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# Obligations - Exclusive Listing Agreements - Potestative Conditions

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does expire on a date beyond the end of the ten-year prescriptive period, the term of the servitude will be extended.<sup>10</sup>

The drafters of the agreement in the principal case were well aware of the latest expressions of the court holding that the signing of a joint lease of itself would not serve to interrupt prescription and attempted to establish a clear-cut interruption by contract. The defendant Davis, being equally well advised, struck out this clause, thereby showing a clear intention not to allow the interruption of prescription.

The court said that if the defendant Davis had not struck out this paragraph there would have been an express interruption, "and it is equally as obvious that the purposes and intention of these parties in striking out the provisions of this paragraph was in effect to deny the interruption of prescription and to refuse any acknowledgment thereof."<sup>11</sup>

The instant case shows the hesitancy of the courts to allow an interruption of prescription unless there is a clear intention to do so. This seems to be a wise policy in view of the fact that no new consideration need be given when there is an interruption of prescription by acknowledgment.<sup>12</sup>

*Arthur E. Sparling*

OBLIGATIONS—EXCLUSIVE LISTING AGREEMENTS—  
POTESTATIVE CONDITIONS

Under terms of an exclusive listing contract, defendant, an owner of real estate, on December 7, 1949, listed for sale certain property with plaintiffs, real estate brokers. Defendant agreed to pay plaintiffs a commission whether the property was sold by plaintiffs, by defendant or by any other person or persons. Thereafter, about December 27, 1949, defendant requested the return of his listing, advising plaintiffs that he no longer wished to sell the property. The listing was surrendered with the understanding that if defendant desired to sell the property within sixty days he would relist the same with plaintiffs. The property was nevertheless sold by defendant on January 6, 1950, to a purchaser

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10. *Achee v. Caillouet*, 197 La. 313, 1 So. 2d 530 (1941) and *White v. Hodges*, 201 La. 1, 9 So. 2d 433 (1942).

11. *Placid Oil Co. v. George*, 49 So. 2d 500, 505 (La. App. 1950).

12. For a discussion of this point, see *Daggett, Mineral Rights in Louisiana 73-74* (1949).

he procured by his own efforts. Plaintiffs claim the commission is rightfully due them. Defendant filed an exception of no cause and no right of action based on "the proposition that the contract as alleged under plaintiffs' petition is purely potestative and therefore not binding upon the defendant." The exception was sustained by the district judge and plaintiffs' suit dismissed. Plaintiffs appealed and the judgment was affirmed. *Breard v. Kanelos*, 49 So. 2d 451 (La. App. 1950).

Where reciprocal obligations are exchanged and one of them is found to be "null" because its performance is left solely to the whim of the party who purports to assume it, the question confronting the court is what effect this fact has on the obligation assumed by the other party. When the conclusion is reached that the other party's obligation is also unenforceable, the explanation too frequently given in the cases is that the "contract" is potestative.

In the instant case the court found from an examination of the terms of the listing agreement that the brokers did not assume any obligation.<sup>1</sup> In consequence, the listing agreement amounted to an assumption of an obligation by the owner without any corresponding obligation being assumed by the brokers. The court concluded that the owner was not bound by the listing contract and explained "that the agreement must be regarded as potestative." For authority the court cited Article 2034 of the Civil Code which reads as follows:

"Every obligation is null, that has been contracted, on a potestative condition, on the part of him who binds himself."

This article deals with the *obligation*, that is, with the promise of one party, and not with the whole *contract*.<sup>2</sup> What the codal articles declare to be potestative is a *condition*,<sup>3</sup> the performance of which is within the option of a contracting party. And the code provides that the obligation, the performance of which is left

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1. One possible disposition the court might have made of this case would have been to imply a promise on the part of the brokers to make reasonable efforts to secure a purchaser and hold the listing agreement to be a valid bilateral contract. See Note, 18 Texas L. Rev. 334 (1940); Mechem, *The Real Estate Broker and his Commission*, 6 Ill. L. Rev. 313 (1911); *Hayes v. Clark*, 95 Conn. 510, 111 Atl. 781 (1920).

2. Brown, *Potestative Conditions and Illusory Promises*, 5 Tulane L. Rev. 396, 400 (1931); Snellings, *Cause and Consideration in Louisiana*, 8 Tulane L. Rev. 178, 207 (1934).

3. Arts. 2024, 2034, 2035, La. Civil Code of 1870.

solely to the whim of the obligor, is null.<sup>4</sup> Since the court found that "no obligations were assumed or undertaken" by the brokers, it seems apparent that the articles of the code dealing with potestative conditions would not be applicable to the present case.

Since the listing agreement was potestative, the second agreement also failed, its validity depending upon that of the first.

The reasoning here seems to be that a contract is potestative if one of the parties does not assume a binding obligation, since in that situation the contract is lacking the "consideration" necessary to support it, that is, a potestative contract is a contract unsupported by "consideration." However, it must be remembered that the only requirements for a valid contract in Louisiana are set forth in Article 1779 of the Civil Code, which reads:

"Four requisites are necessary to the validity of a contract:

"1. Parties legally capable of contracting.

