Louisiana Law Review

Volume 54 | Number 3
January 1994

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Bruce V. Schewe

Kent A. Lambert

Repository Citation
Bruce V. Schewe and Kent A. Lambert, *Obligations*, 54 La. L. Rev. (1994)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol54/iss3/12

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Obligations

Bruce V. Schewe[*]
Kent A. Lambert[**]

Over the past year, the courts of Louisiana have commented upon a variety of subjects, including contractual negligence,[1] quasi contracts,[2] stipulations pour autrui,[3] reformation of documents,[4] offer and acceptance,[5] dation en paiement,[6] damages,[7] intentional interference with contracts,[8] noncompetition pacts,[9]

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* Lecturer in Civil Law, Loyola University School of Law (New Orleans); member, New Orleans, Louisiana State, and American Bar Associations.

** Member, New Orleans, Louisiana State, and American Bar Associations.

1. *See, e.g.*, Illinois Cent. Gulf R.R. v. Railroad Land Inc., 988 F.2d 1397 (5th Cir. 1993).

2. *See, e.g.*, Burns v. Sabine River Auth., 614 So. 2d 1337 (La. App. 3d Cir.), *writ denied*, 617 So. 2d 935 (La. 1993).

3. *See, e.g.*, Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138 (5th Cir. 1993); Charia v. Hulse, 619 So. 2d 1099, 1101 (La. App. 4th Cir. 1993) ("[D]ecedent's intended legatees were third party beneficiaries and thus could pursue a claim against the notary for his failure to perform the contract he had with decedent to confect a valid will.") (citing Killingsworth v. Schlater, 292 So. 2d 536 (La. 1973)); Barrie v. V.P. Exterminators, Inc., 614 So. 2d 295 (La. App. 4th Cir.), *rev'd*, 625 So. 2d 1007 (1993); McKee v. Southfield Sch., 613 So. 2d 659, 662 (La. App. 2d Cir. 1993) ("As a third party beneficiary, [plaintiff's] rights under the contract are subject to the terms and conditions of the contract entered into by [the contracting parties].") (citing Pelican Well & Tool Supply Co. v. Johnson, 194 La. 987, 195 So. 514 (1940)); A. F. Blair Co. v. Haydel, 504 So. 2d 1044 (La. App. 1st Cir. 1987)).

4. *See, e.g.*, *Illinois Cent.*, 988 F.2d at 1405-06; Greer v. State, 616 So. 2d 811, 815 (La. App. 2d Cir. 1993) ("[E]ither party to a contract is permitted to correct any error in an instrument purporting to evidence the contract . . ., provided that the rights of third parties have not intervened.") (citing Succession of Jones v. Jones, 486 So. 2d 1124 (La. App. 2d Cir.), *writ denied*, 489 So. 2d 249 (1986)); Wise v. Lapworth, 614 So. 2d 728, 731 (La. App. 5th Cir. 1993) ("A contract may be modified only by mutual consent.") (citing River Oaks, Inc. v. Blue Cross of Louisiana/Louisiana Health Serv. & Indem. Co., 595 So. 2d 785 (La. App. 5th Cir.), *writ denied*, 598 So. 2d 361 (1992)).

5. *See, e.g.*, Myers v. Burger King Corp., 618 So. 2d 1123, 1126 (La. App. 4th Cir.), *writ denied*, 629 So. 2d 348 (1993) ("[A]n offeree may tacitly accept a written offer.") (citing Schlingkamp v. Aicklen, 534 So. 2d 1327, 1330 (La. App. 4th Cir. 1988)).

6. *See, e.g.*, Hibernia Nat'l Bank v. Continental Marble & Granite Co., 615 So. 2d 1109, 1111 (La. App. 5th Cir. 1993) ("[A] dation, like a sale of movable property, is effective between the parties from the moment of delivery, which accompanies the execution of the public act.") (citing Quality Fin. Co. of Donaldson, Inc. v. Bourque, 315 So. 2d 656 (La. 1975)).

7. *See, e.g.*, Mayerhofer v. Three R's Inc., 597 So. 2d 151 (La. App. 3d Cir.), *writ denied*, 600 So. 2d 680 (1992).

8. *See, e.g.*, WKG-TV Video Elec. College, Inc. v. Reynolds, 618 So. 2d 1023 (La. App. 1st Cir. 1993); Belle Pass Terminal, Inc. v. Jolin, Inc., 618 So. 2d 1076 (La. App. 1st Cir.), *writ denied*, 626 So. 2d 1172 (1993); Yarbrough v. Federal Land Bank Ass'n, 616 So. 2d 1327 (La. App. 2d Cir. 1993); First Downtown Dev. Partnership v. Cimochowski, 613 So. 2d 671 (La. App. 2d Cir.), *writ denied*, 615 So. 2d 340 (1993); Bolanos v. Madary, 609 So. 2d 972 (La. App. 4th Cir. 1992), *writ denied*, 615 So. 2d 339 (1993). *See also* Bruce V. Schewe, *Obligations, Developments in the Law, 1989-1990*, 51 La. L. Rev. 361, 368-69 (1990).

9. *See, e.g.*, Water Processing Technologies, Inc. v. Ridgeway, 618 So. 2d 533 (La. App. 4th Cir. 1993); Commerce Ins. Agency, Inc. v. Hogue, 618 So. 2d 1048 (La. App. 1st Cir.), *writ denied*,

error,[10] subrogation,[11] proof of agreements,[12] duress,[13] specific performance,[14] fraud,[15] warranties,[16] privity,[17] rescission,[18] and interpretation of contracts.[19] The following discussion highlights a few of the more noteworthy or unusual decisions.

