

Louisiana Law Review

Volume 35 | Number 4

Writing Requirements and the Parol Evidence Rule: A

Student Symposium

Summer 1975

Writing Requirements and the Authentic Act in Louisiana Law: Civil Code Articles 2236, 2275, & 2278

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Repository Citation

M. Thomas Arceneaux, *Writing Requirements and the Authentic Act in Louisiana Law: Civil Code Articles 2236, 2275, & 2278*, 35 La. L. Rev. (1975)

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WRITING REQUIREMENTS AND THE AUTHENTIC ACT IN LOUISIANA LAW: CIVIL CODE ARTICLES 2236, 2275 & 2278

Theoretical and Historical Framework

Both the common law and French legal systems demand that certain formal requisites¹ be fulfilled before some contracts will be deemed enforceable. Formal requirements may perform evidentiary (*ad probationem*) or cautionary (*ad solemnitatem*) functions.² Writing requirements are essentially evidentiary in nature and seek to prevent fraudulent claims based on verbal testimony.³ In addition, the authentic or notarial act⁴ performs a more basic, cautionary function: the law deems certain contracts to be of such importance that the formality of the authentic act is required to insure that the parties give serious thought to the obligations represented by the writing.⁵

The writing requirement at common law is contained in the Statute of Frauds, originally enacted to curb the subornation of perjured testimony in actions of *assumpsit*.⁶ If a contract required by the Statute to be in writing is not written, it is unenforceable, but not void for all purposes.⁷ Thus, the Statute of Frauds has been viewed by some commentators as a rule of evidence rather than a substantive element of a valid contract.⁸

1. This comment is confined to an examination of writing requirements and does not deal with the use of testimonial evidence. For a detailed discussion of Louisiana's parol evidence rule see Comment, 35 LA. L. REV. 779 (1975).

2. S. LITVINOFF AND T. TETE, *LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS* 128-29 (1969); S. LITVINOFF, *OBLIGATIONS* in 6 *LOUISIANA CIVIL LAW TREATISE* § 341 (1969); [hereinafter cited as LITVINOFF]. See also 4 AUBRY & RAU, *DROIT CIVIL FRANÇAIS* § 306 (6th ed. La. St. L. Inst. transl. 1965) [hereinafter cited as AUBRY & RAU]; 2 A. CORBIN, *CORBIN ON CONTRACTS* § 275 (1950) [hereinafter cited as 2 CORBIN].

3. 2 CORBIN § 275; 2 PLANIOL, *CIVIL LAW TREATISE*, pt. 1, no. 1106 (11th ed. La. St. L. Inst. transl. 1959) [hereinafter cited as 2 PLANIOL]; S. WILLISTON & G. THOMPSON, *SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS* 448 (rev. ed. 1938) [hereinafter cited as WILLISTON].

4. "Notarial act" and "authentic act" both refer to the same type of instrument. Unless otherwise specified in a statute, an authentic act is one "which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, aged at least fourteen years, or of three witnesses if the party be blind. . . ." LA. CIV. CODE art. 2234.

5. LITVINOFF § 341.

6. 2 CORBIN § 275.

7. For instance, an oral contract ordinarily required to be in writing may be valid in certain circumstances if there has been full or part performance. For a more complete discussion of the uses of an oral contract, see 2 CORBIN § 279; WILLISTON § 446.

8. See 2 CORBIN § 275.

In France, the writing requirement is included in the French Civil Code along with the provisions on proof of obligations.⁹ Because failure to reduce a contract to writing where required has no effect on the obligations themselves, but only on the parties' ability to prove them, the French writing requirement likewise performs an evidentiary function.¹⁰ In contrast, the articles requiring authentic acts are not placed with the provisions on proof of obligations, but are found among the substantive provisions governing various contracts. Because the lack of a required authentic act renders the act void,¹¹ the requirement of an authentic act is substantive and its function cautionary.

The writing requirement is much more narrowly construed at common law and there are many more exceptions to its use than in France.¹² Part of this difference may be traced to basic distinctions in the contract law of the two systems. At common law, one of the functions of consideration is to evidence the consent of the parties,¹³ so that the functions of consideration and the Statute of Frauds overlap; in contrast, under French law, cause does not serve to evidence consent.¹⁴ Thus, the French necessarily rely upon an independent writing requirement to evidence consent. In addition, the French require some contracts not only to be in writing, but to be executed before a public officer.¹⁵

Much like the French legislation, the Louisiana Civil Code provisions concerning acts under private signature are contained in the chapter on proof of obligations,¹⁶ while those with respect to authentic acts are found throughout the legislation as substantive requirements of particular acts. While it is apparent from this structure that the Louisiana redactors intended to use a basically French pattern of organization, Louisiana did not retain the substance of all the French articles. The result is a hybrid set of provisions which duplicates neither the substance of the French articles nor the Statute of Frauds.

9. FRENCH CIV. CODE arts. 1322-48 (Cachard's transl. 1930).

10. AUBRY & RAU § 306; 2 PLANIOL no. 1106.

11. See, e.g., FRENCH CIV. CODE art. 931 (Cachard's transl. 1930): "Every instrument containing a donation inter vivos shall be executed before notaries in the ordinary form of contracts, and the original shall remain with them; otherwise such instruments shall be void."

