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John Tsai

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ASSUMPTION OF OBLIGATIONS: THIRD PARTY NO MORE

In more than one sense has the concept of assumption of obligations been a "third party." While the basis for NA 1821-1824¹ on assumption of obligations² is nothing new to Louisiana jurisprudence, there have never been any code articles on assumption of obligations until now. In this sense the concept of assumption of obligations has been a "third party," not part of the code but part of the jurisprudence. However, it is more important that code articles never existed as to assumption of obligations because assumptions of obligations were often considered as third-party-beneficiary contracts. In reality, assumptions of obligations are not third-party-beneficiary contracts, and are deserving of separate code articles. With the enactment of NA 1821-1824, assumptions of obligations will no longer be considered "third parties."

The Jurisprudence

The jurisprudence on assumption of obligations arose out of situations in which a vendee assumed a mortgage on some property as part

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1. Articles 1756-2291 of the Louisiana Civil Code of 1870 [hereinafter cited as OA (old articles)] were repealed and replaced by new articles 1756-2057 [hereinafter cited as NA]; see 1984 La. Acts, No. 331, § 1. NA 1821 provides:

An obligor and a third person may agree to an assumption by the latter of an obligation of the former. To be enforceable by the obligee against the third person, the agreement must be made in writing.

The obligee's consent to the agreement does not effect a release of the obligor.

The unreleased obligor remains solidarily bound with the third person.

NA 1822 provides: "A person, who by agreement with the obligor, assumes the obligation of the latter is bound only to the extent of his assumption. The assuming obligor may raise any defense based on the contract by which the assumption was made."

NA 1823 provides: An obligee and a third person may agree on an assumption by the latter of an obligation owed by another to the former. That agreement must be made in writing. That agreement does not effect a release of the original obligor."

NA 1824 provides:

A person who, by agreement with the obligee, has assumed another's obligation may not raise against the obligee any defense based on the relationship between the assuming obligor and the original obligor.

The assuming obligor may raise any defense based on the relationship between the original obligor and the obligee. He may not invoke compensation based on an obligation owed by the obligee to the original obligor.

2. The assumption of a mortgage is a common type of assumption of an obligation; however, the assumption of a mortgage must be distinguished from buying property subject to a mortgage. In an assumption, the assuming party is personally liable for the debt, but where the property is purchased subject to a mortgage, only the property is at stake. Cf. *Balfour v. Chew*, 4 Mart. (n.s.) 154 (La. 1826).

of the price for the conveyance of the property from the original mortgagor.³ Cognizant of the possibility of effectuating a novation by the substitution of debtors in such an assumption, Louisiana courts have protected the mortgagee-creditor from losing a responsible debtor by declaring that when a third person assumes another's debt, the assumption does not operate as a novation so as to discharge the original debtor, unless the creditor has expressly declared his intention to discharge the original debtor.⁴ In giving the mortgagee-creditor a right of action against the assuming debtor without discharging the original debtor, Louisiana courts early decided that an assumption of a mortgage was a third-party-beneficiary contract made for the mortgagee-creditor's favor.⁵ However, the determination that an assumption of a mortgage was a third-party-beneficiary contract was not consistently followed in subsequent decisions.⁶

In *Tiernan v. Martin*,⁷ the court, quoting from Pothier,⁸ refused to classify the assumption of a mortgage as a *stipulation pour autrui* since the stipulation was for the exclusive benefit of the stipulating party.⁹ In *Vinet v. Bres*,¹⁰ the court attempted to reconcile the rationale of *Tiernan* with the earlier jurisprudence by stating that *Tiernan* stood only for the proposition that for stipulations to be of avail, they must be accepted by the beneficiary, which is nothing more than what was expressed by Civil Code article 1890.¹¹ Although *Vinet* purported to dispense with the language of *Tiernan*, the proposition that an assumption of an obligation is not a third-party-beneficiary contract remained alive in later decisions.¹² However, despite the confusion as to

3. *Mayor v. Bailey*, 5 Mart. (o.s.) 321 (La. 1818).

4. *Jacobs v. Calderwood*, 4 La. Ann. 509 (1849).

5. *Mayor v. Bailey*, 5 Mart. (o.s.) 321 (La. 1818); *Jacobs v. Calderwood*, 4 La. Ann. 509 (1849).