A. Inexcusable Error—When Mea Culpa Does Not Suffice

The courts of Louisiana, building upon the French doctrine of "inexcusable error"[20] or contractual negligence, have long proclaimed that they will rescind

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626 So. 2d 1171 (1993).

10. *See, e.g.*, *Hibernia*, 615 So. 2d 1109.

11. *See, e.g.*, Monk v. Scott Truck & Tractor, 619 So. 2d 890, 892 (La. App. 3d Cir. 1993) ("Through subrogation, [the subrogee] can have no greater rights against [the defendant] than does [the subrogor].") (citing Green v. Pesson Plumbing & Heating Co., 599 So. 2d 492, 493 (La. App. 3d Cir. 1992)).

12. *See, e.g.*, Blue/Grey Pipe & Supply, Inc. v. Inland Bay Drilling & Workover, Inc., 614 So. 2d 285 (La. App. 3d Cir.), *writ denied*, 618 So. 2d 404 (1993).

13. *See, e.g.*, Autin v. Autin, 617 So. 2d 229, 233 (La. App. 5th Cir.), *writ denied*, 620 So. 2d 846 (1993) ("Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.") (citing La. Civ. Code art. 1959); Cagle v. Loyd, 617 So. 2d 592, 598 (La. App. 3d Cir.), *writ denied*, 620 So. 2d 877 (1993).

14. *See, e.g.*, Thompson v. Johnson, 602 So. 2d 272, 274 (La. App. 2d Cir. 1992) ("A major requirement of one who seeks specific performance is proper performance of his part of the contract. In the absence of proper performance, plaintiffs must prove they are and were ready to comply with whatever obligations devolved upon them to perform.") (citing Carmadelle v. Koch-Ellis Marine Contractors, 420 So. 2d 1029, 1031-32 (La. App. 5th Cir. 1982), *writ denied*, 427 So. 2d 869 (1983)).

15. *See, e.g.*, *Autin*, 617 So. 2d at 232 ("The two elements essential to establishing legal fraud are an intent to defraud or gain an unfair advantage and a resulting loss or damage.") (citing Heyl v. Heyl, 445 So. 2d 88, 90 (La. App. 2d Cir.), *writ denied*, 446 So. 2d 1228 (1984)).

16. *See, e.g.*, Savannah v. Anthony's Auto Sales, Inc., 618 So. 2d 676 (La. App. 2d Cir.), *writ denied*, 626 So. 2d 1174 (1993); Roddy v. Crawford, 618 So. 2d 1229 (La. App. 3d Cir. 1993); Matthis v. Couvillion, 613 So. 2d 1024 (La. App. 3d Cir. 1993); Coutee v. Williams, 611 So. 2d 803 (La. App. 3d Cir. 1992).

17. *See, e.g.*, Woodlawn Park Ltd. Partnership v. Doster Constr. Co., 602 So. 2d 1029 (La. App. 1st Cir. 1992), *judgment set aside*, 623 So. 2d 645 (1993).

18. *See, e.g.*, Little v. First Nat'l Bank, 616 So. 2d 202 (La. App. 5th Cir. 1993) ("The fact that [borrower] could not afford to repay the loan, even if this fact is known by the lender, is not grounds for rescission of the loan contract.").

19. *See, e.g.*, Frey v. Amoco Prod. Co., 603 So. 2d 166 (La. 1992); Pat O'Brien's Bar, Inc. v. Franco's Cocktail Prods., Inc., 615 So. 2d 429 (La. App. 4th Cir.), *writ denied*, 617 So. 2d 909 (1993); Miguez & Leckband v. Holston's Ambulance Serv., Inc., 614 So. 2d 150 (La. App. 3d Cir. 1993); Moity v. New Iberia Bank, 612 So. 2d 140 (La. App. 3d Cir. 1992); Armstrong v. Hanover Ins. Co., 614 So. 2d 312 (La. App. 4th Cir.), *writ denied*, 617 So. 2d 908 (1993); Spell v. N.L. Indus., Inc., 618 So. 2d 17 (La. App. 3d Cir.), *writ denied*, 624 So. 2d 1224 (1993); McCrory v. Terminex Serv. Co., 609 So. 2d 883 (La. App. 4th Cir. 1992).

20. Vernon V. Palmer, *Contractual Negligence in the Civil Law—The Evolution of a Defense to Actions for Error*, 50 Tul. L. Rev. 1, 6 (1975); Saul Litvinoff, *"Error" in Civil Law*, *in* Essays on the Civil Law of Obligations 222, 225 (Joseph Dainow ed., 1969) (citing J. Ghestin, La notion

a contract upon the basis of unilateral error only when the error is not the fault of the party seeking rescission.[21] In the seminal case of *Watson v. Planters' Bank*, the court refused to avoid a contract when the party in error had failed to read the writing evidencing the agreement before signing it.[22] Subsequent cases have expanded the doctrine to impose a general duty of due diligence upon contracting parties[23] in an effort to protect the party not in error. As one court said, "[W]here one of two innocent parties must suffer, the one who caused the error must suffer the consequences."[24]

In *Illinois Central Gulf Railroad v. Railroad Land, Inc.*,[25] the United States Fifth Circuit Court of Appeals refused to invoke the doctrine of contractual negligence in a reformation action premised upon mutual error. The court correctly noted that no precedent existed for it to apply the theory of contractual negligence in this context. Indeed, there is very little common ground shared between the two actions.

