

## Louisiana Law Review

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Volume 44 | Number 1  
*September 1983*

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### Repository Citation

Bruce V. Schewe, *On Obligations to Pay Money with a View Toward Stipulated Remedies and Usury*, 44 La. L. Rev. (1983)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol44/iss1/6>

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## ON OBLIGATIONS TO PAY MONEY WITH A VIEW TOWARD STIPULATED REMEDIES AND USURY

Bruce V. Schewe\*

Tucked away in section 4<sup>1</sup> of chapter 3<sup>2</sup> of title IV<sup>3</sup> of book III<sup>4</sup> of the Louisiana Civil Code, the provisions of article 1935 may not strike the reader as being very significant. After all, the text is phrased in rather unremarkable terms: "The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more." Given the placement of this rule after the authorization in the Code of stipulated damages<sup>5</sup> and prior to the definition of interest<sup>6</sup> and the limitations regarding the fixing and collection of interest,<sup>7</sup> article 1935 logically and teleologically appears to be addressed to the problem of usury, and it has long been recognized that the article concerns just that.<sup>8</sup> Unfortunately, however, the courts have continued to apply the usury limitations of article 1935 to *all* obligations to pay money—even those which have been excluded from the purview of the usury laws.<sup>9</sup> As a result, reported decisions exist which incorrectly cast an ominous cloud over many agreements perfected in Louisiana. These decisions erroneously indicate that the recovery of interest is the only remedy available to the obligee *in all cases* in which a debtor fails

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\* Member, Louisiana Bar Association. The author wishes to express his appreciation to his fellow attorneys William M. Meyers, John M. Wilson and Joe B. Norman, who provided many thoughtful comments, ideas and suggestions on the topics treated. Additional gratitude is due Billy J. Domingue, for reading a draft of this article. Any errors or omissions, however, must be attributed solely to the writer.

1. Section 4 of chapter 3 of title IV of book III of the Louisiana Civil Code is entitled "Of the Damages Resulting from the Inexecution of Obligations."

2. Chapter 3 is named "Of the Effect of Obligations."

3. Title IV of book III of the Code is labeled "Of Conventional Obligations."

4. "Of the Different Modes of Acquiring the Ownership of Things" is the subject matter of book III.

5. LA. CIV. CODE art. 1934(5).

6. LA. CIV. CODE art. 1936.

7. LA. CIV. CODE arts. 1938-1940; *see* LA. CIV. CODE art. 2924.

8. *See Griffin v. His Creditors*, 6 Rob. 216 (La. 1843).

9. *See* LA. R.S. 12:703 (Supp. 1983); LA. R.S. 9:3509 (1983). These statutes make usury limitations, including the provision of article 1935 limiting the damages for delay in an obligation to pay money to interest, inapplicable to certain types of obligations to pay money (for instance, those contracted by corporations or those contracted by any person for commercial or business purposes). The usury limitations of article 1935 now seem to apply only in situations in which a natural person borrows funds or defers payment of an obligation for other than "commercial or business purposes." *Id.*

to discharge an obligation to pay money in a timely fashion.<sup>10</sup> The purpose of this Forum Juridicum paper is to suggest that: (1) article 1935 is addressed to the problem of usury; (2) usury limitations, such as article 1935 and the restriction of damages to interest, do not apply where usury is not at issue, and therefore do not apply to all obligations to pay money;<sup>11</sup> and (3) where article 1935 and the limitation on the damages due for delay do not apply to an obligation to pay money, contractual stipulations fixing the damages or penalties for delay in performance may be upheld in some circumstances.<sup>12</sup>

*From the Beginning*

An appropriate starting point for the present discussion is the case of *Griffin v. His Creditors*,<sup>13</sup> decided by the Louisiana Supreme Court in 1843. At issue in *Griffin* was the validity of "a note for \$1966.66 2/3, dated the 8th of February, 1836, and made payable three years thereafter, with interest at ten per cent per annum from its date, if not punctually paid at maturity."<sup>14</sup> At trial, the holders of the note had been allowed only five percent interest, despite their argument that the stipulation contained in the note was lawful and "not usurious."<sup>15</sup> In concluding that the district court had ruled correctly on the question of interest, the supreme court set forth the following statement which has been repeated time and again in the jurisprudence:

There is, in our law, a marked difference between the damages which may be stipulated for the breach of an obligation to pay money, and an obligation to give a thing or perform an act. Where the object of a contract is anything but the payment of money, the parties may determine the sum that shall

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10. *E.g.*, *Benglis Sash & Door Co. v. Leonards*, 387 So. 2d 1171 (La. 1980); *Associated Press v. Toledo Invs.*, 389 So. 2d 752 (La. App. 3d Cir. 1980); *Mossy Enters. v. Piggy-Bak Cartage Corp.*, 177 So. 2d 406 (La. App. 4th Cir. 1965); *Carbo v. Maison Jolie, Inc.*, 155 So. 2d 238 (La. App. 4th Cir. 1963).