6. *Tiernan v. Martin*, 2 Rob. 523 (La. 1842); *Campti Motor Co. v. Jolley*, 10 La. App. 287, 120 So. 684 (2d Cir. 1929); *Freedman v. Ratcliff*, 183 La. 1, 162 So. 783 (1935); *Moriarty v. Weiss*, 196 La. 34, 198 So. 643 (1939).

7. 2 Rob. 523 (La. 1842).

8. To stipulate that anything shall be delivered or paid to a third party designated by the agreement, is not to stipulate for another. For instance, if I contract to sell to you an estate for a thousand pounds, which it is agreed shall be paid to Peter, it is not for him, but for myself, that I make this stipulation; Peter is only introduced into the agreement as a person to receive the money for me and in my name, and is what the Roman jurists call *adjectus solutionis prata*.

1 M. Pothier, *Treatise on the Law of Obligations* no. 57, at 132 (W. Evans ed. & trans. 3d ed. 1853).

9. 2 Rob. at 525.

10. 48 La. Ann. 1254, 20 So. 693 (1895).

11. *Id.* at 1264, 20 So. at 697.

12. *Campti Motor Co. v. Jolley*, 10 La. App. 287, 120 So. 684 (2d Cir. 1929); *Freedman v. Ratcliff*, 183 La. 1, 162 So. 783 (1935); *Moriarty v. Weiss*, 196 La. 34, 198 So. 643 (1939).

the nature of assumption of an obligation, the courts consistently applied the basic notion that an assumption of an obligation does not create a novation unless the creditor has expressly declared his intention to discharge the original debtor.¹³

Although the *Tiernan* court apparently used the quotation from Pothier erroneously and applied it out of context,¹⁴ the proposition that an assumption of an obligation is not a third-party-beneficiary contract is tenable. Accordingly, the purpose of the enactment of NA 1821-1824 was to take assumptions out of the framework of the third-party-beneficiary provisions by creating independent provisions on assumption of obligations.¹⁵ While the necessity of differentiating between third-party-beneficiary contracts and assumption of obligations has been questioned,¹⁶ the inclusion of assumptions of obligations in the framework of third-party-beneficiary contracts has bent the framework of third-party-beneficiary contracts out of shape.

While assumptions of obligations and third-party-beneficiary contracts are similar in that they both involve three parties, there exists a difference between them that warrants separate code articles. In *Tiernan* and its progeny, the courts consistently noted that in an assumption the benefit was not for the obligee but for the stipulating party.¹⁷ Arguably, the court's reluctance to consider an assumption as a third-party-beneficiary contract was rooted in the court's unwillingness to give the obligee an action to force the assuming party to abide by an assumption that was not for the obligee's benefit. Inequity would result if the original obligor and the third party subsequently attempted to revoke

13. *Jacobs v. Calderwood*, 4 La. Ann. 509 (1849); *Union Bank v. Bowman*, 9 La. Ann. 195 (1854); *Latiolais v. Citizen's Bank*, 33 La. Ann. 1444 (1881); *Issacs v. Van Hoose*, 171 La. 676, 131 So. 845 (1930).

14. [Pothier] had argued that, in accordance with Roman doctrine, where a stipulation was made in which the promisee had no enforceable interest, because nothing had been stipulated for himself, the stipulation would fail since the third party under such a doctrine, could not enforce it also. In the given passage Pothier was attempting to state a case where the stipulation would be effective because the promisee would have an enforceable interest; he was not trying to state a cause where the third party would not have an interest. This distinction is necessary to an accurate evaluation of the passage.

Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 Tul. L. Rev. 18, 25 (1936).

15. NA 1821, comment (b).

16. *Obligations Revision—meeting of Louisiana State Law Institute, January 11-12, 1980*, at 3 ("Denson Smith argued that special articles on 'Assumption' were not needed. He thought that the articles on stipulation pour autrui would cover all problems.") (on file with Louisiana State Law Institute, Paul M. Hebert Law Center, Baton Rouge, Louisiana). See generally Smith, *supra* note 14.