Civil-law systems generally provide relief for unilateral error; these systems have addressed the concurrence of unilateral error and negligence. The French doctrine of inexcusable error is one resolution of this problem.[26]

On the other hand, the action for reformation of written contracts, an equitable remedy that Louisiana received from the common law, corrects mistakes or errors in a writing when the writing does not express the true agreement between the parties.[27] But, in the situation of *mutual error* the sole negligence of one party is not at issue.[28]

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d'erreur dans le droit positif actuel (1963)).

21. *See, e.g.*, Watson v. Planters' Bank, 22 La. Ann. 14 (1870); Moreland v. Smith, 457 So. 2d 748, 750-51 (La. App. 2d Cir.), *writ denied*, 462 So. 2d 196 (1984); Hebert v. Livingston Parish Sch. Bd., 438 So. 2d 1141 (La. App. 1st Cir. 1983); Wikoff v. Townsend, 7 Mart. (o.s.) 451 (La. 1820).

22. *Watson*, 22 La. Ann. at 14.

23. *See* Palmer, *supra* note 20, at 14-17. "[T]he defense of negligence may be premised upon the breach of an implied precontractual duty owed by the rescinding party to his adversary . . . requiring him to make a reasonable investigation before binding himself in a consensual obligation. It may also be discussed in terms of the doctrine of *culpa in contrahendo*." *Id.* at 14. The doctrine of *culpa in contrahendo* provides that "damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection." Friedrich Kessler & Edith Fine, Culpa in Contrahendo, *Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401 (1964), *quoted in* Palmer, *supra* note 20, at 42.

24. Cox-Hardie Co. v. Rabalais, 162 So. 2d 713, 715 (La. App. 4th Cir. 1964).

25. 988 F.2d 1397, 1405-06 (5th Cir. 1993).

26. *See, e.g.*, Dig. 41.10.5 (Neratius, Parchments 5); Dig. 18.143.1; BGB § 122 (Palanet 1974); OR (C.O.) art. 28 (1911).

27. Ober v. Williams, 213 La. 568, 583, 35 So. 2d 219, 224 (1948); Louisiana Sulfur Mining Co. v. Brimstone R. & Canal Co., 143 La. 743, 746, 79 So. 324, 325-26 (1918).

28. *See* Elysian Homes Inc. v. Davis, 231 La. 95, 90 So. 2d 791 (1957). Moreover, modern commentators have suggested that even in the context of unilateral error, concerns like reliance damages on the part of an "innocent party" are better addressed by article 1952 of the Civil Code, authorizing the court to award damages rather than enforce the defective agreement. La. Civ. Code

Accordingly, the court in *Illinois Central Gulf Railroad v. Railroad Land, Inc.* was correct in refusing to reform the terms of the defective written contract by invoking the doctrine of contractual error.

B. On Handling Thy Neighbor's Problems

Aside from conventions, obligations may exist between individuals via delicts[29] and quasi contracts,[30] including unjust enrichments. The Civil Code places quasi contracts in two categories: the transaction of another's business and the payment of a thing not due.[31] In *Burns v. Sabine River Authority*,[32] the Louisiana Court of Appeal for the Third Circuit addressed the type of quasi contract traditionally known as *negotiorum gestio*[33] or *gestion d'affaire d'altui*.[34]

Article 2295 of the Civil Code provides the following:

> When a man undertakes, of his own accord, to manage the affairs of another, where the owner be acquainted with the undertaking or ignorant of it, the person assuming the agency contracts the tacit engagement to continue it and to complete it, until the owner shall be in a condition to attend to it himself . . . .[35]

Article 2299 of the Civil Code sets forth reciprocal obligations on the part of the owner: "Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager, in his name; to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses."[36] Commentators have suggested that *negotiorum gestio* truly encompasses two notions—the obligation of the gestor towards the owner arising from the gestor's intervention, and the obligation of the owner, not unrelated to the theory of unjust enrichment, to account to the gestor for his benefit.[37]

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art. 1952, cmt. b; *see* David P. Doughty, Comment, *Error Revisited: The Louisiana Revision of Error as a Vice of Consent in Contracting*, 62 Tul. L. Rev. 717, 738 (1988). The approach of the courts of Louisiana to negligence in contracting, by smudging the lines between delict and error, may make rescission difficult to obtain. An analogy to bilateral error is comparative fault, where current legal thought has rejected the "all or nothing" notion of contributory negligence.

29. La. Civ. Code art. 1757. *See also* La. Civ. Code art. 2315 ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.").

30. La. Civ. Code art. 1757. *See also* La. Civ. Code art. 2293.

31. La. Civ. Code art. 2294.

32. 614 So. 2d 1337 (La. App. 3d Cir.), *writ denied*, 617 So. 2d 935 (1993).

33. La. Civ. Code art. 2295; *see also* Dig. 3.5.2 (Gaius, Provincial Edict 3).

34. *See* C. Civ. arts. 1372-75.

35. La. Civ. Code art. 2295.

36. La. Civ. Code art. 2299.

37. *See, e.g.*, J. Menalco Solis R., Comment, *Management of the Affairs of Another*, 36 Tul. L. Rev. 108, 112 (1961).

