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Marlin Risinger

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THE TRANSFER OF LITIGIOUS RIGHTS
IN LOUISIANA CIVIL LAW

LOUISIANA CIVIL CODE OF 1870:

ART. 2447. Public officers connected with courts of justice, such as judges, advocates, attorneys, clerks and sheriffs, can not purchase litigious rights, which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages and interest.¹

ART. 2652. He against whom a litigious right has been transferred, may get himself released by paying to the transferee the real price of the transfer, together with interest from its date.²

ART. 2653. A right is said to be litigious whenever there exists a suit and contestation on the same.³

ART. 2654. The provisions of article 2652 do not apply:

1. When the transfer has been made either to a co-heir or to a coproprietor of the right.

1. This article first appeared in La. Civil Code of 1825 as Art. 2422. It was taken from Art. 1597, French Civil Code: "*Les juges, leurs suppléants, les magistrats remplissant le ministère public, les greffiers, huissiers, avoués, défenseurs officieux et notaires, ne peuvent devenir cessionnaires des procès, droits et actions litigieux qui sont de la compétence du tribunal dans le ressort duquel ils exercent leurs fonctions, à peine de nullité, et des dépens, dommages et intérêts.*"

Art. 1597. "Judges, their assistants, magistrates acting as Public Prosecutors, clerks of the Court, bailiffs, sollicitors, counsellors and notaries cannot purchase the actions, contested rights and causes of action which come under the jurisdiction of the Tribunal in the district before which they practice, under penalty of avoidance of the sale and of costs and damages." (Transl. Cachard, The French Civil Code, rev. ed. 1930) (Italics supplied.)

Art. 2422, La. Civil Code of 1825: "*Les fonctionnaires publics attachés aux cours de justice, tels que les juges, les avocats, les procureurs, les greffiers et les shérifs, ne peuvent acheter des droits litigieux, qui sont de la compétence du tribunal dans le ressort duquel ils exercent leurs fonctions, à peine de nullité, et de tous dépens, dommages et intérêts.*" The difference between the French Civil Code and the text of the Louisiana article, that is emphasized by the roman lettering, will be discussed at a later point.

2. This article is taken almost literally from Art. 1699, French Civil Code. It appeared in La. Civil Code of 1808, p. 368, 3.6.130, and as Art. 2622, La. Civil Code of 1825.

3. This article is taken from Art. 1700, French Civil Code: "*La chose est censée litigieuse dès qu'il y a procès et contestation sur le fond du droit.*"

Art. 1700: "A claim is supposed to be contested when there is a suit or a dispute as to the existence of the right." (Transl. Cachard, The French Civil Code, rev. ed. 1930) The French texts of the Louisiana Codes of 1808 and 1825 are exactly the same as that of the French Civil Code, Article 1700. But a slight difference in meaning is found in the English text due to the translation of "*sur le fond du droit*" (on the basis of the right) as "on the same" and also due to the translation of "*La chose*" (the thing) as "The right," La. Civil Code of 1808, pp. 368-369, 3.6.131; Art. 2623, La. Civil Code of 1825.

2. When such right has been transferred to a creditor as a payment for a debt due him.
3. When the transfer has been made to the possessor of the estate subject to the litigious right.⁴

ART. 3556. Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:

18. Litigious rights are those which can not be exercised without undergoing a lawsuit.⁵

The foregoing provisions of the Louisiana Civil Code seek to prevent the acquisition of litigious rights by public officers connected with courts of justice⁶ and are also designed to prevent the fomenting and prolongation of litigation through financial speculation in the outcome of lawsuits.⁷

Historically, the civil law restriction on the free transferability of rights in litigation found in Article 2652 may be traced to the rigid prohibition in early Roman law against the purchase of lawsuits⁸ and the modification thereof by a constitution of the Emperor Anastasius later confirmed by Justinian.⁹ The Code of Justinian permitted the transfer of litigious rights but reserved to the debtor of a credit that had been sold the right to acquire the credit upon a reimbursement of the price actually paid.¹⁰ From this Roman law source, the principle of litigious redemption found its way into the French Civil Code and has become, in modified form, a part of the Louisiana civil law.

In Louisiana, because of the current flood of litigation that

4. This article is a literal translation of Art. 1701, French Civil Code. It appeared in La. Civil Code of 1808, p. 368, 3.6.132, and in Art. 2624, La. Civil Code of 1825.

5. This provision first appeared in Art. 3522 (22), La. Civil Code of 1825.

6. The object of this prohibition is to avoid all possible suspicion of abuse of influence by public officers connected with the administration of justice. 2 Planiol, *Traité Élémentaire de Droit Civil* (11 ed. 1937) 533, n° 1434.