17. *Tiernan v. Martin*, 2 Rob. at 525 (La. 1842); *Campti Motor Co. v. Jolley*, 10 La. App. at 289, 120 So. at 685 (2d Cir. 1929); *Freedman v. Ratcliff*, 183 La. at 8, 162 So. at 785 (1935); *Moriarty v. Weiss*, 196 La. at 61, 198 So. at 652 (1939).

the stipulation but the obligee could force the assuming party to abide by the assumption. After all, if the original obligor continued to meet the obligation owed to the obligee, it would seem that the obligee would have no reason to object to the revocation of the stipulation. However, if, in the assumption between the original obligor and the assuming party, the assuming party also obligated himself to the obligee, then it would be equitable to allow the obligee an action to force the assuming party to abide by the assumption despite attempts by the original obligor and the assuming party to revoke the stipulation.

Hence, in an assumption of an obligation, a right of action does not inure to the obligee until the assuming party obligates himself to the obligee.¹⁸ Consequently, an assumption of an obligation is not a third-party-beneficiary contract since in a third-party-beneficiary contract a right of action inures to the third-party-beneficiary without his being a party to the stipulation.¹⁹ To the contrary, in third-party-beneficiary contracts, the beneficiary is never a party to the contract.²⁰ Therefore, in assumptions of obligations, a *stipulation pour autrui* does not exist because the contract is not for another, but for a party to the agreement. Consequently, the jurisprudence stating that an assumption of an obligation is not a third-party-beneficiary contract is correct.

French Law

Ironically, NA 1821, which envisions an assumption by agreement between the original obligor and a third party, and NA 1823, which envisions an assumption by agreement between the obligee and the third party, have their origins in novation.²¹ Subjective novation, which is the substitution of one debtor for another, was subdivided under French law into *delegation*, (in which the original debtor procures a new debtor for his creditor) and *expromission* (in which the new debtor binds himself to the creditor without the consent of the original debtor).²² Under

18. For all practical purposes, in an assumption of an obligation the obligee should be a party to the assumption. At least in assumption of mortgages, what are known colloquially as "due on sale" clauses allow banking institutions to mature the indebtedness of the mortgagor if the payment of the mortgage is assumed by a purchaser. Consequently, an assuming party would be forced to deal with the bank in an assumption of a mortgage. See La. R.S. 6:833 (Supp. 1984).

19. See *United States v. Automobile Club Ins. Co.*, 522 F.2d 1 (5th Cir. 1975).

20. *Merco Mfg. Co. v. J. P. McMichael Constr. Co.*, 372 F. Supp. 967 (W.D. La. 1974); see also Smith, *supra* note 14, at 33.

21. 2 M. Planiol, *Treatise on the Civil Law* pt. 1, no. 540(2), at 301 (11th ed. La. St. L. Inst. Trans. 1959); 1 C. Aubry & C. Rau, *Droit Civil Francais* § 324(1)(b), at 229 (E. Bartin 6th ed. 1942, La. St. L. Inst. trans. 1965). Cf. Comment, *The Requisites and Effects of Novation: A Comparative Survey*, 25 Tul. L. Rev. 100, 108 (1950).

22. 2 M. Planiol, *supra* note 21, no. 540(2), at 301.

Louisiana law, OA 2191 contemplated both *delegation* and *expromission*, though not explicitly.²³

The French concept of *delegation* is the basis for NA 1821, since both envision the original debtor procuring a new debtor for his creditor.²⁴ Consistent with NA 1821, a *delegation* consists of a delegatee who is the creditor, a delegator who is the original debtor and a delegated who is the new debtor.²⁵ Furthermore, not unlike the Louisiana jurisprudence which gave rise to NA 1821, in a *delegation* the delegator usually is the debtor of the delegatee and creditor of the delegated.²⁶ However, NA 1821 is not expressly limited to such a situation, and apparently gratuitous assumptions by third parties are within the scope of NA 1821.²⁷

Subjective novation by *delegation* requires the concurrence of all three parties.²⁸ A *delegation* is effected when the delegatee procures the obligation of the delegated on the invitation of the delegator.²⁹ Since the consent of the delegatee is necessary to create a *delegation*, the delegatee does not have an action against the delegated until the delegated obligates himself personally to the delegatee.³⁰ NA 1821 is in accord with the requirement that all three parties concur before a right of action arises for the delegatee, since therein lies the distinction between an assumption of an obligation and a third-party-beneficiary contract.