In *Burns*, the Sabine River Authority instituted and prevailed in a lawsuit to remove a roadway across an inlet waterway that cut off water access to other property. That, in the words of the court, presented "a classic case of *negotiorum gestio*."[38] In bringing the claim, the Sabine River Authority acted to preserve the rights of the landowners of property that was cut off by the roadway. Accordingly, seventeen years after the Sabine River Authority won the judgment ordering the removal of the roadway, it was "obliged to complete the management of that affair by enforcing the judgment it obtained as the gestor of the owners."[39]

The elements for the enforcement of the rights of the owner are not, in Louisiana, as demanding as those for enforcement by the gestor of the correlative obligations of the owner.[40] Thus, the contemporary view requires only that the owner show an intervention into his juridic sphere before asserting his rights via the quasi contract of *negotiorum gestio*.[41] Any obligations owed by the owner, however, may be enforced by the gestor only by showing that he intended to manage the affairs of the owner and that the owner reaped a benefit from the gestor's action.[42]

In *Burns*, the court's conclusions seem valid. An action based on *negotiorum gestio* may have as its object the preservation of rights like those at issue, which involved the accessibility of property by public waterway.[43] Whether or not the property owners were aware of the benefit they received is not relevant under the terms of Article 2295;[44] and the lack of any express authorization or engagement among the affected landowners and the Sabine River Authority confirms that the proper remedy lies in quasi contract.

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38. Burns v. Sabine River Authority, 614 So. 2d 1337, 1340 (La. App. 3d Cir.), *writ denied*, 617 So. 2d 935 (1993).

39. *Id.* The courts were forced to rely upon the quasi contract of *negotiorum gestio* after concluding that the Sabine River Authority was not otherwise mandated by law to enforce the judgment.

40. This distinction may be evidenced by the origins of *negotiorum gestio*, which can be traced to the absolute authority of an owner at Roman Law and the corresponding rights vested in an owner concerning another's intervention. *See* Solis, *supra* note 37, at 111; Alfredo de Castro, Jr., Comment, Negotiorum Gestio *in Louisiana*, 7 Tul. L. Rev. 253, 255 (1933).

41. *See, e.g.*, Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co., 97 So. 2d 435, 439 n. 9 (La. App. 1st Cir. 1957). *See also* Chance v. Stevens of Leesville, Inc., 491 So. 2d 116 (La. App. 3d Cir.), *writ denied*, 495 So. 2d 302 (1986); Hodges v. Southern Farm Bureau Casualty Ins. Co., 411 So. 2d 564 (La. App. 1st Cir. 1982), *order amended*, 433 So. 2d 125 (1983). The gestor may not act unlawfully. *See* La. Civ. Code art. 2293.

42. *See, e.g.*, Kirkpatrick v. Young, 456 So. 2d 622 (La. 1984); John P. Dawson, Negotiorum Gestio*: The Altruistic Intermeddler*, 74 Harv. L. Rev. 817, 824 (1961).

43. *See* 2 Marcel Plainol, Treatise on the Civil Law § 2274 (Louisiana Law Institute trans., 1959). *See also* David v. Southern Import Wine Co., 171 So. 180 (La. App. Orl. 1936).

44. Article 2295 of the Civil Code provides that a *negotiorum* may exist whether the owner is acquainted with the undertaking or ignorant of it.

C. Real Obligations, Subrogation, and Where They Are Not

In *Aizpurua v. Crane Pool Co.*,[45] the Supreme Court of Louisiana held that privity of contract was not required in a warranty action between a purchaser of an immovable and a contractor who made improvements to the movable as a consequence of an agreement with the vendor of the immovable.[46] Although somewhat abstruse, the opinion appeared to rest this conclusion upon three alternative grounds.[47] The first basis for the court's decision, premised upon Article 2011 of the Civil Code of 1870, was the doctrine of "real obligations."[48] The second ground was the court's invocation of *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*,[49] where the court ruled that a sub-buyer was subrogated to the original purchaser's/distributor's rights and warranty action against the original vendor/manufacturer.[50] Finally, the court acknowledged the French doctrine of transmission, whereby the right to sue for a breach of warranty is transmitted with the object of the sale as an accessory.[51]

In *St. Jude Medical Office Building Ltd. Partnership v. City Glass & Mirror Inc.*,[52] the supreme court chipped away at *Aizpurua*. Travelers Insurance Company ("Travelers"), the secured lender of St. Jude Medical Office Building, Ltd. Partnership ("St. Jude Partnership"), acquired the mortgaged property via a judicial sale. Travelers then sought to intervene in a suit commenced by St. Jude Partnership against a contractor and several sub-contractors concerning alleged faulty construction on a building forming a portion of the property that served as the security under Travelers' mortgage. The trial court, affirmed on appeal by the fifth circuit,[53] dismissed Travelers' petition. The supreme court agreed.[54]

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45. 449 So. 2d 471 (La. 1984).

46. Bruce V. Schewe, *Obligations, Developments in the Law, 1983-1984*, 45 La. L. Rev. 447, 455-60 (1984).

47. *See* Jeffrey W. Weiss, Note, *Overcoming Barriers of Privity to Warranty Actions—The Introduction of the French Transmission Rule into the Louisiana Jurisprudence*, 59 Tul. L. Rev. 1128 (1985). *See also* Schewe, *supra* note 46, at 456-57.

48. *Aizpurua*, 449 So. 2d at 473. Comment b to Article 1763 says the following:

> The classification of obligations as strictly personal, heritable, or real confuses the traditional notion of an obligation, which is a vinculum juris between two persons, with a real right, which is a right in a thing that can be held against the world. . . . Neither the French Civil Code nor any other modern Civil Code has established this classification. In this respect, the Louisiana Civil Code is entirely isolated in the civilian world.

See A.N. Yiannopoulos, *Real Obligations*, *in* Essays on the Civil Law of Obligations 292, 296 (Joseph Dainow ed., 1969).