12. See generally Comment, 35 LA. L. REV. 745 (1975).

13. 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 99 (3d ed. W. Jaeger 1957).

14. LITVINOFF §§ 213-14.

15. See note 11, *supra*, and accompanying text.

16. LA. CIV. CODE arts. 2240-50, 2275-83.

*The Writing Requirement of Article 2275**Scope of the Article*

Although article 2275 of the Louisiana Civil Code literally requires only that transfers of immovable property be in writing,¹⁷ Louisiana courts have construed the article to apply to all contracts concerning immovable property,¹⁸ except lease.¹⁹ Article 2275 relates to all immovables in the traditional sense,²⁰ and supplemental legislation extends coverage to two other important interests. Timber estates are legislatively classed as immovables²¹ and mineral rights are categorized as incorporeal immovables;²² hence, contracts concerning both interests must be in writing.²³ The Louisiana supreme court has construed the writing requirement liberally when mineral rights are involved, extending it to all contracts applying to or affecting mineral rights.²⁴ This construction produces anomalous results since although leases of land are not covered by article 2275,²⁵ contracts affecting mineral leases must be in writing.²⁶

17. LA. CIV. CODE art. 2275: "Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property, be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property thus sold."

18. *Harris v. Crichton*, 158 La. 358, 104 So. 114 (1925); *Guier v. Guier*, 7 La. Ann. 103 (1852) (provision held to apply to grant of a conventional usufruct on land); *Castenado v. Toll*, 6 Mart. (O.S.) 557 (La. 1819). Furthermore, any alterations or extensions of such dispositions must be in writing. *Torrey v. Simon-Torrey, Inc.*, 307 So. 2d 569 (La. 1974). *But see* *Smith v. Hardy*, 190 So. 180 (La. App. 2d Cir. 1939) (escrow agreement collateral to a sale of land need not be in writing).

19. LA. CIV. CODE art. 2683; *DeJean v. Whisenhunt*, 191 La. 608, 186 So. 43 (1938); *Johnson v. Williams*, 178 La. 891, 152 So. 556 (1934); *Rabassa v. Orleans Navigation Co.*, 5 La. 461 (1833); *Rachal v. Pearsall*, 8 Mart. (O.S.) 702 (La. 1820). *But see* *Brown v. Martin*, 9 La. Ann. 504 (1854) (purchaser of property subject to a lease is not affected unless lease is evidenced by writing).

20. *Guier v. Guier*, 7 La. Ann. 103 (1852).

21. LA. R.S. 9:1103 (1950).

22. LA. MIN. CODE art. 18. The former LA. R.S. 9:1105 (1950) (repealed by La. Acts 1974, No. 50, § 3) also classified mineral rights as immovables.

23. *Martin Timber Co. v. Jean Lumber Co.*, 227 La. 894, 80 So. 2d 855 (1955); *Kennedy v. Perry Timber Co.*, 219 La. 264, 52 So. 2d 847 (1951); *Sabine Lumber Co. v. Trumbull*, 158 La. 621, 104 So. 476 (1925); *Harvard v. Lutrell*, 68 So. 2d 798 (La. App. 2d Cir. 1953).

24. *See, e.g., McRoberts v. Hayes*, 248 La. 676, 181 So. 2d 390 (1965); *Little v. Haik*, 246 La. 121, 163 So. 2d 558 (1964).

25. *See* text at note 19, *supra*.

26. *See, e.g., McRoberts v. Hayes*, 248 La. 676, 181 So. 2d 390 (1965); *Little v. Haik*, 246 La. 121, 163 So. 2d 558 (1964).

Because the general sales provisions of the Code apply equally to the contract of exchange,²⁷ an exchange has been held to be a "transfer" within the meaning of article 2275.²⁸ Hence, an exchange involving the transfer of immovable property must be in writing. Likewise, since a partition is in essence an exchange of rights in property, if the partitioned property is immovable, the act is in the nature of an exchange of immovable property that must also be evidenced by a writing.²⁹ One intermediate court has stated that if a verbal partition is executed and the lines fixed, the partition is thereby ratified and the co-owners are estopped from questioning the partition.³⁰ The court's position, however, appears inconsistent with article 2275 and the clear jurisprudential rule as expressed by the Louisiana supreme court in *Fox v. Succession of Broussard*.³¹

Numerous contracts, not in themselves transfers or other dispositions of immovable property, have been held to require a writing under article 2275, since they affect dispositions of immovable property. Article 2462 of the Civil Code provides that the contract to sell or buy immovable property must be in writing³² and acceptances of offers to sell or buy immovable property have likewise been held to require a writing.³³ It would seem harsh to require a written acceptance when there is a separate writing evidencing the contract formed by the oral offer and acceptance, but if no other writing exists, the requirement is merely an application of the general rule that contracts to buy or sell immovable property must be in writing.