In harmony with NA 1886 (a novation article that complements NA 1821-1824), *delegation* is not considered the same as novation and results in novation only if the creditor expressly discharged the original debtor.³¹ However, under French law the intention to novate does not need to be in writing or even declared, but could be tacit—implied either from the nature of the contract, or from external circumstances.³² Accordingly,

23. La. Civ. Code art. 2191 ("Novation by the substitution of a new debtor may take place without the concurrence of the former debtor."); see also NA 1882.

24. See 2 M. Planiol, *supra* note 21, no. 540(2), at 301.

25. *Id.* no. 551, at 306.

26. *Id.* no. 552, at 306.

27. *Id.* Compare NA 1978 with OA 1890, which required that a third-party-beneficiary contract be made as part of either a commutative contract or an onerous donation.

28. 1 C. Aubry & C. Rau, *supra* note 21, no. 324(1), at 229.

29. 2 M. Planiol, *supra* note 21, no. 558, at 310.

30. [T]he stipulation pour autrui gives the third party an immediate right, while in the delegation, the delegator confines himself to inviting the delegated to go and obligate himself personally to the delegatee. The direct action of the latter does not arise until the stipulation has been made, which is necessarily after the invitation by the delegator.

Id. no. 559, at 311-12 (citation omitted).

31. 4 C. Aubry & C. Rau, *supra* note 21, § 324(4), at 236.

32. 2 M. Planiol, *supra* note 21, no. 555, at 308-09.

Louisiana jurisprudence has indicated that acts tantamount to an express declaration will suffice³³ to create a novation.

In *Walton v. Beauregard*,³⁴ the court, in holding that novation had occurred, stated, "We know of no more formal acceptance of a delegated debtor, than commencing a suit against him to enforce the execution of the obligation he has undertaken towards the creditor."³⁵ However, *Walton* was subsequently considered questionable authority for the contention that suit against the delegated debtor was evidence of an intention by the creditor to discharge the original debtor.³⁶ Yet in *Walton*, the creditor, without the consent of the original debtor, had made stipulations for delay—rendering the contract more onerous as to the delegated debtor.³⁷ Although a suit against a delegated debtor may not effect a novation, when a creditor makes the contract more onerous without the original debtor's consent, a novation should result.³⁸ Novation is recognized in such a situation since a codebtor is released if a creditor impairs his subrogation rights.³⁹ NA 1821 does not appear to change the law in this respect.⁴⁰

Since *delegation* does not imply novation, *delegation* is divided into perfect *delegation*, which operates as a novation, and imperfect *delegation*, which does not.⁴¹ Perfect *delegation* is considered inferior to imperfect *delegation* because the latter is more advantageous to the creditor.⁴² Consequently, perfect *delegation* is rarely encountered in practice. Imperfect *delegation* is also referred to as *adstipulation*.⁴³

The Articles

Consistent with Louisiana jurisprudence and NA 1821, imperfect *delegation* or *adstipulation* creates solidary co-debtors.⁴⁴ The jurisprudence

33. *Short v. New Orleans*, 4 La. Ann. 281 (1849); Comment, *supra* note 21, at 113.

34. 1 Rob. 301 (La. 1842).

35. *Id.* at 303.

36. *Jackson v. Williams*, 11 La. Ann. 93 (1856).

37. 1 Rob. at 302.

38. *Walton v. Beauregard*, 1 Rob. 301 (La. 1842); *Gay v. Blanchard*, 32 La. Ann. 497 (1880); *Wilkinson v. Adams*, 179 La. 630, 154 So. 630 (1934).

39. *Issacs v. Van Hoose*, 171 La. 676, 131 So. 845 (1931); *Exchange Nat'l Bank of Chicago v. Spalitta*, 321 So. 2d 338 (La. 1975) (Sanders J., dissenting).

40. According to comment (a) to NA 1886 (a novation article which accompanies the articles on assumption of obligations and replaces OA 2196), NA 1886 does not change the law. Furthermore, under NA 1886 a novation does not occur unless the creditor expressly discharges the original debtor, whereas under OA 2192, a novation occurred when the creditor expressly *declared* that he intended to discharge the original debtor. This change seems to conform the code to the jurisprudence.