49. 262 La. 80, 262 So. 2d 377 (1972).

50. *Aizpurua*, 449 So. 2d at 472-73.

51. *Id.* at 473 ("[T]he right to sue for breach of warranty of quality is transmitted with the object of the sale.") (quoting Note, *Sales—Warranty of Quality—Liability of Manufacturer to Sub-Vendee for Breach of Warranty*, 14 Tul. L. Rev. 470, 471 (1940)).

52. 619 So. 2d 529 (La. 1993).

53. 608 So. 2d 236 (La. App. 5th Cir. 1992), *aff'd*, 619 So. 2d 529 (1993).

54. *St. Jude*, 619 So. 2d at 531.

The court began its analysis by noting that, as a general proposition, a purchaser has no right against a third party who may have damaged the purchased property before its sale to the present owner.[55] The court then rejected Travelers' assertion that *Aizpurua* authorizes an exception to that principle.[56] Deciding that "*Aizpurua* was based on the now repealed provisions of LSA-C.C. art. 2011," the court concluded that at least this portion of the case—that an action for defective construction of a building is a real obligation running with the land to subsequent purchasers—is no longer valid under Article 1764, which replaced Article 2011 of the Civil Code of 1870.[57] The court's reading of Article 1764, revised in 1984, appears to be correct.[58]

Article 2011 of the Civil Code of 1870 afforded the acquirer of an immovable, whether by universal or particular title, the right "to enforce a contract made for the improvement of the property by a person from whom he acquired it."[59] Application of the legislation, however, was problematic: "The duties [and rights] arising from a contract for the improvement of an immovable may not be regarded as real obligations under the Code" because "while one cannot transfer a greater *real* right than one has, one can always transfer things free of all personal obligations contracted by an ancestor in title"; thus, "[i]n the absence of assignment, personal obligations assumed by an ancestor in title may not bind [or benefit] a particular successor, i.e., a purchaser . . . under particular title; this person is always a third person and may be bound [and benefited] only by his own act."[60]

Article 1763 now states that "[a] real obligation is a duty correlative and incidental to a real right" burdening a thing.[61] When viewed from this perspective, old Article 2011 may be understood as a mechanism for an *ex lege* assignment of rights concerning contracts providing for the improvement of immovables.[62] As noted by the supreme court, however, comment (d) to Article 1764 states that old Article 2011 has been "suppressed because its provisions are conceptually inconsistent with other provisions of Louisiana law."[63]

Although the court's decision in *St. Jude* appears to be correct, it illuminates a troubling gap in Louisiana's creditor-debtor legal regime. By stripping creditors (Travelers in this case) of any remedy against their mortgagors' contractors, the court allows a contractor, who allegedly breached obligations and

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55. *Id.* at 530.

56. *Id.* at 531.

57. *Id. See* La. Civ. Code arts. 1763, 1764 and 1764, cmt. (d). *See also* Schewe, *supra* note 46, at 485-89.

58. *See* Schewe, *supra* note 46, at 458-59.

59. La. Civ. Code art. 2011 (1870). *See* Yiannopoulos, *supra* note 48, at 298.

60. Yiannopoulos, *supra* note 48, at 298-306.

61. La. Civ. Code art. 1763 and cmt. (b).

62. Yiannopoulos, *supra* note 48, at 298-99.

63. St. Jude Medical Office Bldg. Ltd. Partnership v. City Glass & Mirror, Inc., 619 So. 2d 529, 531 (La. 1993) (citing La. Civ. Code art. 1764, cmt. (d)).

warranties it owed to the former owner/mortgagor, to avoid any accountability to the secured creditor/subsequent owner simply because the mortgagor defaulted upon his agreement with the mortgagee and the secured creditor successfully bid for the property at a judicial sale.[64] Moreover, as a matter of practicality, the mortgagor who funded the improvements must absorb the loss in value to the property allegedly attributable to the faulty workmanship without any recourse against the contractor in question.[65] The issue, in part,[66] calls for legislative attention. An appropriate remedy may be legislation recognizing an *ex lege* assignment of rights to a mortgaged creditor that acquires the secured property at a judicial sale or providing a specific instance of subrogation under Article 1829(5).[67]

D. Dation en Paiement—Give It Away (and Register) Now

When Hibernia National Bank ("Hibernia") delayed for forty-eight hours filing for recordation an instrument evidencing a partial dation en paiement from Continental Marble & Granite ("Continental Marble"), it learned a hard lesson about the stony resilience of Louisiana's public records doctrine.[68] During the delay, a judgment creditor of Continental Marble filed its judgment for recordation in the parish that was the situs of the transferred property.[69] Hibernia, not desiring encumbered property, attempted to avoid the dation en paiement by raising various objections to its validity, focusing on error and failure of cause.

Hibernia initially argued that the act had no effect until recordation, at which point the immovable was not "free from any lien, mortgage, or encumbrance whatsoever," as stipulated in the writing evidencing the dation en paiement.[70] Accordingly, Hibernia asked the court to avoid the agreement on the ground of error. The court, however, correctly noted that a dation en paiement is effective as between the parties from the moment of the execution of their contract. Recordation, without language to the contrary in the agreement, is an issue only

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64. If the rights against the contractor remain vested in and enforceable by the dispossessed debtor, the rights would be a windfall to the mortgagor. *Cf.* La. Civ. Code art. 2301; Minyard v. Curtis Prods., Inc., 205 So. 2d 422 (La. 1967).