Contracts granting an option to buy immovable property must also be in writing³⁴ since they concern the disposition of immovables.³⁵ In addition, a writing is required to exercise an option, as illustrated by the early case of *Barchus v. Johnson*.³⁶ In *Barchus*, plaintiff pur-

27. LA. CIV. CODE art. 2667.

28. *Laycock v. Davidson*, 11 La. Ann. 328 (1856) (exchange of slaves); *Morgan v. McGowan*, 4 Mart. (O.S.) 209 (La. 1816) (exchange of slaves).

29. *Fox v. Succession of Broussard*, 161 La. 949, 109 So. 773 (1926); *Bach v. Ballard*, 13 La. Ann. 487 (1858); *Faulk v. Faulk*, 180 So. 887 (La. App. 1st Cir. 1938) (dicta). *But see Johnson v. Labat*, 26 La. Ann. 159 (1874).

30. *Faulk v. Faulk*, 180 So. 887 (La. App. 1st Cir. 1938).

31. 161 La. 949, 109 So. 773 (1926).

32. For the distinction between a contract to sell and the contract of sale, see *Litvinoff, Of the Promise of Sale and the Contract to Sell*, 34 LA. L. REV. 1017 (1974).

33. *Louisiana State Bd. of Educ. v. Lindsay*, 227 La. 553, 79 So. 2d 879 (1955); *Dane & Northrop v. Selzer*, 63 So. 2d 760 (La. App. Orl. Cir. 1953).

34. *Hoth v. Schmidt*, 220 La. 249, 56 So. 2d 412 (1951); *Conklin v. Caffall*, 189 La. 301, 179 So. 434 (1938); *Barchus v. Johnson*, 151 La. 985, 92 So. 566 (1922); *Briggs v. Siggio*, 285 So. 2d 324 (La. App. 3d Cir. 1973).

35. LA. CIV. CODE art. 2462.

36. 151 La. 985, 92 So. 566 (1922).

chased a thirty day option to buy land from defendant. Within the thirty day period, plaintiff telephoned his acceptance to defendant and after the expiration of the option period, plaintiff sent a written acceptance. In denying specific performance, the court held that, to be effective, the exercise of the option must be tendered to the offeror in writing prior to the expiration of the specified time period.³⁷

If a partnership is formed for the purpose of dealing with interests in immovable property, the Louisiana supreme court has held that the partnership agreement must be in writing.³⁸ In addition, a mandate to sell or purchase land must be in writing. Although Civil Code article 2992 states that the contract of mandate may be verbal, it also specifically requires that the contract conform to the rules governing testimonial proof of conventional obligations. Thus, Louisiana courts apply a kind of "equal dignities" rule to powers of attorney so that the authorization to enter into a contract which must be in writing must itself be in writing.³⁹

Effect of the Article

The effect of a writing is prescribed by Civil Code articles 2242 and 2276. If the act has been acknowledged, it has the same effect as an authentic act.⁴⁰ Even if the act has not been acknowledged, testimonial evidence is not admissible "against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since."⁴¹ Extrinsic written evidence, however, is not within the rule.⁴²

There are two situations when a writing is not necessary to trans-

37. *Id.* at 986, 92 So. at 566. *But cf.* *Briggs v. Siggio*, 285 So. 2d 324 (La. App. 3d Cir. 1973), which held that where the offeror notifies the offeree that a verbal acceptance is sufficient, the writing requirement is considered fulfilled. The court reasoned that the writing was a "condition" of the contract that must be considered fulfilled since defendant prevented its performance. *See* LA. CIV. CODE art. 2040. However, it would appear that the writing requirement is *not* a condition to the contract, but is rather merely an evidentiary requirement. Even if reduction to writing had been made a condition for the effectiveness of the exercise of the option, article 2040 does not apply to these facts, since it provides that the fulfillment is imputed when prevented by the party bound to perform the condition. In *Briggs*, the offeree was bound to perform and the offeror prevented performance.

38. *Gantt v. Gantt*, 6 La. Ann. 677 (1851); *Castenado v. Toll*, 6 Mart. (O.S.) 557 (La. 1819). *See* *McRoberts v. Hayes*, 248 La. 676, 181 So. 2d 390 (1965). *Cf.* *Battle v. Jenkins*, 25 La. Ann. 593 (1873).

39. *See, e.g., Opelousas-St. Landry Bank & Trust Co. v. Bruner*, 125 So. 507 (La. App. 1st Cir. 1929) (mandate to sell land).

40. LA. CIV. CODE art. 2242.

41. *Id.* art. 2276. *See* Comment, 35 LA. L. REV. 779 (1975).

42. Comment, 35 LA. L. REV. 779, 780 (1975).

fer an immovable. Since the writing requirement is essentially evidentiary, parol evidence admitted without objection will be heard and considered.⁴³ Further, if a verbal sale has been followed by delivery, and if a party confesses the sale under oath (*e.g.*, in open court or upon interrogatories), the writing is not necessary as proof.⁴⁴ In the latter instance, the party seeking to prove the verbal sale by confession is bound by the answers given under oath.⁴⁵

Sufficiency of the Writing

There is only one article in the Civil Code detailing the requirements of a sufficient writing. Article 2241 declares that the parties need not have written the act themselves, provided they have signed it.⁴⁶ Article 2241 seems clearly to require that the signature of *both* parties appear on the document and the jurisprudence has rarely deviated from this rule.⁴⁷ However, in *Succession of Jenkins*,⁴⁸ an intermediate court, relying on the holding of the supreme court in *Saunders v. Bolden*,⁴⁹ upheld a writing signed only by the vendor. *Saunders* had erroneously announced that the jurisprudence was well settled that the acceptance of an offer to sell need not be in writing, upon the strength of a case that did not even involve immovable property.⁵⁰ Despite this deviation, the rule that both signatures are necessary should be considered established law in Louisiana.