"2. Their consent legally given.

"3. A certain object, which forms the matter of agreement.

"4. A lawful purpose."

The requirement of "consideration" in the common law sense is significantly absent as a necessary element for the validity of a Louisiana contract.<sup>5</sup> It is submitted that the civilian doctrine of *cause* set forth in the Civil Code<sup>6</sup> provides the correct solution to the problem presented by the instant case and should have claimed the court's attention. Since the code declares *cause* to be the *motive*<sup>7</sup> for making the contract, it follows that whether the owner's obligation ought to subsist depends upon the intentions of the parties in entering the listing agreement.

If the owner intended to bind himself without receiving a binding obligation in return, then the fact that no such promise was received should not operate to release the owner of his own undertaking.<sup>8</sup> There is the possibility, at least, that the promise

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4. Art. 2034, La. Civil Code of 1870.

5. Brown, *The Potestative Condition in Louisiana*, 6 *Tulane L. Rev.* 23, 30 (1931); Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 *Yale L.J.* 621 (1919).

6. Arts. 1893-1900, La. Civil Code of 1870.

7. Arts. 1824, 1896, La. Civil Code of 1870. See Smith, *A Refresher Course in Cause*, 12 *LOUISIANA LAW REVIEW* 2 (1951).

8. *Mouton v. Noble*, 1 *La. Ann.* 192 (1846).

of the owner was in the nature of a continuing offer which he intended to leave open for a period of time. If so, his promise would be irrevocable for such reasonable time as from the terms of the offer or from the circumstances of the case the owner may be supposed to have intended to allow.<sup>9</sup>

On the other hand, if the principal motive of the owner in binding himself to this agreement was to obtain an obligation from the brokers to make reasonable efforts to sell his property, and they did not in fact bind themselves to do so, then it may be said that the obligation of the owner was founded on a false cause,<sup>10</sup> or that his obligation was tacitly conditioned on the receipt of a return promise that he did not get. Authority for releasing the owner from his undertaking is found in Article 1893, which reads:

“An obligation without a cause, or with a false or unlawful cause, can have no effect.”

If the owner entered into the listing contract and there existed this mistake as to his principal motive it would follow that the second agreement would not be binding on him, because his principal motive for consenting to the second agreement was the mistaken belief that the listing contract was binding.

As a practical matter it is extremely unlikely that an owner of real estate would bind himself to pay a broker a sizable commission, regardless of the identity of the person who procures the buyer, without expecting from the broker a binding obligation to make reasonable efforts to sell the property.

It is important to note that no allegation was made in plaintiffs' petition that they had made the slightest effort to procure a purchaser. The court conceded that had the brokers “actually performed services under the contract” an enforceable agreement might have resulted. The court was merely recognizing the proposition frequently appearing in Louisiana jurisprudence that “a potestative condition that has been fulfilled ceases to be potestative.”<sup>11</sup> This is but another way of saying that although a purported obligation to do something may not be obligatory in fact, if the service is nevertheless rendered, the

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9. Art. 1809, La. Civil Code of 1870.

10. Art. 1824, La. Civil Code of 1870.

11. *Oliver v. Home Service Ice Co., Inc.*, 161 So. 766 (La. App. 1935); *Board of Commissioners v. Concordia Abstract & Realty Co.*, 181 La. 373, 159 So. 588 (1935).

recipient will have no cause for complaint. This means that if the broker performs services under an exclusive listing contract, the fact that he did not bind himself so to perform cannot be relied upon by the owner as a basis for escaping his own obligation.

This treatment of the exclusive listing contract is in keeping with the majority view at common law, which holds that where an agent has expended time, effort or money in attempting to secure a purchaser, the owner of the real estate will be bound by the listing agreement, for the consideration necessary to support his promise has been supplied.<sup>12</sup>

It may be conceded that from a practical viewpoint the decision in this case is sound. However, the reasoning employed by the court in disposing of the issues involved is open to some objection.

*John C. Wagnon*

WORKMEN'S COMPENSATION—DEATH BENEFITS—  
PRIORITY OF CLAIMANTS

Decedent's mother and the nephew of his concubine claimed compensation under the Workmen's Compensation Act as his dependents. The mother was found to be partially dependent and, in the absence of definite proof of greater contributions to her support by the deceased, was given the statutory minimum. Compensation to the nephew was resisted on the grounds that the nephew was not decedent's child or a member of his family, and, alternatively, that he was in a deferred class, whose claim to compensation was dependent upon the absence of a member of higher rank. *Held*, (1) the nephew was a wholly dependent of decedent's family, and (2) the presence of a *partial* dependent of a higher rank did not preclude compensation to a total dependent of a lower rank, even if Sections 1231, 1232, 1251 and 1252 of the Workmen's Compensation Act establish and rank classes. *Patin v. T. L. James & Company, Incorporated*, 218 La. 949, 51 So. 2d 586 (1951).

The supreme court admitted that a reading of Section 1232 alone would lead to the conclusion that the minor was barred from recovery. However, it held that the first sentence of Section

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12. *Bell v. Dimmerling*, 149 Ohio St. 165, 78 N.E. 2d 49 (1948), and the cases there cited.