41. 2 M. Plainol, *supra* note 21, no. 554, at 308.

42. *Id.*

43. *Id.*

44. *Gay v. Blanchard*, 32 La. Ann. 497 (1880); *Simon v. McMeel*, 167 La. 243, 119 So. 35 (1928); cf. 2 M. Plainol, *supra* note 21, no. 559, at 311.

ence on assumption of obligations had suggested that the original debtor and the assuming debtor are bound in imperfect solidarity to the creditor. However, when NA 1821 states that "the unreleased obligor remains solidarily bound with the third person," the distinction between perfect and imperfect solidarity is not contemplated, since *Foster v. Hampton*⁴⁵ dispensed with such a distinction. Consequently, interruption of prescription as to either the assuming debtor or the original debtor is effective as to the other.

While *delegation* is the basis of NA 1821, *expromission* is the basis of NA 1823. *Expromission*, unlike *delegation*, requires only the concurrence of the creditor and the new debtor.⁴⁶ Since NA 1823 contemplates an agreement between the creditor and the new debtor, an assumption under NA 1823 can occur without the knowledge of the original debtor.⁴⁷ In accord with NA 1821, NA 1823 is not explicitly limited to onerous assumptions, and gratuitous assumptions should be included within its scope. Despite the fact that NA 1823 is modeled after *expromission*, it differs from *expromission* on when a novation is effected. *Expromission* always suggests a novation,⁴⁸ while NA 1823 borrows from both *delegation* and NA 1821, and requires an express intent to discharge the original debtor. Under French law, an *expromission* which does not operate as a novation is an *adpromissio*, or a suretyship.⁴⁹

Although NA 1823 does not envision suretyship,⁵⁰ it is similar to suretyship in that the obligee and the third party can arrange the third party's assumption of the debt without the original obligor's knowledge.⁵¹ Furthermore, consistent with suretyship but different from NA 1821, NA 1823 does not create solidarity between the original obligor and the assuming obligor. This is due partially to the fact that solidarity in reference to an obligation is never presumed and only arises from a clear expression of the parties' intent or from the law,⁵² and while NA 1821 explicitly creates solidarity between the original and the assuming debtors, NA 1823 does not.

45. 381 So. 2d 789 (La. 1980). NA 1799 provides: "The interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs." The distinction between imperfect solidarity and perfect solidarity is that in imperfect solidarity the liability arises from different acts or different times, whereas in perfect solidarity, the liability arises from the same act at the same time. Imperfect solidarity does not interrupt prescription as to the other co-debtors, while perfect solidarity does. *Wooten v. Wimberly*, 272 So. 2d. 303 (La. 1973) (Tate, J., concurring).

46. 4 C. Aubry & C. Rau, supra note 21, no. 324(1), at 229.

47. NA 1823, comment (c).

48. 4 C. Aubry & C. Rau, supra note 21, no. 324(4), at 326.

49. *Id.* at 236 n.38.

50. NA 1824, comment (a).

51. La. Civ. Code art. 3038.

52. NA 1796.

However, unlike suretyship, NA 1823 obligates the assuming obligor to pay the debt regardless of the original obligor's ability or inability to satisfy the debt. Furthermore, since the assuming obligor is unconditionally bound, the right of discussion⁵³ afforded the surety by article 3045 is inapplicable to NA 1823.

While NA 1821 and NA 1823 are derived from the French concepts of *adstipulation* and *adpromissio*, Louisiana jurisprudence has imposed the requirement that an assumption of an obligation be in writing.⁵⁴ Furthermore, the similar promise to pay the debt of another which refers to suretyship cannot be established by parol evidence and must be in writing.⁵⁵ Although the requirement that a promise to pay the debt of another must be in writing is well established, there are exceptions to this rule.