11. *See supra* note 9 and statutes cited therein.

12. In those classes of obligations to pay money to which article 1935 and other usury limitations do not apply, parties may validly agree to *any* rate of interest. LA. R.S. 12:703 (Supp. 1983); LA. R.S. 9:3509 (1983). If the parties may validly agree to any rate of interest—for instance, 1000%—then it would seem that other stipulated remedies for delay in the performance of an obligation to pay money could be sustained.

13. 6 Rob. 216 (La. 1843).

14. *Id.* at 217. According to the court, "this note was given for the third installment of certain slaves, sold at the probate sale of the estate of Joseph Brown, and bought by the insolvent on a credit of one, two, and three years." *Id.* at 220.

15. *Id.* at 219.

be paid as damages for its breach . . . . But it is otherwise, when the contract is to pay a sum of money. The law has provided, that no damages exceeding ten per cent on the amount that was to be paid, can be stipulated.<sup>16</sup>

Under the arrangement before the court in *Griffin*,<sup>17</sup> if the penalty was enforced, the maker could have been required to pay, "for the three years elapsed, thirty per cent over and above the interest of ten per cent"<sup>18</sup> which had been running from the date of protest. The supreme court, therefore, held that the district court ruled properly in denying any conventional interest and in allowing only legal interest.<sup>19</sup>

Certainly, the supreme court was correct in recognizing the division or the classification of civil obligations according to the object of each obligation.<sup>20</sup> In the Louisiana Civil Code distinctions are drawn with respect to obligations to do, obligations not to do,<sup>21</sup> and obligations to give.<sup>22</sup> The result in *Griffin*, however, did not turn upon the categorization of the obligation owed by the maker of a negotiable instrument as an obligation to give. The plain thrust of the opinion centers on the issue of usury,<sup>23</sup> and, read in this context, the decision is undeniably correct.

Unfortunately, in the ensuing years since *Griffin*, it appears that neither article 1935 nor the *Griffin* case has been considered precisely.

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16. *Id.* at 220 (citation omitted). The court additionally remarked that "[a]ny contract, or agreement, therefore, into whatever shape it may be thrown, which stipulates for more than ten per cent damages, or interest, for the delay to pay money, is illegal." *Id.* at 221.

17. *See supra* note 14.

18. 6 Rob. at 221.

19. *Id.*

20. LA. CIV. CODE art. 1761; *see* A. LEVASSEUR, *PRECIS IN CONVENTIONAL OBLIGATIONS: A CIVIL CODE ANALYSIS* 4-6 (1980).

21. *See* LA. CIV. CODE arts. 1926-1928, 2756, 2940.

22. *See* LA. CIV. CODE art. 1905.

23. In denying an application for rehearing, the court voiced its sentiments:

If, instead of . . . back interest at ten per cent, the published terms of the sale had announced that the notes, in case of non-payment, should bear twenty per cent from their maturity, would the announcement of such a stipulation render it less *usurious*? Could it be pretended that, because the purchaser had it in his power to relieve himself from such interest by paying the principal at the time fixed, there was no *usury*, and that the stipulation should be enforced? . . . The law protects contracting parties against their own imprudence and folly in such a case; and a stipulation, *usurious in itself*, cannot be rendered legal by the inconsiderate consent that may have been given to it, at the time of the contract.

6 Rob. at 229-30 (emphasis added).

The appellate courts of Louisiana have been inclined to seize upon the language found in article 1935 and in *Griffin* and to conclude that interest, at a rate not exceeding the conventional ceiling stated in article 2924, is the only measure of recovery which may be agreed upon for a debtor's failure in an obligation to pay money. Often, difficult factual scenarios have prompted this judicial syllogism. *Heeb v. Codifer & Bonnabel, Inc.*<sup>24</sup> is a classic example of such a scenario.