The Doctrine of Eking Out Title

Although article 2241 requires only the signatures of the parties, Louisiana courts have also demanded that a description of the prop-

43. *Johnston v. Labat*, 26 La. Ann. 159 (1874); *Pauline v. Hubert*, 14 La. Ann. 161 (1859); *Brown v. Frantum*, 6 La. 39 (1833); *Hopkins v. Lacouture*, 4 La. 64 (1832); *Strawbridge v. Warfield*, 4 La. 20 (1832); *Wells v. Hunter*, 5 Mart. (N.S.) 119 (La. 1826); *Babineau v. Cormier*, 1 Mart. (N.S.) 456 (La. 1823).

44. LA. CIV. CODE art. 2275; *Cernich v. Cernich*, 210 La. 421, 27 So. 2d 266 (1946); *Guice v. Mason*, 156 La. 201, 100 So. 397 (1924); *Rubenstein v. Files*, 146 La. 727, 84 So. 33 (1920); *Perry v. Perry*, 122 So. 2d 829 (La. App. 1st Cir. 1960).

45. *See, e.g.*, *Cernich v. Cernich*, 210 La. 421, 27 So. 2d 266 (1946); *Rubenstein v. Files*, 146 La. 727, 84 So. 33 (1920).

46. LA. CIV. CODE art. 2241: "It is not necessary that those acts [executed under private signature] be written by the contracting parties, provided they be signed by them."

47. *See, e.g.*, *Waggoner v. Grant Parish Police Jury*, 203 La. 1071, 14 So. 2d 855 (1943); *Coats v. Guaranty Bank & Trust Co.*, 174 La. 503, 141 So. 41 (1932); *Carona v. McCallum*, 146 So. 2d 697 (La. App. 1st Cir. 1962).

48. 91 So. 2d 416 (La. App. 2d Cir. 1956).

49. 155 La. 136, 98 So. 867 (1923).

50. *Balch v. Young*, 23 La. Ann. 272 (1871).

erty transferred be included in acts of sale governed by article 2275.⁵¹ Unless the description rests substantially on the writing as opposed to oral supplementary testimony, the entire writing will be held to be a nullity.⁵² The most common descriptions that satisfy the test are those stating name and locality⁵³ or acreage and landmark of the property transferred⁵⁴ and those naming the owners of surrounding lands.⁵⁵ Under the doctrine, such meager descriptions as "the Prudhomme Place"⁵⁶ and "Lovely Point Plantation"⁵⁷ have been held sufficient as between the parties to allow oral proof, although descriptions based on landmarks or by reference to a survey and township plat are certainly clearer.

If the description rests substantially on the writing, the court will allow further evidence to determine the exact extent of the transfer.⁵⁸ This notion of "eking out title" is somewhat akin to the French concept of commencement of proof in writing, derived from article 1348 of the French Civil Code.⁵⁹ Under the French doctrine, testimonial evidence is allowed to prove a contract when there is a writing that tends to make the existence of the contract probable, although the writing is not complete proof in itself.⁶⁰

Under the theory of "eking," the Louisiana courts have consistently admitted testimonial evidence to complete a written description such as "the Judie Lewis place,"⁶¹ or descriptions in terms of the surrounding lands.⁶² However, merely because the court admits testimonial proof does not mean that the party introducing the oral clari-

51. See, e.g., *Lemoine v. Lacour*, 213 La. 109, 34 So. 2d 392 (1948).

52. *Blevins v. Manufacturer's Record Publishing Co.*, 235 La. 708, 105 So. 2d 392 (1958); *Bryan v. Wisner*, 44 La. Ann. 832, 11 So. 290 (1892); *Lemoine v. Lacour*, 28 So. 2d 784 (La. App. 2d Cir. 1946), *amended* 213 La. 109, 34 So. 2d 392 (1948).

53. *Pheland v. Wilson*, 114 La. 813, 38 So. 570 (1905); *Jackson v. Harris*, 136 So. 166 (La. App. 2d Cir. 1931), *reinstated* 137 So. 655 (La. App. 2d Cir. 1931).

54. *Minor v. Daspit*, 128 La. 33, 54 So. 413 (1911); *Ramos Lumber & Mfg. Co. v. Sanders*, 117 La. 615, 42 So. 158 (1906).

55. *Gary v. Bullock*, 206 La. 231, 19 So. 2d 120 (1944); *Bayard v. Baldwin Lumber Co.*, 157 La. 994, 103 So. 290 (1925).

56. *Jackson v. Harris*, 136 So. 166 (La. App. 2d Cir. 1931), *reinstated* 137 So. 655 (La. App. 2d Cir. 1931).