In *Baskin v. Abell*,⁵⁶ an agreement by a transferee of a truck to pay the transferor's debt to another as part of the price of the transfer was held to be valid despite the fact that the agreement was not in writing. The court stated that OA 2278(3),⁵⁷ which prohibits the use of parol evidence to prove the promise to pay the debt of another, "contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover to shield against the actual obligations of the defendant himself" ⁵⁸ Later in *Coreil v. Vidrine*,⁵⁹ the court held that parol evidence was competent to prove the promise to pay the debt of a third person if the promisor has a material interest in making the promise and receives consideration for it.⁶⁰ Apparently NA 1821 and NA 1823 embrace the *Coreil* approach.⁶¹

However, if NA 1821 and NA 1823 embrace the *Coreil* approach, the writing requirement of NA 1821 and NA 1823 may be drastically limited. Certainly, when there has been a gratuitous assumption the assumption would have to be in writing since the promisor does not receive consideration for his promise. On the other hand, when there

53. Code of Civil Procedure article 5151 provides: "Discussion is the right of a secondary obligor to compel the creditor to enforce the obligation against the property of the primary obligor" See also La. Civ. Code art. 3045.

54. *Fontenot v. Marquette Cas. Co.*, 258 La. 671, 247 So. 2d 572 (1971) (treating of *stipulation pour autrui*); *Whittington v. Louisiana-Pacific Corp.*, 385 So. 2d 863 (La. App. 2d Cir.), cert. denied, 393 So. 2d 738 (La. 1980).

55. *Hill v. Atwater*, 24 La. Ann. 325 (1872); *Baker v. Pagaud*, 26 La. Ann. 220 (1874); *Hamilton v. Hodges*, 30 La. Ann. 1290 (1878); *Guillot v. Guillot*, 141 La. 81, 74 So. 702 (1917); NA 1847; OA 2278(3).

56. 14 La. App. 601, 122 So. 133 (2d Cir. 1929).

57. See NA 1847.

58. *Id.* at 603, 122 So. at 134.

59. 188 La. 343, 177 So. 233 (1937).

60. *Id.* at 352, 177 So. at 236.

61. NA 1823, comment (b); cf. NA 1821, comment (e).

has been a novation along with the assumption, arguably, the assumption would not have to be in writing since the principle behind OA 2278(3) is that suretyship or an accessory obligation needs to be in writing, whereas an independent obligation does not. As for assumptions in which the assuming obligor has received consideration, and no novation has been effected, whether the requirement of writing is applicable is unclear.

In *Fabacher v. Crampes*,⁶² the earliest Louisiana case to espouse the inapplicability of OA 2278(3) when the promisor receives consideration for his promise, while the court did state that "the prohibition against the admission of parol evidence to prove promise to pay the debt of another does not apply. . . . when the promise is made upon adequate consideration . . .,"⁶³ the court qualified this statement by stating "[f]or in [this] case it is an original and direct undertaking by the promisor towards the debtor himself, and not at all a collateral undertaking to pay the debt of another."⁶⁴

Arguably, what the court in *Fabacher* was precluding from the exception to the writing requirement imposed by OA 2278(3) were suretyships, and NA 1821 and NA 1823 clearly do not envision suretyship. Furthermore, NA 1821 and NA 1823 do envision original and direct undertakings by assuming obligors to obligees. Consequently, if NA 1821 and NA 1823 adhere strictly to *Coreil*, the requirement of writing as explicitly provided in NA 1821 and NA 1823 would be effectively limited to gratuitous assumptions. This limitation would seem contrary to the purpose of providing explicitly the requirement of writing in assumption of an obligation. The more logical approach would be to limit the exception to the writing requirement to assumptions that effect a novation since such an assumption could in no sense be considered an accessorial obligation,⁶⁵ and could only be considered as a principal obligation.

NA 1822, which accompanies NA 1821, states that a person who, by agreement with the obligor, assumes the obligation of the latter is bound only to the extent of his assumption. This is supported by Louisiana jurisprudence as well as French law.⁶⁶ Although NA 1822 states that "the assuming obligor may raise any defense based on the

62. 166 La. 397, 117 So. 439 (1928).

63. *Id.* at 402, 117 So. at 441.

64. *Id.*

65. While NA 1821 and NA 1823 do not envision suretyship, the assuming obligor can still assert defenses that the original obligor had against the obligee. This indicates that the contract between the assuming obligor and the obligee is still dependent on the contract between the original obligor and the obligee. With a novation, such a dependency does not exist and the assumption is a completely independent undertaking.