In *Heeb*, the supreme court confronted a claim brought by a prospective purchaser of immovable properties to recover sums paid and amounts expended in improvements on the tracts. Mrs. Heeb had entered into a contract with the defendants in which she agreed to purchase three lots in Jefferson Parish. The price was set at \$825; \$82.50 was paid at the closing, and the balance was to be satisfied through thirty-six notes. Title to the properties, however, was not to pass to Mrs. Heeb until all of the installments were paid. Apparently in the nature of a bond for deed contract, the agreement also contained language to the effect that, if Mrs. Heeb should fail to pay any installment promptly, the vendor would be entitled, "without the necessity of placing the purchaser in default, to appropriate to itself, as liquidated damages, all amounts that may have been paid by the purchaser."<sup>25</sup> Payments were made for several months<sup>26</sup> before Mrs. Heeb defaulted. Shortly thereafter, the defendant took possession of the lots in question and conveyed one of the tracts to a third person.

When the matter was presented to the trial court, the forfeiture clause was held to be invalid; this ruling was sustained by the Louisiana Supreme Court. After stating that "[t]he law does not sanction the imposition of punitive or exemplary damages by contract or otherwise, but only as are in their nature and character compensatory,"<sup>27</sup> Justice Thompson, writing for the court, declared the invalidity of the stipulated damages clause to be obvious.

Indeed, the words employed by the defendant in the agreement were harsh; no provision stated that the sums paid should be considered as rent if Mrs. Heeb defaulted.<sup>28</sup> Rather, "[t]he forfeiture was to be absolute, without reservation, condition, or consideration, on the

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24. 162 La. 139, 110 So. 178 (1926).

25. 162 La. at 141, 110 So. at 179.

26. Together with the downpayment, the defendant received \$185.75 from Mrs. Heeb.

27. 162 La. at 143, 110 So. at 179.

28. On this basis, the court distinguished *Pruyn v. Gay*, 159 La. 981, 106 So. 536 (1925).

mere failure of the purchaser to pay any one of the small monthly installments."<sup>29</sup> Given this language, the court envisioned a situation in which Mrs. Heeb made all but the final payment—a failure to pay a sum of \$19.75—with the defendant/vendor claiming the right to retain all of the money paid *and* title to the lots.

It is apparent that the arrangement proposed by the defendants could have operated unfairly against the plaintiff, Mrs. Heeb; the contract, under the situation before the court in *Heeb*, probably should not have been enforced, although arguments to the contrary may be advanced.<sup>30</sup> One obvious problem in *Heeb* was the bond for deed sale, an arrangement which suspends the passing of title to the purchaser until the credit portion of the price is paid<sup>31</sup> and which was finally regulated by the legislature in 1934;<sup>32</sup> this type of contract has caused many difficulties, some of which have arisen recently.<sup>33</sup>

However, instead of basing its decision upon the peculiarities of the bond for deed agreement or upon the potential unfairness of the stipulations in the contract, the court quoted from the *Griffin* case and from article 1935, and said no more. Thus, it appears that the vendor in *Heeb* lost because the law of Louisiana forbids a creditor to recover anything but interest when a debtor breaches an obligation to pay money. In truth, the court may have added the quotations merely to bolster a conclusion that it had already reached; after all, the court stated in an earlier portion of the opinion that "[t]he inequity, unreasonableness, and illegality of such a penal clause as here sought to be enforced is so obvious as to scarcely need citation of authority."<sup>34</sup> This may only be postulated, however, for it is not evident from a review of the reported opinion. Yet, the real problem with *Heeb* is not the language used by the court. The opinion is troubling because often it has been read rather superficially by subsequent courts; these courts have concluded that the *Heeb* decision and article 1935 forbid the recovery by a creditor of anything other than interest on money debts. As is suggested below, simply because an obligation to pay money is at issue, it does not necessarily follow that the limitations of article 1935 control.

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29. 162 La. at 143, 110 So. at 179.

30. Of the potential contentions, the court noted the rule of Civil Code article 2046 but did not explain why it did not give the rule more weight.

31. See *Pruyn v. Gay*, 159 La. 981, 106 So. 536 (1925); *Campbell v. Richmond Ins. Co.*, 156 La. 455, 100 So. 679 (1924); *Trichel v. Home Ins. Co.*, 155 La. 459, 99 So. 403 (1924); Comment, *Bond for Deed Contracts*, 31 LA. L. REV. 587 (1971); Note, *Community Ownership of Immovables: Bond for Deed Contracts*, 41 LA. L. REV. 253 (1980).

32. 1934 La. Acts, No. 169, §§ 1-7.

33. See *supra* note 31.

34. 162 La. at 143, 110 So. at 179-80.

