co.*, 118 La. 181, 42 So. 766 (1907); *Sewall v. Howard*, 15 La. Ann. 400 (1860); *Baldwin v. LeLong*, 143 So. 723 (La. App. Orl. Cir. 1932). This view, while not consistent with a strict interpretation of the language of LA. CIV. CODE art. 2160(1), is nonetheless consistent with its theoretical basis—that an attempt to effectuate subrogation after the payment is made is an attempt to revive an extinguished obligation. See AUBRY & RAU § 321.

14. LA. CIV. CODE art. 2160(1).

15. AUBRY & RAU § 321. If the subrogation is legal rather than conventional, neither the consent of the debtor nor the original creditor is necessary. LA. CIV. CODE arts. 2161, 1760(1), 2292.

16. Language in earlier cases involving partial assignments indicated in dicta that the debtor's consent is necessary for a partial subrogation. See *Staples v. Rush*, 99 So. 2d 502, 506 (La. App. 2d Cir. 1957); *Stein v. Williams Lumber Co.*, 36 So. 2d 62, 64

gation extinguishes the debt as between the debtor and the original creditor, but the principal obligation and its accessories continue to exist in favor of the subrogee,¹⁷ who can recover from the debtor only the amount actually paid to the original creditor.¹⁸

In the instant case, the court first considered whether the general contractor, as an uninterested third party, was entitled to pay the debt due by the subcontractor to the supplier and to be reimbursed by the subcontractor for the payment. Justice Tate, writing for the majority, held that "by reason of the totality of the circumstances"¹⁹ including the contract between the general contractor and the subcontractor²⁰ and the latter's protest, the general contractor did not have the right under Civil Code article 2134 to directly pay the supplier and claim reimbursement as a *negotiorum gestor*.²¹

The court then examined the general contractor's claim that he was conventionally subrogated to the supplier's rights against the subcontractor, and was therefore entitled to credit the amount paid against his liability under the subcontract. The court found a conventional subrogation resulting from the supplier's statement that the general contractor would be subrogated to his rights upon payment of the debt and the general contractor's acceptance of this offer by making actual payment,²² even though the creditor's consent to the subrogation and the act of payment were not simultaneous. The debtor's protest did not affect the supplier's right to subrogate the general contractor to his claim, since subrogation under Civil Code

(La. App. Orl. Cir. 1948). Where partial assignment is involved, the debtor's consent is clearly needed. *Red River Valley Bank & Trust Co. v. Louisiana Petrolithic Constr. Co.*, 142 La. 838, 77 So. 763 (1918); *Cantrelle v. Le Goaster*, 3 Rob. 432 (La. 1843); *King v. Havard*, 5 Mart. (N.S.) 194 (La. 1826); *Marmol v. Wright*, 62 So. 2d 528 (La. App. Orl. Cir. 1953).

17. See, e.g., *Roman v. Forstall*, 11 La. Ann. 717 (1856); *Keller v. Thompson*, 121 So. 2d 575 (La. App. 2d Cir. 1960); *St. Paul Fire & Marine Ins. Co. v. Gallien*, 111 So. 2d 571 (La. App. 1st Cir. 1959). Payment with subrogation may be regarded either as an exception to the general rule that payment completely extinguishes the obligation, or as a legal fiction by which an extinguished obligation is considered as continuing in favor of the subrogee. AUBRY & RAU §§ 316, 321; 2 PLANIOL pt. 1, no. 477, at 273.

18. E.g., *Shropshire v. His Creditors*, 15 La. Ann. 705 (1860); *R.F. Mestayer Lumber Co. v. Cusack*, 141 So. 2d 166 (La. App. 4th Cir. 1962).

19. *Cox v. W.M. Heroman & Co.*, 298 So. 2d 848, 854 (La. 1974).

20. The contract in the instant case provided that if the subcontractor fell behind in his payments to suppliers, the general contractor could withhold sums due the subcontractor until the suppliers were paid.

21. See notes 4, 5 *supra*. The court noted that although the general contractor could not recover as a *gestor*, he did have a possible action *de in rem verso* to recover to the extent the subcontractor was benefited by the payment. See note 7 *supra*.