65. The purchaser of property at a judicial sale enjoys no warranty rights. La. Civ. Code arts. 2537, 2619.

66. Neither *Aizpurua* nor *St. Jude* mention rights flowing from conventional subrogation. *See* Schewe, *supra* note 46, at 457. There appears to be no reason why the mortgage could not provide for the subrogation of the mortgagee to the mortgagor's rights, particularly regarding the mortgagor's claims against contractors making improvements to the immovable burdened by the mortgage.

67. La. Civ. Code art. 1829 provides, in pertinent part, that "[s]ubrogation takes place by operation of law . . . (5) [i]n the other cases provided by law."

68. Hibernia Nat'l Bank v. Continental Marble & Granite Co., 615 So. 2d 1109, 1110 (La. App. 5th Cir. 1993).

69. *Id.*

70. *Id.* at 1111.

insofar as third persons are concerned.[71] Thus, at the time the dation en paiement was completed (between Hibernia and Continental Marble), there was no error since Continental Marble's judgment creditor had not filed its judgment for recordation.

The court also rejected Hibernia's claim that its forty-eight hour delay in filing the dation en paiement for recordation—characterized by Hibernia as a "reasonable" time based upon usual practice in the area—should immunize it from the pure "race" aspect of Louisiana's system of registry. The court noted that, "in this state registry is not a mere matter of notice alone, but a matter of public policy upon a 'most important property right;' and that considerations of equity cannot prevail against it."[72]

E. Mandataries and Free Agents on their Own

In *Teachers' Retirement System v. Louisiana State Employees' Retirement System*,[73] the supreme court reversed a decision by the Louisiana First Circuit Court of Appeal upholding the trial court's grant of an exception of no right of action against an undisclosed principal seeking to enforce a contract. The first circuit concluded that an agent acting for an undisclosed principal in negotiating a contract was in reality a *prête-nom*, acting on its own behalf rather than for the alleged principal.[74] Thus, only the agent, and not the undisclosed principal, had a claim against the other contracting party. The supreme court premised its reversal upon a lack of evidence in the record that prevented it from determining whether "the plaintiffs, dismissed by the lower courts on the no right of action

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71. A giving in payment has no effect without "delivery" of the thing to the obligee. Durnford v. Syndics of Brooks, 3 Mart. (o.s.) 222 (1814); Wilson v. Smith, 12 La. 375 (1838). Prior to that, the agreement is merely executory; there is no transfer of ownership, and the debt is not extinguished or reduced. *See* La. Civ. Code art. 2656; Donoven & Daley v. Travelers & Hermann, 122 La. 458, 47 So. 769 (1908). The delivery of the thing to the creditor extinguishing or reducing the debt and perfecting the dation distinguishes a giving in payment from a novation. *Compare* La. Civ. Code art. 2655 ("The giving in payment is an act by which a debtor gives a thing to the creditor, who is willing to receive it, in payment of a sum that is due.") *with* La. Civ. Code art. 1881 *and* La. Civ. Code art. 1879 ("Novation is the extinguishment of an existing obligation by the substitution of a new one."). The delivery of an immovable is complete upon the delivery of the act that evidences the sale. La. Civ. Code art. 2479; Miller v. Miller, 234 La. 883, 893, 102 So. 2d 52, 55 (1957); Shultz v. Morgan, 27 La. Ann. 616 (1875). The act is a deed containing the elements of a perfected sale, to wit: A description of the thing sold, the price, and the consent to transfer ownership by the effect of the deed. *See* Gibson v. Zylks, 186 La. 1043, 1047, 173 So. 757, 758-59 (1937). The deed may be either an authentic act or an act under private signature. La. Civ. Code art. 1839.

72. *Hibernia*, 615 So. 2d at 1111 (quoting State ex rel. Hebert v. Recorder of Mortgages, 175 La. 94, 100, 143 So. 15, 17 (1932)). *See* La. Civ. Code arts. 1839, 2021; La. Civ. Code art. 2035; La. R.S. 9:2756 (1991).

73. 456 So. 2d 594 (La. 1984).

74. Teachers' Retirement Sys. v. Louisiana State Employees' Retirement Sys., 444 So. 2d 193, 196-97 (La. App. 1st Cir. 1983), *rev'd*, 456 So. 2d 594 (1984).

exception, have no legal interest in the subject matter, or in judicially enforcing the right asserted in the litigation."[75]

Nine years after rendering its decision in *Teachers' Retirement System*, the first circuit revisited the question of whether an undisclosed principal has a right of action against the party that came to terms with the ostensible agent for breach of the contract. In *Woodlawn Park Ltd. Partnership v. Doster Construction Co.*,[76] a limited partnership brought suit for breach of contract, seeking to enforce its alleged rights stemming from an agreement struck between two other companies. The plaintiff argued that the contract was negotiated in its favor, as an undisclosed principal, by one of the contracting parties.[77] In affirming the trial court's granting of an exception of no right of action, the first circuit recognized its rejection of other appellate authority[78] and reiterated its position, stated in *Teachers' Retirement System*, that there is no right of action in contract benefiting an "undisclosed principal" to an agreement.[79]

The court's conclusion concerning an "undisclosed principal" is valid. Simply, the undisclosed principal is not a party to the agreement and the Civil Code provides an action in contract to third persons only in the instance of a *stipulation pour autrui*.[80]

F. Nothing More, Nothing Less—The Buyer Getting What He Thought He Bought

Scogin v. Smith[81] presented the first circuit with the issue whether the existence of delinquent taxes on property conveyed to another constitutes a breach of the seller's obligations concerning warranties against eviction and redhibitory vices.[82] Relying upon *Williams v. Louisiana Machinery Co.*,[83] for the proposition that redhibition is available only in the context of "physical imperfections or deformity," the first circuit upheld the trial court's judgment that delinquent taxes did not constitute a redhibitory defect.[84] The court also held

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75. *Teachers'*, 456 So. 2d at 598.

