Assumption of Obligations: Third Party No More

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In more than one sense has the concept of assumption of obligations been a "third party." While the basis for NA 1821-1824 on assumption of obligations 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 of the purchase agreement. 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

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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.*
10. 2 Rob. at 525.
12. 2 Rob. at 525.
13. Id. at 1264, 20 So. at 697.
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 dis-
charge the original debtor.\textsuperscript{13}

Although the \textit{Tiernan} court apparently used the quotation from
Pothier erroneously and applied it out of context,\textsuperscript{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.\textsuperscript{15} While the necessity of differentiating between third-
party-beneficiary contracts and assumption of obligations has been ques-
tioned,\textsuperscript{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 con-
tracts are similar in that they both involve three parties, there exists a
difference between them that warrants separate code articles. In \textit{Tiernan}
and its progeny, the courts consistently noted that in an assumption the
benefit was not for the obligee but for the stipulating party.\textsuperscript{17} Arguably,
the court's reluctance to consider an assumption as a third-party-ben-
ficiary 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

\textsuperscript{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).

\textsuperscript{14} [Pothier] had argued that, in accordance with Roman doctrine, where a stip-
ulation 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).

\textsuperscript{15} NA 1821, comment (b).

\textsuperscript{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,

\textsuperscript{17} Tiernan v. Martin, 2 Rob. at 525 (La. 1842); Campiti 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. 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. To the contrary, in third-party-beneficiary contracts, the beneficiary is never a party to the contract. 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. 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). 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).
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,
Louisiana jurisprudence has indicated that acts tantamount to an express declaration will suffice to create a novation.

In *Walton v. Beauregard*, 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." 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. 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. 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. Novation is recognized in such a situation since a codebtor is released if a creditor impairs his subrogation rights. NA 1821 does not appear to change the law in this respect.

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

The Articles

Consistent with Louisiana jurisprudence and NA 1821, imperfect delegation or adstipulation creates solidary co-debtors. The jurisprud-
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\(^4\) 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.\(^6\) 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.\(^7\) 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,\(^8\) 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.\(^9\)

Although NA 1823 does not envision suretyship,\(^10\) 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.\(^11\) 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,\(^12\) and while NA 1821 explicitly creates solidarity between the original and the assuming debtors, NA 1823 does not.

\(^4\) 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).
\(^6\) 4 C. Aubry & C. Rau, supra note 21, no. 324(1), at 229.
\(^7\) NA 1823, comment (c).
\(^8\) 4 C. Aubry & C. Rau, supra note 21, no. 324(4), at 326.
\(^9\) Id. at 236 n.38.
\(^10\) NA 1824, comitiment (a).
\(^12\) 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 promissor 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.
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, 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 . . . ," 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." 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 accessorrial obligation, 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. 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.
contract by which the assumption was made," this is unsupported by the concept of delegation. 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. 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. 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.

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 compensation 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. I 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. 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. 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.

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72. See supra text accompanying note 34.
73. See supra text accompanying note 65.