57. *Robinson v. Atkins*, 105 La. 790, 30 So. 231 (1901).

58. *Lemoine v. Lacour*, 213 La. 109, 34 So. 2d 392 (1948); *Jackson v. Harris*, 18 La. App. 434, 136 So. 166 (La. App. 2d Cir. 1931).

59. See Comment, 35 LA. L. REV. 745, 752 (1975).

60. 2 PLANIOL, no. 1124 at 641. In no. 1125, Planiol further explains that the danger of testimonial proof is greatly eliminated since the judge relies primarily upon the written document.

61. *Saunders v. Bolden*, 155 La. 136, 98 So. 867 (1923).

62. *Gary v. Bullock*, 206 La. 231, 19 So. 2d 120 (1944).

fication will prevail. For instance, in *Tircuit v. Burton-Swartz Cypress Co.*,⁶³ a description reciting that "a portion of land was situated in section 49 of township 12 south, range 15 east, containing 123.01 acres" was deemed sufficient to allow the parties to eke out title by oral testimony, but the court concluded that the additional evidence did not complete the description adequately enough to effect a transfer of title.

At some point, the description contained in the writing will be either insufficient to allow eking or so complete that additional testimony is redundant. While the lower limit includes all those titles which do not rest substantially on the writings, the cases do not discuss the upper limit when additional testimony is unnecessary. Presumably, titles in this category are those reciting descriptions according to surveys. In the middle ground between the two limits, the court apparently looks to several factors to determine the availability of eking out title: description by name or locality, general location within township specifications, courses and distances according to landmarks, names of surrounding owners and quantity specifications.

Requirements of Article 2278

Promise to Pay the Debt of a Third Person

Article 2278, the other major writing requirement contained in the Civil Code, concerns four types of acts which cannot be proven by testimonial evidence.⁶⁴ The most important of these is the promise to pay the debt of a third person. This provision extends to suretyship,⁶⁵ which creates contingent liability, as well as to a direct prom-

63. 162 La. 319, 110 So. 489 (1926).

64. LA. CIV. CODE art. 2278 *as amended* by La. Acts 1886, No. 121 provides: "Parol evidence shall not be received: (1) To prove any acknowledgment or promise to pay any judgment, sentence or decree of any court of competent jurisdiction, either in or out of this State, for the purpose or in order to take such judgment, sentence or decree out of prescription, or to revive the same, after prescription has run or been completed. (2) To prove any acknowledgment or promise of a party deceased to pay any debt or liability, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed. (3) To prove any promise to pay the debt of a third person. (4) To prove any acknowledgment or promise to pay any debt or liability, evidenced by writing, when prescription has already run. But in all cases mentioned in this article, the acknowledgment or promise to pay shall be proved by written evidence signed by the party who is alleged to have made the acknowledgment or promise or by his agent or attorney in fact, specially authorized in writing so to do."

65. Because by definition suretyship is a promise to pay the debt of a third person, Louisiana courts have long held that a suretyship agreement must be in writing, citing article 2278(3). *Graves v. Scott*, 23 La. Ann. 690 (1871).

ise to pay the debt of a third person. A jurisprudential exception to the rule of article 2278 allows the promise to pay the debt of a third person to be proven by testimony if the promisor has a business or pecuniary interest underlying his promise.⁶⁶ This exception has been drawn from common law authorities, and its effect is to limit the operation of article 2278(3) to gratuitous promises.⁶⁷ It would seem, however, that the list of article 2278 is rather specific, so that such a limitation would not fall within the intended scope of the article.⁶⁸

Several cases have failed to recognize that the pecuniary interest exception, if applicable at all, applies not when the promise is to pay the promisor's *own* debt, but only when there is a promise to pay the debt of a *third* person. For example, in *Fuselier v. Hudson*,⁶⁹ in which corporate officers agreed to assume joint liability for corporate debts, the court found the promisors to be primarily liable and because of the pecuniary interest exception allowed testimonial evidence in proof of the debt. Although the result is correct, the court's reasoning is not. If the promisor has not agreed to pay the debt of another, but has merely obligated himself jointly with another, he is primarily liable and article 2278 is inapplicable.⁷⁰

Other Requirements Under Article 2278

Article 2278(2) excludes testimonial proof to establish a deceased party's acknowledgment or promise to pay alleged to have interrupted prescription or to have revived a debt after prescription had run.⁷¹ The broad scope of the subsection, including both interruption and renunciation of prescription,⁷² is intended to protect the heirs and legal representatives of the deceased from "scheming and unscrupulous creditors."⁷³ Article 2278(1) prescribes the same rule for all per-

66. See, e.g., *Flick v. Salloum*, 163 So. 2d 143 (La. App. 4th Cir. 1964); *Waldrop Tire & Supply Co. v. Campbell Const. Co.*, 158 So. 2d 464 (La. App. 2d Cir. 1963).

67. Article 2278 does not extend to a promise by a person to pay the debt of the promisee, since that promise is not to pay the debt of a third person. *Rowe v. Smith*, 160 La. 12, 106 So. 657 (1925); *Baskin v. Abell*, 122 So. 133 (La. App. 2d Cir. 1929).