76. 602 So. 2d 1029 (La. App. 1st Cir. 1992), *judgment set aside*, 623 So. 2d 645 (1993).

77. *Id.* at 1030.

78. Childers v. Police Jury, 9 La. App. 490, 121 So. 248 (2d Cir. 1928); DeSoto Bldg. Co. v. Kohnstamm, 3 Pelt. 54 (La. App. 1919).

79. *Woodlawn Park*, 602 So. 2d at 1031. Nothing in the court's opinion addressed whether the contract in question lacked the necessary prerequisites for a valid *stipulation pour autrui* benefitting the "undisclosed principal." The court addressed this issue in *Teachers'* and concluded that a *stipulation pour autrui* was not present because the language of the agreement did not include an express declaration of intent to benefit the alleged third-party beneficiary. *Teachers'*, 444 So. 2d at 195.

80. *See* La. Civ. Code arts. 1978-1982.

81. 612 So. 2d 739 (La. App. 1st Cir. 1992).

82. La. Civ. Code art. 1949; La. Civ. Code arts. 2500-2548; La. Civ. Code arts. 2439, 2452, 2475, 2557-2565.

83. 387 So. 2d 8 (La. App. 3d Cir. 1980).

84. *Scogin*, 612 So. 2d at 741 (citing *Williams*, 387 So. 2d at 11).

that rescission of a sale for eviction, pursuant to Article 2506, is not available when the state has acquired the property for nonpayment of taxes.[85] The adjudication is only a partial eviction and is insufficient to justify judicial rescission of the sale.[86] The first circuit adopted the trial court's view that the buyer could, in these circumstances, redeem the property from the state by paying the delinquent taxes and proceed against the vendor for the amount of the taxes.[87] The court's conclusion denying rescission may be incorrect.

Redhibition is defined in Article 2520 as "the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."[88] Although most of the jurisprudence treating redhibition speaks in terms of physical defects or vices,[89] Article 2529 expressly authorizes an action in redhibition based upon a misrepresentation "that the thing sold has some quality which it is found not to have," thereby extending the scope of the action to situations involving no physical vice or defect.[90]

In essence, the redhibitory claim is premised upon a failure of cause.[91] Article 1949, authorizing the courts to avoid contracts for unilateral error, is analogous.[92] The jurisprudence also establishes that redhibition and error are alternative solutions to the problem.[93] Either may empower a court to rescind a contract upon a showing of what amounts to the failure of the principal cause of the contract.

The court in *Scogin* may have acted too abruptly in dismissing the plaintiff's claim for rescission. An established principle of the law of Louisiana is that a

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85. *Id.* at 741.

86. *Id.* at 742

87. *Id.*

88. La. Civ. Code art. 2520.

89. *See, e.g.*, Harper v. Coleman Chrysler-Plymouth-Dodge, Inc., 510 So. 2d 1366 (La. App. 3d Cir. 1987); *Williams*, 387 So. 2d at 11.

90. La. Civ. Code art. 2529. *See* Couch v. Frichter's Sportsmen's Haven, Inc., 365 So. 2d 901, 903 (La. App. 4th Cir. 1978), *writ denied*, 367 So. 2d 1185 (1979) ("An action for redhibition or reduction lies notwithstanding the good faith of the seller where the thing sold lacks a quality which it was represented to have, if this quality was a principal motive for making the contract."). *See also* Fusilier v. Ardoin, 266 So. 2d 531 (La. App. 3d Cir. 1972); Kardis v. Barrere, 17 La. App. 433, 438, 136 So. 135, 138-39 (Orl. Cir. 1931) ("quality," as used in Article 2529, refers to misrepresentations as to character, make, nature, characteristics, manufacture, or trade-mark).

91. *See* La. Civ. Code art. 2520. *Compare* La. Civ. Code art. 2529 *with* La. Civ. Code art. 1949.

92. La. Civ. Code art. 1949 ("Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."). *See, e.g.*, Nugent v. Stanley, 336 So. 2d 1058, 1063 (La. App. 3d Cir. 1976).

93. *See, e.g.*, *Kardis*, 17 La. App. 433, 136 So. 135 (relying upon both error and redhibition). *See also* Wax v. Woods, 209 So. 2d 329 (La. App. 4th Cir.), *writ denied*, 252 La. 467, 211 So. 2d 330 (1968).

partial eviction can support rescission of the contract if the buyer would not have made the purchase without the lost rights.[94] As stated above, proof of a failure of cause supports a claim for rescission.[95] Because the court did not analyze this element of the contract, there was not a complete resolution of the issues.