*A More Modern Error—Still the Same Problems*

Much of what is set out above may appear to be a lesson in history, mildly interesting, although not relevant today. However, a reading of *Associated Press v. Toledo Investments*,<sup>35</sup> decided by the Louisiana Third Circuit Court of Appeals in 1980, quickly dispels this notion. The facts of the *Toledo Investments* case are straight-forward; the Associated Press agreed to furnish its news service to radio station KWLA, owned by Toledo Investments, for a five-year period at a rate of \$58.15 per week. The contract empowered Associated Press to suspend or terminate the arrangement should its debtor fail to pay the assessments. Additionally, the following liquidated damages provision was inserted into the agreement:

Upon . . . suspension or termination the Member [Toledo Investments] shall be liable to AP for the total amounts which otherwise would become due to AP under this agreement . . . during the balance of the term hereof, less the expenses which AP would incur in supplying Service to the member.<sup>36</sup>

Subsequently, Toledo Investments contracted with Associated Press to add an audio service for an additional weekly charge of \$58.60; this second agreement incorporated all of the other terms of the prior contract. For the purposes of both service contracts, the laws of the state of New York were stated to govern.<sup>37</sup>

In time, Toledo Investments fell into arrears in paying the assessments. Consequently, Associated Press suspended the services and instituted suit for the amounts it was owed for invoices not paid and for the liquidated damages—the total sums which otherwise would have become due. The trial court awarded judgment in favor of Associated Press for the past due assessments but denied relief on the claim for the stipulated remedy, a ruling which prompted the appeal.

In the third circuit, Associated Press argued that the laws of New York controlled by virtue of contractual choice, and that in New York a distinction is not drawn between obligations to pay money and other types of obligations insofar as a stipulated recovery is concerned. In response, the appellate panel recited the Louisiana choice of law policy<sup>38</sup> and declared that, if the invocation of the laws of New York

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35. 389 So. 2d 752 (La. App. 3d Cir. 1980).

36. *Id.* at 753.

37. *Id.* at 754.

38. "Where parties stipulate the State law governing the contract, Louisiana conflict of laws principles require that the stipulation be given effect, unless there is

would offend a Louisiana rule of public order, the contractual stipulation of governing law would not be honored.

Up to this point, the reasoning of the court is beyond criticism. With the general choice of law guide established, the court addressed the question of whether a conflict existed between the laws of New York and the Louisiana statutes on the issue of a stipulated remedy in the event of a breach by a debtor of an obligation to pay money. The court concluded that "Louisiana statutorily limits damages recoverable for delay in performing an obligation to pay money. *Those damages are restricted to recovery of interest in order to prevent usury.*"<sup>39</sup> By referring to Civil Code article 1935 and the cases of *Griffin* and *Heeb*, the third circuit decided that the limitation of a creditor's recovery to interest when a debtor has defaulted on an obligation to pay money is a matter of "strong public policy"<sup>40</sup> in Louisiana. Accordingly, the liquidated damages clause at issue, although proper under the laws of New York, was not enforced, and the order of the trial court was affirmed.

The third circuit was both perceptive and correct in recognizing usury as the vice or mischief addressed by article 1935. And, under Louisiana law, it is entirely correct to assert that "[w]hen the primary obligation of contract is solely the payment of money, the parties may be precluded by the usury statutes from setting a liquidated amount in excess of the maximum allowable rate of interest."<sup>41</sup> Nevertheless, the court in *Toledo Investments* plainly erred in applying the laws of Louisiana.

In deciding the choice of law question, the third circuit was bound to give effect to the stipulation by the contractants as to what law would govern, unless a provision of the law chosen was in conflict with the public policy of Louisiana. In *Toledo Investments*, the public order problem discerned was usury, as set forth in Civil Code articles 1935 and 2924 and as interpreted by the jurisprudence. What apparently escaped the attention of the court, however, was the rule of Louisiana Revised Statutes 12:703,<sup>42</sup> through which the legislature

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statutory or jurisprudential law to the contrary or strong public policy considerations justifying the refusal to honor the contract as written." *Id.* (citing *Davis v. Humble Oil & Ref. Co.*, 283 So. 2d 783, 794 (La. App. 1st Cir. 1973) (on rehearing)); see *Fine v. Property Damage Appraisers*, 393 F. Supp. 1304 (E.D. La. 1975).

39. 389 So. 2d at 754 (emphasis added) (citing LA. CIV. CODE art. 2924; LA. R.S. 9:3501 (1983)).

40. 389 So. 2d at 754.

41. *Pembroke v. Gulf Oil Corp.*, 454 F.2d 606, 611-12 (5th Cir. 1971) (citing *Ekman v. Vallery*, 185 La. 488, 169 So. 521 (1936)).