68. It is submitted that the intent of the article is better served by the decision in *Gateway Barge Line, Inc. v. R.B. Tyler Co.*, 175 So. 2d 867 (La. App. 1st Cir. 1965), in which testimonial evidence was not allowed to prove that a contractor had promised to pay the debt of his subcontractor.

69. 93 So. 2d 266 (La. App. 1st Cir. 1957).

70. This distinction was recognized in *National Material Co. v. Guest*, 147 So. 771 (La. App. Orl. Cir. 1933).

71. See text of article 2278, note 64, *supra*.

72. *Coyle v. Succession of Creevy*, 34 La. Ann. 539 (1882); *Goodman v. Rayburn*, 27 La. Ann. 639 (1875).

73. *Sliman Realty Corp. v. Sliman's Estate*, 225 La. 521, 530, 73 So. 2d 447, 450 (1954).

sons with respect to judgments and court decrees.⁷⁴

Although its provisions are similar to subsection (2), article 2278 (4) requires a writing for an acknowledgment or promise to pay the debt of a living person only if the debt has already prescribed.⁷⁵ Thus, the courts have held that testimonial evidence is admissible to prove a promise by a living person which interrupts prescription before it has run.⁷⁶

The writing mandated by article 2278 is the same act under private signature required in article 2275; thus, the rules of sufficiency and effect under articles 2241 and 2242 apply equally to article 2278.⁷⁷

Miscellaneous Writing Requirements

Scattered throughout the Louisiana Civil Code and Revised Statutes are a number of writing requirements in addition to those discussed above. Generally, the same principles of sufficiency and effect apply, since the private act is governed by article 2241. The majority of these statutes govern security devices,⁷⁸ contracts to avoid litigation⁷⁹ or special interest statutes.⁸⁰

The Authentic Act

Historical Perspective

The authentic act in Louisiana law is derived directly from the provisions of the French Civil Code.⁸¹ The French notariate, or insti-

74. See text of article 2278, note 64, *supra*.

75. *Id.*

76. *The People's Bank v. Girod*, 31 La. Ann. 502 (1879); *Crone v. The Citizen's Bank*, 28 La. Ann. 449 (1876); *Heinz v. Toune*, 18 So. 2d 49 (La. App. Orl. Cir. 1944); *Cook v. Crow*, 194 So. 455 (La. App. 2d Cir. 1939).

77. See *Sliman Realty Corp. v. Sliman's Estate*, 225 La. 521, 73 So. 2d 447 (1954). See also text at notes 40-45, *supra*.

78. *E.g.*, mortgages, chattel mortgages and pawns. See LA. CIV. CODE arts. 3158, 3305; LA. R.S. 9:5352 (1950).

79. *E.g.*, transaction or compromise. LA. CIV. CODE art. 3071.

80. *E.g.*, public contracts and assignments of future wages as against employer. See LA. R.S. 23:731 (1950); LA. R.S. 33:2213 (1950).

81. FRENCH CIV. CODE art. 1319 (Cachard's transl. 1930): "An instrument in public form is absolute proof of the agreement which it contains between the contracting parties and their heirs or legal representatives. Nevertheless, in case of a criminal case for forgery, the execution of the instrument alleged to have been forged shall be suspended by the indictment, and in case of a complaint for forgery made incidentally, the courts may, according to the circumstances, suspend the execution of the instrument temporarily."

tution of the notary, was begun in 1302,⁸² and has since been strictly regulated by statute. For instance, *notaires* are required to keep a register and to report to the court concerning documents which appear to be tainted by fraud or duress.⁸³ Because the French notary functions as an officer of the court,⁸⁴ he must meet the ordinary qualifications of an *officier ministeriel* (i.e., French nationality, good character and fulfillment of military obligation)⁸⁵ and must spend an apprenticeship of four to six years in a notary's office.⁸⁶

In fulfilling his obligations, the *notaire* serves not only as a public witness, but is also the impartial legal advisor for the parties.⁸⁷ The trained lawyer is more closely his American counterpart than is the notary public.⁸⁸ The notariate is regulated by the local *Chambre des Notaires*, a council empowered to censure and even to suspend a notary from office permanently for breach of his notarial duties. A person so suspended suffers a loss of his political rights, including the right to vote.⁸⁹

Contrasted with the rules of such a disciplined institution are the provisions governing the notariate in Louisiana.⁹⁰ To qualify for office, the applicant must only post bond and prove his competency to a panel of notaries.⁹¹ Even examination before the panel is unnecessary if the applicant is an attorney licensed to practice in Louisiana.⁹² Unlike the French, Louisiana has no body specifically appointed to regulate the notariate.

Notwithstanding the marked differences in the notarial institutions, the effect of an act passed before a notary in Louisiana is the same as that passed before a *notaire* in France; that is, it is full proof of what is contained in the act.⁹³ Thus, the effectiveness of the cautionary function of the authentic act in Louisiana is based only upon the presumption that "a public officer, exercising a high and impor-

82. A. ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 24 (1927).

83. *Id.*

84. P. HERZOG, CIVIL PROCEDURE IN FRANCE 102 (1967) [hereinafter cited as HERZOG].

85. *Id.*

86. *Id.* at 103: "Candidates must ordinarily have worked as clerks in a notary's office for six years before they receive an official appointment. The period of clerkship is only four years for candidates who have a degree of *docteur* or *licencié* in law, or who have attended one of the accredited training institutes for *notaires*."