66. *Capital Loans, Inc. v. Stassi*, 195 So. 2d 670 (La. App. 1st Cir. 1967); 2 M. Planiol, *supra* note 21, no. 552, at 306.

contract by which the assumption was made," this is unsupported by the concept of *delegation*.⁶⁷ However, Louisiana jurisprudence has long held that a creditor's rights against the assuming debtor can be no greater than the original debtor's rights against the assuming debtor.⁶⁸ Consequently, if the original debtor fails to perform his part of the agreement in an assumption, the assuming debtor, if he asserts such a defense, should be relieved of the assumption.⁶⁹ Additionally, NA 1822 allows the assuming obligor defenses which the original obligor may have against the obligee. However, the assuming obligor may not raise defenses purely personal to the original obligor against the obligee.⁷⁰

NA 1824, which accompanies NA 1823, states that in an agreement of assumption between the obligee and the assuming obligor, the assuming obligor "may not raise against the obligee any defense based on the relationship between the assuming obligor and the original obligor." This is in contrast to NA 1822. The difference between NA 1824 and NA 1823 is justified by the fact that in an agreement of assumption between the obligee and the assuming obligor, the original obligor is not a party to the agreement and the assumption can occur without his knowledge. However, NA 1824 does allow the assuming obligor "any defense based on the relationship between the original obligor and the obligee" since this relationship determines the existence of the debt being assumed. Yet, like NA 1822, defenses purely personal to the original obligor against the obligee are not allowed under NA 1824.

Contrary to article 2211, which allows a surety to assert compensation⁷¹ of what the creditor owes to a principal debtor, NA 1824 states that the assuming obligor "may not invoke compensation based on an obligation owed by the obligee to the original obligor." The difference between article 2211 and NA 1824 is justified by the fact that the situation contemplated in NA 1823 is not a suretyship and the assuming debtor is not secondarily liable but is bound unconditionally. Therefore, like the right of discussion, the right to assert compensation between the obligee and the original obligor is inconsistent with the assumption of an obligation envisioned by NA 1824.

Conclusion

In brief, although Louisiana law on novation implicitly contemplated *delegation* and *expromission*, the French concepts of *adstipulation* and

67. 1 M. Pothier, *supra* note 8, no. 566, at 445.

68. See cases cited *supra* note 6.

69. *Id.*

70. NA 1822, comment (c). Common personal defenses are minority, incapacity and bankruptcy.

71. "When two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts . . ." OA 2207; see also NA 1893.

adpromissio were not carried over from French law to Louisiana law. Consequently, there arose a gap in Louisiana law when the courts, in dealing with assumptions, did not want to recognize a novation, but instead desired to give the obligee an additional obligor. In refusing to recognize a novation in an assumption the courts also stretched the framework of third-party-beneficiary contracts to accommodate *adstipulations*. Otherwise, the effect of repudiating a novation in an assumption would leave the parties in the same situation that they had occupied prior to the agreement, the creditor still having only one debtor. With the enactment of NA 1821-1824, the Louisiana law is complete as to the assumption of obligations, and the concept of third-party-beneficiary contracts does not need to be contorted. Now an assumption of an obligation can be distinguished from a third-party-beneficiary contract. An assumption of an obligation occurs either when an obligor agrees with another that he will assume the obligor's debt or when a third party agrees with the obligee that he will assume the obligor's debt. However, unlike a third-party-beneficiary contract in which the third-party-beneficiary is never a party to the contract, in an assumption a right of action does not inure to the obligee until the assuming party obligates himself to the obligee. Hence, an assumption can be distinguished from a third-party-beneficiary contract in that an assumption requires the concurrence of all three parties, while a third-party-beneficiary contract only requires the concurrence of the stipulator and the promisor. While novation is inapplicable to third-party-beneficiary contracts, due to the close nature of *adstipulation* and *adpromissio* to novation, a novation will be effected if, in an assumption of an obligation, there is an express intent of the creditor to discharge the original debtor.⁷² Furthermore, if in an assumption of an obligation the original obligor is released, contrary to NA 1821 and NA 1823, the assumption does not need to be in writing.⁷³ While the law as to the effect of assumptions has not changed, the addition of the NA 1821-1824 has cleared up the confusion in Louisiana jurisprudence as to assumptions and given *adstipulation* and *adpromissio* their rightful place in Louisiana law.

John Tsai

72. See *supra* text accompanying note 34.

73. See *supra* text accompanying note 65.