22. *Cox v. W.M. Heroman & Co.*, 298 So. 2d 848, 854-55 (La. 1974).

article 2161(1) is allowed for the benefit of the creditor rather than the debtor. In rejecting the need for the debtor's consent to effect a partial subrogation, the court repudiated the line of cases so indicating.²³ The court agreed that the debtor's consent would be required in a partial assignment, the purpose of which is the sale of a credit, because the debtor's interest in avoiding the necessity of paying his debt to multiple claimants outweighs the creditor's interest in selling a portion of the credit. However, in a partial subrogation, the interest of the creditor in receiving partial payment of the debt in return for subrogation outweighs the debtor's interest in avoiding the burden of paying his debt to several claimants. Since the contractor established the subcontractor's liability to the supplier to be greater than the amount paid by the general contractor,²⁴ the court held the general contractor was entitled to compensation in the amount paid the supplier.

The court's refusal to allow reimbursement under *negotiorum gestio*, based upon the "totality of the circumstances"²⁵ of the case rather than upon an evaluation of the weight accorded each factor, does not clarify the confused jurisprudence.²⁶ A clear indication by the court of the relative significance of the debtor's protest and the provision in the subcontract regulating the contractor's rights in the event of the subcontractor's failure to pay suppliers would have been helpful. The provision in the subcontract granting the general contractor one method of dealing with the subcontractor's failure to pay his materialmen does not clearly indicate that the parties intended this to be the exclusive remedy.²⁷ It could be argued that the general contractor retained a right as an uninterested third party to pay the subcontractor's debt and demand reimbursement. Nevertheless, the debtor's objection to the third party's act should alone be sufficient to bar the payor's recovery as a *negotiorum gestor*, since such a

23. See note 16 *supra*.

24. The supplier held unpaid invoices totaling \$8,360.55, of which the subcontractor contested only about \$2500.00. The general contractor paid the supplier \$4,349.74 with funds due the subcontractor, to be credited against the sum owed the supplier by the subcontractor.

25. *Cox v. W.M. Heroman & Co.*, 298 So. 2d 848, 854 (La. 1974).

26. See note 4 *supra*.

27. The court, however, indicates that the provision in the contract authorizing the general contractor to withhold payments to the subcontractor if suppliers were not paid might limit his right to pay the suppliers directly and recover the amount paid from the subcontractor. *Cox v. W.H. Heroman & Co.*, 298 So. 2d 848, 854 (La. 1974). This difficulty would be avoided if the contract itself provided that the general contractor could directly pay suppliers if the subcontractor fell behind in his payments to them.

protest would clearly negate the presumed consent upon which *negotiorum gestio* is founded.²⁸

The court's interpretation of Civil Code article 2161(1) as allowing the creditor's consent to the conventional subrogation at any time before payment is made is consistent with the reason for the provision—that an attempt to subrogate *after* payment is made is an attempt to revive an extinguished obligation.²⁹ This interpretation allows parties greater flexibility in their dealings than if payment and subrogation were required to be simultaneous.³⁰ Although its reasoning is perhaps not entirely clear,³¹ the court does settle the law concerning the role of the debtor's consent in partial subrogation as opposed to partial assignment.

The court in *Cox* carefully limits its holding to payment of a sum which the debtor clearly owed. Should the subrogee assert a seriously disputed claim a different situation would be presented. When a subrogee sues on the subrogated claim, his rights are no greater than those of the subrogor—he bears the burden of establishing the exist-

28. *But see Cox v. W.M. Heroman & Co.*, 282 So. 2d 734 (La. App. 1st Cir. 1973), in which the First Circuit Court of Appeal allowed the general contractor to recover the amount paid as a *negotiorum gestor*. If the payor's recovery is barred under *negotiorum gestio*, he would still have a potential action *de in rem verso*, (note 7 *supra*), although his recovery would be limited to the amount benefiting the debtor. If there was a defense whereby the debtor could have avoided payment, he would of course not be enriched by the payment, and the payor would recover nothing from him. The payor's only recourse would be against the original creditor under Civil Code articles 2301-14, regulating payment of a thing not due.