87. R. DAVID & H. DeVRIES, THE FRENCH LEGAL SYSTEM 24 (1958); HERZOG at 102.

88. R. DAVID & H. DeVRIES, THE FRENCH LEGAL SYSTEM 24 (1958).

89. HERZOG at 105-07.

90. See Title 35, Louisiana Revised Statutes of 1950.

91. *Id.* §§ 191, 253, 392-93, 622.

92. *Id.* § 191 (Supp. 1966). See also LA. R.S. 35:253, 393, 622 (1950).

93. LA. CIV. CODE art. 2236.

tant trust, . . . has done his duty when acting within the scope of his authority."⁹⁴ Because Louisiana imposes few sanctions on notaries for breaches of the public trust, it seems questionable to accord to the Louisiana authentic act the full weight of proof without adequate provision for the parties' protection.

Effect of the Authentic Act

The authentic act performs both an evidentiary and cautionary function. When the formality is required for a particular act, it serves the cautionary purpose, and, if omitted, the act is null and void.⁹⁵ Although all the acts required by law to be in authentic form are too numerous to discuss, several of the more important ones bear mentioning. Since an act is required to be in authentic form to impress upon the parties the seriousness of their actions, there must be an authentic act for a donation,⁹⁶ for certain types of testaments⁹⁷ and for certain solemn acts of status, such as the legitimation of children.⁹⁸

When the parties execute an authentic act, whether required or not, its use is governed by article 2236, and its evidentiary function comes into play.⁹⁹ Article 2236 provides that the authentic act operates as full proof of the agreement contained in it against the contracting parties, their heirs and assigns. While Louisiana courts have nearly always reached the proper result in excluding extrinsic evidence against an authentic act, much of the language used appears to be inconsistent with the Civil Code. For example, in *Gary v. Bullock*,¹⁰⁰ the supreme court applied the common law theory of estoppel by deed to exclude extrinsic evidence instead of using article 2236 to reach the same result. In addition, some courts have spoken of article 2236 as a part of the "parol evidence rule."¹⁰¹ While the application of either the "parol evidence rule" or the "full proof" provision of article 2236 may lead to identical results in many cases (*i.e.*, exclusion of extrinsic oral evidence), it may be argued that the many exceptions to the parol evidence rule should not apply with equal force to the authentic act whose function is more than merely

94. Succession of Tete, 7 La. Ann. 95, 96 (1852).

95. *Miller v. Andrus*, 1 La. Ann. 237 (1846).

96. LA. CIV. CODE art. 1536.

97. *Id.* arts. 1578 (nuncupative testament by public act), 1584 (mystic testament).

98. *Id.* art. 200.

99. For a discussion of the function and effect of the authentic act, see *Succession of Tete*, 7 La. Ann. 95 (1852).

100. 206 La. 231, 19 So. 2d 120 (1944).

101. See, *e.g.*, *Smith v. Bell*, 224 La. 1, 68 So. 2d 737 (1953).

evidentiary.¹⁰² Imposing the parol evidence rule upon the authentic act seems analytically incongruous with the system of proof of obligations outlined in the Civil Code.

Attacking the Authentic Act

The authentic act is clothed with a presumption of genuineness that may be rebutted, although the party attacking the act bears the burden of proving the invalidity or falsehood.¹⁰³ Among the insufficiencies of form which have been held to vitiate an authentic act are the failure of the notary and witnesses to sign the act,¹⁰⁴ the failure to sign in the presence of the notary and witnesses,¹⁰⁵ and the failure to include the date of the act on its face.¹⁰⁶ The act need not, however, be passed in the notary's office.¹⁰⁷ If for any reason the act loses its authentic effect, it may still function as an act under private signature.¹⁰⁸

In addition, the grant by article 2239 of the Louisiana Civil Code to forced heirs of the right "to annul absolutely and by parol evidence the simulated contracts of those from whom they inherit," extends to simulations in authentic form. Although an early Louisiana supreme court decision reasoned that the right to annul contracts as simulations belongs only to forced heirs,¹⁰⁹ later cases have allowed other interested third parties to use writings and interrogatories to assail allegedly simulated authentic acts.¹¹⁰ Whatever the extent of the application of article 2239, however, it is a true exception to the full proof rule. Other provisions of the Code provide a similar exception for creditors attacking the obligation itself via the revocatory action, if the contract is one in fraud of their rights.¹¹¹

102. However, the Louisiana supreme court has used the same criteria for determining if an exception to the parol evidence rule exists whether the act is in authentic or nonauthentic form. See Comment, 35 LA. L. REV. 779, 782 (1975).

103. *Barron v. Jackson Parish Bank*, 184 La. 886, 168 So. 90 (1936); *Perry v. Akin*, 174 La. 472, 141 So. 32 (1932); *Eschete v. Kraemer*, 129 So. 2d 475 (La. App. 1st Cir. 1961).