42. LA. R.S. 12:703 (Supp. 1983) reads as follows:



has declared that corporations may not avail themselves of the "defense of usury or of the taking of interest in excess of the maximum rate of conventional interest."<sup>43</sup> Since Toledo Investments was a corporation and, therefore, properly unable to raise an issue of usury, the remedy stipulated in favor of Associated Press, in the event of the failure of Toledo Investments to remit timely on the wire charges, did not conflict with any provision of Louisiana law, much less with the public policies of the state.<sup>44</sup>

Once it is recognized that the court was correct in characterizing article 1935 and its jurisprudential progeny as usury limitations but that the court applied the limitations incorrectly, a question, however,

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Notwithstanding any other provisions of the law of this state to the contrary, any debtor that is a domestic corporation, a foreign corporation, a partnership in commendam formed pursuant to the laws of this state, a foreign limited partnership, or a partnership all of the partners of which are either corporations, foreign limited partnerships, partnerships in commendam or partnerships comprised of corporations, foreign limited partnerships or partnerships in commendam, may agree to pay interest in excess of the maximum rate of conventional interest authorized by the laws of this state, whether in connection with unsecured or secured indebtedness and whether the secured indebtedness is secured, in whole or in part, directly or indirectly, by a real estate mortgage or chattel mortgage on property in this state or is otherwise secured, and as to any such agreement such debtor corporation or partnership shall be prohibited from asserting a claim or defense of usury or of the taking of interest in excess of the maximum rate of conventional interest, and any person, partnership or corporation whatsoever signing as co-maker, guarantor or endorser for such debtor corporation or partnership shall also be prohibited from asserting any such claim or defense. The term foreign limited partnership as used hereinabove shall mean any partnership domiciled in a state of the United States other than Louisiana or the District of Columbia which shall have been formed and is existing pursuant to the limited partnership law or Uniform Limited Partnership Law of any such state, and such partnership need not qualify as a partnership in commendam under the laws of this state.

43. *Id.* Furthermore, no co-maker, guarantor or endorser of a note of a corporate or partnership debtor may raise a claim or a defense relating to usury. *Id.*; see *Bank of New Orleans & Trust Co. v. Reed Printing & Custom Graphics*, 399 So. 2d 1260 (La. App. 4th Cir. 1981). This clarification of LA. R.S. 12:703 was added after the rendering of the decision in *Meadow Brook Nat'l Bank v. Recile*, 302 F. Supp. 62, 78-80 (E.D. La. 1969), in which it was said that the policy prohibiting corporations from raising an argument of usury did not extend to individual sureties of a corporate debtor.

44. In regard to questions of usury and public policy in Louisiana today, LA. R.S. 9:3509 should be carefully noted. LA. R.S. 9:3509, added to title 9 by Act 665 of 1981, is an almost verbatim reenactment of LA. R.S. 12:703, with one important exception—LA. R.S. 9:3509 extends the class of persons prohibited from raising claims or defenses of usury to include "any debtor that is . . . [an] ordinary partnership or any other person borrowing funds for commercial or business purposes or deferring payment of an obligation for commercial or business purposes."

remains as to what restrictions should be placed upon stipulated remedies in obligations to pay money which are not subject to the usury laws. Clearly, interest in excess of the permissible conventional rate stated in the Civil Code may be charged, for the specific mandates of Louisiana Revised Statutes 9:3509 and 12:703<sup>45</sup> prevail over the general provisions of Civil Code articles 1935 and 2924. Furthermore, if exorbitant rates of interest may validly be fixed, it would seem that other stipulated remedies, such as resolatory clauses and forfeitures, should be allowable—especially vis-a-vis corporate or partnership debtors, even for breaches of only obligations to pay money.

*A Brief Argument in Support of Forfeitures in Limited Circumstances*

It is not disputed that forfeitures are not favored in either the common law or the civil law and are not implied in contracts.<sup>46</sup> A forfeiture of an interest pursuant to a contractual provision is not forbidden in Louisiana,<sup>47</sup> however, and may serve a useful purpose in certain instances.

For example, suppose that four corporations or partnerships, in an industry in which high financial risks and speculative prospects are not uncommon, combine as joint venturers in a particular investment.<sup>48</sup> Further, suppose that one of the venturers is nominated to act for the others in contracting with third persons, in fronting money, and in preserving the investment opportunity, which may result in either a generous profit or a total loss. In turn, the principal venturer will bill the other investors according to the percentage in the deal to which each holds rights. In order to ensure that each venturer makes its investment contributions in due course, the contract between the joint venturers may provide that should a party fail to pay its share after proper billing and after the running of a grace period, the other investors may either institute suit against the delinquent party or require the tardy investor to assign its interest in the prospect to them, in proportion to the interests they hold.