G. Freedom of Contract and Imperative Legislation

Louisiana Revised Statutes 22:628, the "Entire Contract Policy Statute," is a legislative pronouncement of the formal requirements for modifications to the coverage of insurance policies.[96] In particular, this section provides the following:

> No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless it is in writing and physically made a part of the policy or other written evidence of insurance, or it is incorporated in the policy or other written evidence of insurance . . . .
>
> The provisions of this Section shall apply where a policy or other written evidence of insurance is coupled by specific reference with another policy or written evidence of insurance in existence as of the effective date hereof or issued thereafter.
>
> Any written agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be deemed to be physically made a part of a policy or other written evidence of insurance, within the meaning of this section, whenever such written agreement makes reference to such policy or evidence of insurance and is sent to the holder of such policy or evidence of insurance by United States mail, postage prepaid, at such holder's last known address as shown on such policy or evidence of insurance or is personally delivered to such holder.[97]

In *Lindsey v. Colonial Lloyd's Insurance Co.*,[98] the supreme court determined that Louisiana Revised Statutes 22:628 did not invalidate a "two tier" insurance policy that extends the insurance coverage of the lessor to its lessee but reduces the coverage the lessor had under the original policy with the insurer flowing

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94. La. Civ. Code arts. 2506, 2511, and 2514; Huckabay v. Keaton, 600 So. 2d 97, 100 (La. App. 2d Cir. 1992) ("[E]ven where the buyer is only partially evicted, he may still have the sale cancelled if he would not have made the purchase without the part from which he has been evicted.") (citing Richmond v. Zapata Dev., 350 So. 2d 875 (La. 1977); Collins v. Slocum, 317 So. 2d 672 (La. App. 3d Cir.), *writ refused*, 321 So. 2d 364 (1975)).

95. *See Huckabay*, 600 So. 2d at 97; *Collins*, 317 So. 2d at 672.

96. La. R.S. 22:628 (Supp. 1993).

97. *Id.*

98. 595 So. 2d 606 (La. 1992).

from a rental agreement.[99] The *Lindsey* case involved an automobile accident in which a leased car hit and injured the plaintiff. The plaintiff brought suit against the driver of the rental car and her insurer, her own uninsured motorist carrier, and the automobile lessor's insurer.

The trial court, rendering judgment in favor of the plaintiff, concluded that a provision in the automobile rental agreement that purported to limit the $500,000 coverage potentially available to the lessee of the automobile to the statutory minimum had no effect because the insurer had not complied with Louisiana Revised Statutes 22:628 in reducing coverage. The intermediate court of appeal reversed, holding that the original insurance policy was modified by the rental agreement.[100]

The supreme court, in affirming the ruling of the fourth circuit, concluded that the "two tier" insurance arrangement in the automobile lease contract, resulting in reduced liability protection to the lessee from the full amount of coverage available to the lessor under its policy with its insurer, was valid.[101] The court stated that the constraints upon the allocation of risks concerning an insured and a third person "are those that apply to all contracts,"[102] and that no legislation or public policy dictated that the automobile lessee receive the same protection purchased by the lessor.[103]

In examining the applicability of Louisiana Revised Statutes 22:628, the supreme court concluded that it protects "the parties to the insurance contract by assuring that both had in their possession the entire contract," and, consequently, "that § 628 does not provide and was not meant to provide protection to third parties."[104] The court also addressed what restrictions apply to two-tier insurance policies and decided that public policy guides are the only limits to agreements between a policyholder and a third party regarding allocating risks between them via the insurance policy.[105] The court saw no prohibition in the Insurance Code or elsewhere against "two tier" insurance agreements and stated that the provision in the lease, for the statutory minimum coverage, did not offend public policy or any legislation.[106]

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99. *Id.* at 614. In his concurring opinion, Justice Hall took issue with the majority's conclusion that the requirements of the statute had been met in the instant case because of the inconsistent finding that "the 'entire contract policy statute' is designed for the protection of the named insured only." *Id.* at 614-15 (Hall, J., concurring). Similarly, in his dissent, Justice Watson considered La. R.S. 22:628 to be implicated by the rental agreement's limitation of the total coverage to be provided by the insurer, invalidating any purported limitations on the amount of coverage offered by the insurer in its policy with the lessor. *Id.* at 615 (Watson, J., dissenting).

100. 581 So. 2d 408 (La. App. 4th Cir. 1991), *aff'd*, 595 So. 2d 606 (1992).

101. *Lindsey*, 595 So. 2d at 614.

102. *Id.* at 612.

103. *Id.* at 612-14.

104. *Id.* at 611 (citing Guarantee Bank & Trust Co. v. Ideal Mut. Ins. Co., 526 So. 2d 1094, 1098 (La. 1988); Johnson v. Occidental Life Ins. Co., 368 So. 2d 1032, 1035 (La. 1979)).

105. *Id.* at 612-14.

106. *Id.* at 614. The court relied, in part, upon "a survey of cases around the country" in

The court's decision is consistent with the theory of *autonomie de la volonté*.[107] The parties to a contract should be free to agree so long as they do not contradict public policy,[108] which in this case extended no further than requiring the lessor to furnish the minimum statutory coverage to its customers.[109]

arriving at its conclusion. *Id.* at 612-13 (citing Buckeye Union Ins. Co. v. Shelby Mut. Ins. Co., 465 N.E. 2d 403 (Ohio 1984)).

107. *See* La. Civ. Code art. 1983. *See also* C. Civ. art. 1134 ("Agreements legally formed have the character of loi for those who have made them."); La. Civ. Code arts. 1968, 2033.

108. *See generally* Alejandro M. Garro, *Codification Technique and the Problem of Imperative and Suppletive Laws*, 41 La. L. Rev. 1007 (1981).

109. In a footnote, the court suggested that the law is ambiguous regarding a lessor's requirement to provide any insurance to lessees protecting against a lessee's own negligence. *Lindsey*, 595 So. 2d at 613 n.12 (citing La. R.S. 32:900; La. R.S. 32:1041(B)). The court did not explore this subject, however, since the litigants did not raise it.