29. *See* note 13 *supra*.

30. Justice Dixon, dissenting, argues that Civil Code article 2160(1) is explicit, and should be construed literally to require the creditor's consent to the subrogation to be given at the time the payment is made. 298 So. 2d at 857. He believes that the instant case should be decided on the basis of legal subrogation under Civil Code article 2161(3). *Id.* at 858. The majority's decision may indicate an intention to abide by its dictum in *Pringle-Associated Mortgage Corp. v. Eanes*, 254 La. 705, 718, 226 So. 2d 502, 506 (1969), that one "bound with or for others" under Civil Code article 2161(3) encompasses only solidary obligors and sureties, and does not extend to all who may ultimately be held liable for the debt.

31. The court states that the reason the debtor's consent is needed for an effective partial assignment but not for a partial subrogation is that assignment and subrogation have different purposes. Since the inconvenience to the debtor is the same whether partial subrogation or partial assignment is involved, a difference in the purposes of the institutions should not make an appreciable difference. However, in a partial subrogation, the original creditor may recover the face value of the debt by accepting payment from the subrogee and recovering the remainder from the debtor. In a partial assignment, the creditor may be forced to sell a portion of the debt at a discount and may not subsequently recover the full face value. The creditor's interest in giving partial subrogation rather than partial assignment may be sufficiently different to account for the varying role of the debtor's consent in the two cases.

ence of the debt, and the debtor can assert against the subrogee any defenses he had against the original creditor.³² If the subrogation is partial, the debtor can require the joinder of both the partial subrogor and the partial subrogee, avoiding the possibility of multiple suits.³³ Thus, even in cases of partial subrogation, the debtor is not prejudiced and the court correctly viewed his lack of consent as immaterial.

Susan Kelly

CONTRIBUTION IN NON-COLLISION MARITIME CASES

Sessions, a longshoreman, was employed by Mid-Gulf Stevedores, Inc. to load a vessel in the Port of Houston. While walking atop cargo previously loaded in Mobile by Cooper Stevedoring Co., he stepped into a concealed gap, sustaining injury. Thereafter, Sessions recovered damages from the vessel and the vessel sought contribution from Cooper Stevedoring. In affirming the Fifth Circuit Court of Appeals,¹ the United States Supreme Court *held* that contribution is permissible between joint tortfeasors in non-collision maritime cases if the party against whom contribution is sought is not immune from liability by statute. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

32. *E.g.*, *St. Paul Fire & Marine Ins. Co. v. Gallien*, 111 So. 2d 571 (La. App. 1st Cir. 1959); *Motor Ins. Corp. v. Employers' Liability Assurance Corp.*, 52 So. 2d 311 (La. App. 1st Cir. 1951); *International Paper Co. v. Arkansas & Louisiana M. Ry. Co.*, 35 So. 2d 769 (La. App. 2d Cir. 1948). Since the subrogee is subject to all defenses available to the debtor against the original creditor, and the subrogee can recover only the amount expended, a third party will seldom pay the debt of another and request a conventional subrogation from the original creditor, unless it is in his own interest to do so. While the general contractor in the instant case could have let the supplier file his lien, requested that the subcontractor bond the lien, and paid the supplier only in case the subcontractor refused, it was more advantageous to the general contractor to keep the supplier from filing the lien. See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Security Devices*, 35 LA. L. REV. 321, 325-26 (1975), discussing the instant case.

33. LA. CODE CIV. P. art. 697 provides: "An incorporeal real right to which a person has been subrogated, either conventionally or by effect of law, shall be enforced judicially by: (1) the subrogor and the subrogee, when the subrogation is partial; or (2) the subrogee, when the entire right is subrogated." The official comment to the article indicates that both the partial subrogee and the partial subrogor are necessary parties to a suit enforcing the subrogated claim, and the defendant waives his exception unless he timely objects to the nonjoinder of a necessary party. Since in most cases the debtor will be able to join both partial subrogee and partial subrogor, the instant case poses no significant impediment to judicial economy.

1. *Sessions v. Fritz Kopke, Inc.*, 479 F.2d 1041 (5th Cir. 1973).