If the validity of such an arrangement is contested, the delinquent venturer may initially argue that it has breached nothing more than an obligation to pay money and that Civil Code article 1935 therefore

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45. See *supra* note 42.

46. See, e.g., *People's State Bank v. United States Fidelity & Guar. Co.*, 164 La. 95, 113 So. 779 (1927).

47. See, e.g., *Schultz v. Texas & Pac. Ry. Co.*, 191 La. 624, 186 So. 49 (1938); *Bender v. Louisiana & Ark. Ry. Co.*, 255 So. 2d 849 (La. App. 2d Cir. 1971).

48. A good illustration is the oil and gas exploration business. Many other examples exist, including real estate venture capital syndications.

restricts the range of remedies available to the other investors to interest on the past due sums. To the extent that the debt has been incurred for commercial or business purposes or the debtor is a corporation or a partnership, however, it is clear that usury is not a concern,<sup>49</sup> and article 1935 should not be considered relevant. As for any questions concerning the validity of such an assignment/forfeiture provision, it should be noted that the Louisiana Supreme Court has passed upon, and found lawful, clauses seemingly harsher<sup>50</sup> and that

49. LA. R.S. 12:703 (Supp. 1983).

50. The decision rendered in *Pruyn v. Gay*, 159 La. 981, 106 So. 536 (1925), concerned the application of the article 1901 presumption of validity to a forfeiture provision contained in a contract. Involved in the dispute before the court was the following contract to sell:

For and in consideration of seventeen hundred and seventy-five and no/100 dollars, of which I, F.G. Pruyn, have received in cash the sum of two hundred and no/100 dollars, the remainder of which is to be paid to me in quarter installments of forty-six and 25/100 dollars each, due respectively on the 10th day of September, 1918, and quarterly thereafter at 444 Lafayette Street, Baton Rouge, La., with 8 per cent interest on each installment from maturity until paid, I hereby agree to sell to Gilbert Gay the following described property to wit, lots 2, 3, and 4 of square 1, McGrath Heights, with improvements thereof.

It is distinctly understood that this promise is made upon the following conditions: First. That the contemplated purchaser shall pay all taxes and assessments of any kind that may be due on said property before they become delinquent, and all insurance promptly and punctually when they become due. *The failure of said purchaser to make said payments when due shall ipso facto without demand or putting in default and as a penalty nullify and abrogate this contract; in which event all sums paid to said Pruyn shall be considered as rental for the use of said property, and any building or other improvements on said property shall remain and become the property of said Pruyn.*

159 La. at 982-83, 106 So. at 537 (emphasis added). After paying \$909.50 under the agreement, Gay defaulted. Repeated demands were made by Pruyn upon Gay for compliance with the contract and several notices were sent by Pruyn to Gay stating that, if payments were not brought up-to-date, the contract would be cancelled.

In addressing the validity of the forfeiture language quoted above, the court stated that the provision was "not reprobated by law." 159 La. at 986, 106 So. at 538. The court noted, additionally, "[t]hat the payments made shall be considered as rental for the use of the property is not an inequitable or arbitrary stipulation." 159 La. at 987, 106 So. at 538. The court thus interpreted and enforced the forfeiture language as written, despite the debtor's failure to meet only an obligation to pay money.

In *Schultz v. Texas & Pac. Ry. Co.*, 191 La. 624, 628, 186 So. 49, 50 (1938), the court considered the validity of the following provision of a lease:

In the event this lease is terminated by notice or otherwise the lessee agrees to vacate said premises and remove therefrom before the expiration date, any building, structure or property it may have erected or placed thereon; and if within the time specified the lessee shall fail to remove from said premises said building, structure, or property, the same shall become

there is authority in the Civil Code for this proposal.<sup>51</sup>

Freedom of contract is perhaps the paramount reason for upholding the contractants' proposal for settling potential difficulties in the situation outlined above. Civil Code article 1901 provides that "[a]greements legally entered into have the effect of laws on those who have formed them."<sup>52</sup> Accordingly, it is accepted that persons may contract in any manner they wish; notwithstanding any unusual features or drastic language included in the agreement, the contract

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forfeited to, and the title thereof shall become vested in the Lessor, should the Lessor so desire.

When the lessee, Schultz, was adjudged to have violated certain terms of the lease, he was ordered to deliver possession of the premises to the lessor, the Texas & Pacific Railway Co.