104. *West Louisiana Bank v. Dawson*, 154 La. 830, 98 So. 262 (1923); *Baker v. Baker*, 125 La. 969, 52 So. 115 (1910).

105. *Abshire v. Comeaux*, 159 La. 1087, 106 So. 574 (1925); *Colonial Trust Co. v. St. John Lumber Co.*, 138 La. 1033, 71 So. 147 (1916); *Wessell v. Kite*, 142 So. 363 (La. App. 2d Cir. 1932).

106. *Livingston v. Dick*, 1 La. Ann. 323 (1846).

107. LA. R.S. 35:10 (Supp. 1974); *Desonier v. Hebert*, 177 So. 423 (La. App. 1st Cir. 1937).

108. LA. CIV. CODE art. 2235.

109. *Louis v. Richard*, 12 La. Ann. 684 (1856).

110. See, e.g., *Jones v. Jones*, 214 La. 50, 36 So. 2d 635 (1948); *Johnson v. Campagna*, 200 So. 2d 150 (La. App. 1st Cir. 1967).

111. LA. CIV. CODE arts. 1970-77.

If fraud, error, or certain other defenses are alleged, extrinsic evidence may be offered to attack the authentic act.¹¹² Since in such cases the parties do not attack the writing as such, but rather assert defenses to the obligations therein, these allegations are not true "exceptions" to the full proof rule.¹¹³ For example, in *Smith v. Smith*,¹¹⁴ a husband sought to annul a contract in authentic form between himself and his wife on the grounds that the act was prohibited by law and therefore void. The court allowed the testimony with little discussion of whether admission was in conflict with the full proof rule. The implicit reasoning of the case is that the husband was not attacking the written act as false, but rather was attacking the capacity of the parties to contract. The same reasoning should apply to contracts assailed on the basis of fraud, error, unlawful cause, acts in fraud of creditors, and similar vices which render contracts null. The only misrepresentation or "fraud" that is an attack on the act itself is forgery; however, article 2236 clearly allows the admission of extrinsic evidence to establish a forgery and thereby nullify the act.¹¹⁵

Once the court determines that an authentic act is assailable, it may be attacked by other writings or by answers to an interrogatory.¹¹⁶ In addition, forced heirs may attack a simulation by testimonial evidence.¹¹⁷ Unlike the rights accorded forced heirs and others to challenge allegedly simulated authentic acts as provided by article 2239, there is no legislative basis for attack on an authentic act by an interrogatory. Apparently the practice was derived from the use of such devices in the proof of verbal sales.¹¹⁸

112. *Overby v. Beach*, 220 La. 77, 55 So. 2d 873 (1951); *Paciera v. Benitz*, 284 So. 2d 827 (La. App. 4th Cir. 1973).

113. *Cf.* LA. CIV. CODE art. 1762: "The contract must not be confounded with the instrument in writing by which it is witnessed. The contract may subsist, although the written act may, for some defect, be declared void; and the written act may be good and authentic, although the contract it witnesses be illegal. The contract itself is only void for some cause or defect determined by law."

114. 239 La. 688, 119 So. 2d 827 (1960).

115. LA. CIV. CODE art. 2236: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery." For a discussion of the meaning of "forgery" as it pertains to this article, see *Succession of Tete*, 7 La. Ann. 95 (1852).

116. *Jones v. Jones*, 214 La. 50, 36 So. 2d 635 (1948); *Godwin v. Newstadt*, 42 La. Ann. 735, 7 So. 744 (1890); *Semere v. Semere*, 10 La. Ann. 204 (1855); *Wise v. Johnson*, 229 So. 2d 179 (La. App. 2d Cir. 1969); *Louis v. Garrison*, 64 So. 2d 254 (La. App. Or. Cir. 1953). If attacked by interrogatory, the parties are bound by the answers given. *Godwin v. Newstadt*, *supra*; *Wise v. Johnson*, *supra*.

117. LA. CIV. CODE art. 2239.

118. See LA. CIV. CODE art. 2275. See also text at notes 44-45, *supra*.

Conclusion

Despite the myriad of cases involving writings and authentic acts, the Louisiana courts have not developed a consistent pattern in applying the provisions of the Code in this area. The courts have often used common law authority to arrive at just solutions, based on the policy interest behind requiring a writing. In most cases, the same result would have been obtained by employing reasoning compatible with the background of articles 2236, 2275, and 2278. In a few instances, however, the lack of an understanding of the principles and functions of writing requirements has led to results inconsistent with the theory of the Civil Code.

Because the results reached in most instances would have been the same, it would be a relatively simple matter for the courts to approach the entire area using a framework consistent with the system of the Code. In the areas where contrary results have been reached, the sound approach would be for the legislature either to affirm the jurisprudence or make the statutes more explicit so as to provide a better standard for judicial application. Finally, in light of the vast differences in the French and Louisiana notarial institutions, it may be appropriate to re-examine the role of the authentic act in Louisiana law and either to accord it less weight or to strengthen the regulation of the notariate.

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