7. Pothier, *Treatise on the Contract of Sale* (Cushing's Translation 1839) 356-357, n° 591: "The laws, in order to put a bridle upon the cupidity of the buyers of litigious rights, and to put a stop to suits, ordain that the buyers of litigious rights shall not be able to exact of the debtor anything more than what they give as the price of the assignment, with interest, and that the debtor shall be discharged from the remainder." See also 2 Planiol, *op. cit. supra* note 6, at 603, n° 1650.

8. Cf. Amos, *The History and Principles of the Civil Law of Rome* (1883) 190; 11 Beudant, *Cours de Droit Civil Français* (2 ed. 1938) n° 397.

9. Code, 4.35.22,23: *Per diversas* and *Ab Anastasio*. 13 Scott, *The Civil Law* (1932) 90-92. See also, Troplong, *Droit Civil Expliqué, de la Vente*, II (5 ed. 1856) 481-483, n°s 984, 985; 2 Planiol, *op. cit. supra* note 6, at 603, n° 1651.

10. The text of the passages in the Code of Justinian indicates that its provisions were applicable to "rights of action" assigned prior to the institution of suit. 13 Scott, *The Civil Law* (1932) 90-91. See Radin, *Maintenance by Champerty* (1935) 24 Calif. L. Rev. 48, 54-55.

has resulted from the extensive development of the oil and gas resources of the state, and the large number of transfers of oil and gas rights, opportunities for invoking principles pertaining to the transfer of litigious rights, particularly insofar as the litigious redemption is concerned, have greatly multiplied.¹¹ Transfers to attorneys in payment for legal services may, under some circumstances fall within the prohibition of Article 2447.¹² This comment is intended to examine the codal articles and to discuss their application to some of the problems involved in the transfer of litigious rights.

Two distinct legal results may follow from the purchase of a litigious right: (1) the nullity of the transfer results when the claim is purchased by certain court officers in violation of the prohibition in Article 2447, and (2) litigious redemption (*retrait litigieux*) may be exercised under Article 2652 when the transfer is to a third person other than such an officer.

As the term "litigious right" is used in the application of both of the above principles, it is a matter of primary importance to make a preliminary inquiry into what constitutes a "litigious right."

I. DEFINITIONS

Scope of Articles 2653 and 3556 (18)

If both Article 2653 and Article 3556 (18) are to be taken as complete definitions, there is an apparent conflict between the two provisions. The former requires that there exist a suit and contestation for a right to be considered as litigious, while the latter is broad enough to include within the category of litigious rights not only pending contested suits but also threatened or imminent litigation as rights "which can not be exercised without undergoing a lawsuit." This latter article which has no counterpart in the French Civil Code, is susceptible of the construction that it was intended to adopt the view of Pothier who defined litigious rights so as to include both rights *which are* or *which may be* contested.¹³ Thus, according to Pothier, actual commencement of

11. For two recent cases in which Article 2652 was invoked, see *Gulf Refining Co. of La. v. Glassell*, 185 La. 143, 168 So. 755 (1936), and *Smith v. Cook*, 189 La. 632, 180 So. 469 (1938).

12. For example, see the recent case of *Gautreaux v. Harang*, 190 La. 1060, 183 So. 349 (1938), in which the nullity of Article 2447 was unsuccessfully invoked. For a discussion of the distinction between the contingency fee contract and the transfer of a litigious right to an attorney, see p. 605, *infra*.

13. 1 Pothier, *Treatise on Contracts* (Cushing's Translation 1839) 353, n° 584: "We denominate *litigious credits* those which are, or which may be, con-

litigation was not necessary and a right might be litigious when there was reason to fear that a suit would be instituted. Article 1700 of the French Civil Code (corresponding to Article 2653 of the Louisiana Civil Code of 1870) rejected Pothier's view for the purpose of litigious redemption, adopting a more restricted definition which requires pendency of contested litigation.¹⁴ The result was that the French Civil Code contained the two provisions relative to the transfer of litigious rights¹⁵ but only one definition.¹⁶

The Louisiana Civil Code of 1808 contained only the provision relative to the redemption of litigious rights, and the restricted definition taken from Article 1700 of the French Civil Code.¹⁷ In the revision of 1825, the prohibition against the purchase of litigious rights by officers of the courts, found in Article 1597 of the French Civil Code, was adopted.¹⁸ There was also adopted at this time the additional definition of litigious rights [Article 3556 (18)] not found in the French Civil Code.¹⁹ This coincidence strongly suggests that the latter definition was intended to apply to the *prohibited purchase* of Article 2447 and that the definition in Article 2653 is limited in its application to the *litigious redemption* of Article 2652. This theory also finds support in the almost unanimous view of the French authorities that Article 1700 of the French Civil Code (corresponding to Article 2653 of the Louisiana Civil Code) is inapplicable to the purchase of litigious rights by court officers and is limited to litigious redemption.²⁰

tested, either in whole or in part, by him whom we pretend to be the debtor of them, whether the process is already commenced, or whether, not being yet commenced, there is ground to apprehend it."