The judgment also contained a reservation of the rights of the railway company to claim rent for the occupation of the premises, for damages thereto, and for the ownership of all buildings, structures and property erected or placed thereon by Schultz, which Schultz had failed to remove therefrom, title to which had become vested in the railway company under the lease.

191 La. at 629, 186 So. at 50.

The difficulty in *Schultz* concerned notice to the lessee of the lessor's declaration of a forfeiture. In the railway company's judgment in its action of ejectment, the forfeiture of Schultz's property, located upon the leased premises, was a reserved right. The principal remedy was to cause a writ to issue to the sheriff "commanding him to remove the property and to take the cost thereof out of the proceeds of its sale." 191 La. at 632, 186 So. at 51. Although the supreme court agreed with the trial judge that the railway company's option to declare a forfeiture was not lost, "or effected [sic] in any way by instituting suit and ordering the lessee to remove," 191 La. at 633, 186 So. at 51-52, reasonable notice of the choice of the forfeiture course of action was not transmitted.

In a similar case, a forfeiture stipulated in an agreement was enforced. *Bender v. Louisiana & Ark. Ry. Co.*, 255 So. 2d 849 (La. App. 2d Cir. 1971). In response to the argument that forfeitures are not favored and should be construed strictly, the second circuit noted that this view does not mean that "contractual provisions calling for forfeitures are to be ignored." *Id.* at 851.

51. Aside from the idea that this clause is but a definition of the resolutive condition of the dilatory investor's participation in the venture, *see* LA. CIV. CODE arts. 2045-2047, it may be argued that once a venturer has failed to pay its proportionate contributions and once the grace period has passed, the debtor may be called upon to perform one of two obligations in the alternative. In this regard, Civil Code article 2066 states that when "the things, which form the object of the contract, are separated by a disjunctive, then the obligation is *alternative*. A promise to deliver a certain thing, or to pay a specified sum of money, is an example of this kind of obligation." (Emphasis added). Typically, the choice is in the debtor of which of the obligations will be performed, but it may be "expressly granted to the creditor." LA. CIV. CODE art. 2068.

52. *See* *Burris v. Gay*, 324 So. 2d 11 (La. App. 2d Cir. 1975), *writ denied*, 326 So. 2d 377 (La. 1976); *Kogos v. Lemann*, 285 So. 2d 548 (La. App. 4th Cir. 1973), *writ denied*, 288 So. 2d 648 (La. 1974).

forms the law between the parties, to be enforced so long as the terms "do not contravene good morals or public policy."<sup>53</sup> With regard to the problems raised above, it is submitted that the only arguable public order concern is usury.<sup>54</sup> Since the question of usury is immaterial with respect to money debts incurred for commercial or business purposes or by corporations or partnerships, the assignment/forfeiture clause outlined above should be enforceable.

Additionally, the equities of this situation do not favor the delinquent venturer. If the assignment/forfeiture provision is not enforced, the financing of the entire operation may be placed in jeopardy and all of the investors may lose the prospective opportunity.<sup>55</sup> This spectre alone may furnish sufficient justification to uphold the assignment/forfeiture clause, despite the classification of the nature of the obligation as one to pay money.<sup>56</sup> Moreover, if the other investors are relegated to an action for a money judgment to recover principal and interest, while having to finance the venture during the pendency of the suit, the nonpaying investor may profit from the breach of contract—he will be bound to pay no more than the principal due and owing, plus interest. In short, without the threat of an assignment/forfeiture clause or a sizable monetary penalty, little incentive

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53. *Lincoln Beach Corp. v. Board of Comm'rs*, 195 So. 2d 367, 373 (La. App. 4th Cir.), *cert. denied*, 250 La. 489, 196 So. 2d 803 (1967); see *Chemical Cleaning, Inc. v. Brindell-Bruno, Inc.*, 214 So. 2d 215 (La. App. 4th Cir. 1968); *Prisock v. Boyd*, 199 So. 2d 373 (La. App. 2d Cir. 1967); *Richardson v. Cole*, 173 So. 2d 336 (La. App. 2d Cir. 1965); *Molero v. California Co.*, 145 So. 2d 602 (La. App. 4th Cir. 1962).

54. See *supra* notes 35-45 and accompanying text.

55. In the oil and gas exploration situation, if financing is not secured in order to complete drilling and to secure production, a lease or a servitude may be lost.

56. Completely aside from the corporate or partnership debtor exceptions, it is submitted that the rule of article 1935 is inapposite when monetary damages, either in the form of interest or as a stipulated sum, are entirely inadequate. While the reported opinions in Louisiana do not reflect that a factual situation has been litigated in which the issue of the inadequacy of a monetary award has been addressed, support for this proposition is located in Aubry's and Rau's discussion of French Civil Code article 1153, the source of article 1935. They have suggested that the doctrine permitting only principal and interest for a breach of an obligation to pay money is not applicable when "a person does not fulfill, on the date fixed, his engagement to furnish by virtue of a loan [or by opening a credit] funds needed for a certain operation, for example, for the exercise of a faculty of redemption." C. AUBRY & C. RAU, *DROIT CIVIL FRANCAIS—OBLIGATIONS* § 308, at 114 (6th ed. La. St. L. Inst. trans. 1965) (footnote omitted). In the event of this type of problem, the creditor "may demand an indemnity in proportion to the damage which this forfeiture has caused to him," *id.*, because "monetary interests are no longer relevant since the promisee will not demand the sum which has been promised to him for a performance which has since become impossible." *Id.* at 114 n.50.

exists for an investor to contribute its share of the investment expenses timely if the investor believes that the other investors, who are financially sound, will make up the difference. If the venture turns a large profit, money will be available to pay the delinquent investor's debts. If the opportunity does not make money, however, the delinquent investor owes only interest and is in no worse shape for failing to pay on time.

### *Conclusion*

If usury is the problem addressed by Civil Code article 1935, it is plain that, insofar as debts incurred for commercial or business reasons or by corporate or partnership debtors are concerned, the apparent designation of interest as the only remedy for the breach of an obligation to pay money is inapplicable. Furthermore, under Civil Code article 1901, obligors—particularly corporate or partnership obligors—should be able to bind themselves to forfeit an interest in a venture in the event they fail to pay their money debts timely. This straightforward resolution is analytically more precise than some of the means used in the jurisprudence to reach the same result—that of permitting a creditor to recover something other than interest when a debtor fails in an obligation to pay money.<sup>57</sup> When adjudicating the

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57. For instance, the opinion issued in *Executive Car Leasing Co. v. Alodex Corp.*, 279 So. 2d 169 (La. 1973), provides support for the proposition that article 1935 is not always restrictive. The suit arose as a claim by a former lessor against a former lessee seeking unpaid rentals and additional contractual compensation after the cancellation of the lease through mutual consent. The former lessee resisted the claim for additional compensation, contending that the collection of it was violative of the public policy of Louisiana. One issue in the suit concerned a clause in the lease which required additional payments by the lessee if the automobile was returned and the lease cancelled in less than a year.

[I]n the event that such date [of termination] is less than one year from the date the lease began then Lessee shall pay to Lessor for each month remaining in the first year of said term a sum equal to the difference between the specified fixed rental and the monthly depreciation reserve.

*Id.* at 170 n.2. In analyzing this provision, the court noted the following:

Under such additional agreement, the lessee Alodex is liable, not only for the \$116.50 rental for the five months of use, but also for a penalty of \$29.71 for each of the remaining seven months of the year—the difference between the rental due (\$116.50, less \$5.50 for tax, net \$111.00) and the depreciation (\$81.29) fixed for each month's use of the vehicle. The intermediate court held that these were liquidated damages for the surrender of the vehicle before the expiration of the year, as provided for by the lease, and that they were properly recoverable as such under Civil Code Article 1934(5). (The evidence reveals that a new car loses about 40% of its market value during its first year.) *This holding correctly rejects the argument that such penalty*

rights of relatively sophisticated contractants, *i.e.*, corporations and partnerships, Louisiana courts should be reluctant to avoid contractual stipulations on any grounds except those that are truly matters of public order. Consequently, if a situation similar to that of either the *Toledo Investments* dispute or the joint venture scenario outlined above arises in Louisiana in the future, proper disposition of the matter would require the court to enforce the contract, as written, according to the intent of the parties.<sup>58</sup> The litigants cannot be heard to have anticipated otherwise, and nothing else can be expected by them from the courts.

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*is not recoverable as being really damages for delay in the payment of money, Civil Code Article 1985, and thus limited to interest.*

*Id.* at 170-71 n.2 (emphasis added).

Previously, the fourth circuit had ruled that the object of the contract between the parties was "not simply the payment of money but the lease of a vehicle with the attendant obligations on each party to perform in accordance with the contract." *Executive Car Leasing Co. v. Alodex Corp.*, 265 So. 2d 288, 294 (La. App. 4th Cir. 1972). Therefore, even though the plaintiff sought a money judgment against the defendant for failure to pay rental, the stipulated remedy was held to be permissible.

58. LA. CIV. CODE arts. 1945-1962.