14. "In transposing into our Code the dispositions of Roman law which permitted redemption in transfers of litigious rights, the legislator wished to have left no uncertainty as to what the law contemplated by litigious right. Such was the object of Article 1700. This provision tends to put an end to the diversity of interpretations proposed by our former jurisprudence as to the circumstance which constituted a litigious right. From now on it is necessary to regard this provision as limitative." (Translation supplied.) Cass. 5 juillet 1819, Sirey, 1819-1821, 1.93,94; Dalloz, Jurisp. Gen. (1858) vo. Vente, n° 2049; quoted in 24 Laurent, Principes de Droit Civil Français (1877) 581, n° 586.

15. Arts. 1597, 1699, French Civil Code.

16. Art. 1700, French Civil Code.

17. La. Civil Code of 1808, pp. 368-369, 3.6.130, 131.

18. Art. 2422, La. Civil Code of 1825, now Art. 2447, La. Civil Code of 1870.

19. Art. 3522 (22), La. Civil Code of 1825, now Art. 3556 (18), La. Civil Code of 1870.

20. 11 Beudant, op. cit. supra note 8, at 331, n° 402: "*S'il y a procès engagé, comme le prévoit l'article 1700, la nullité de l'article 1597 peut sans aucun doute être demandée. Mais l'article 1597 n'est-il applicable que dans ce cas? Quel est le sort de la cession ayant pour objet un droit qui n'est pas encore, mais qui va devenir l'objet d'un procès? Quand il s'agit de l'article 1597,*

Since Article 3556 (18) would include pending contested litigation as well as any right which can not be exercised without undergoing a lawsuit, the only situation in which the problem of definition may be squarely presented is that in which a right not in litigation is transferred to one of the public officers enumerated in Article 2447. Unfortunately, the Louisiana cases frequently fail to distinguish between the application of Articles 2447 and 2652. Cases involving Article 2652²¹ are cited indiscriminately for a situation involving Article 2447, and vice versa.²² *McDougall v. Monlezun*,²³ a leading Louisiana case, concerned Article 2652 (litigious redemption) and the court properly applied the definition of Article 2653. The majority of the court referred with approval, however, to a dissenting opinion by Mr. Justice Preston in a prior case,²⁴ in which he had stated that Articles 2653 and 3556 (18)

on revient au sens grammatical et ordinaire des mots; on considère comme litigieux tout droit que les parties savent être douteux, sujet à litige, et qui a été cédé comme tel."

"If a suit has been instituted, as anticipated in Article 1700, there is no doubt that the nullity of Article 1597 can be invoked. But is Article 1597 applicable only in such a case? What is the result of a transfer having for its object a right which is not yet, but which is going to become the object of a lawsuit? When concerned with Article 1597, we return to the grammatical and ordinary meaning of the words [litigious rights]; we consider as litigious every right that the parties know to be doubtful, subject to litigation, and which has been transferred as such." (Translation supplied.)

To the same effect, see 11 Beudant, *op. cit.* supra note 8, at 328, n° 399. In accord: 24 Laurent, *op. cit.* supra note 14, at 68, 69, n° 58; 19 Baudry-Lacantinerie, *Traité Théorique et Pratique de Droit Civil* (3 ed. 1908) 260, 934, nos 263, 915; 6 Marcadé, *Explication du Code Civil* (7 ed. 1875) 203; 5 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1907) 245, § 359 *quater*, note 5; 10 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1932) 367, n° 325. But see contra: 2 Planiol, *op. cit.* supra note 6, at 533, n° 1434 note (1).

The French authorities all emphasize the terminology "*des procès, droits et actions litigieux*" (lawsuits, litigious rights and actions) found in Article 1597 of the Code Napoleon. This exact terminology has not appeared in the Louisiana Civil Code. The French text of Article 2422, La. Civil Code of 1825, used the term "*droits litigieux*" and the present Art. 2447, La. Civil Code of 1870, merely uses the term "litigious rights." It might be argued that the framers of the Code of 1825 intended by this change to depart from the accepted view of the French authorities interpreting Art. 1597, French Civil Code.

21. For example, *Sanders v. Ditch*, 110 La. 884, 899, 34 So. 860, 866 (1903) relied largely upon authorities involving the application of Article 2652. See also, *Consolidated Ass'n v. Comeau*, 3 La. Ann. 552 (1848), and *Denton v. Willcox*, 2 La. Ann. 60 (1847).

22. For examples, see, *Pearson v. Grice*, 6 La. Ann. 232 (1851); *Grayson v. Sanford*, 12 La. Ann. 646 (1857); *Billiot v. Robinson*, 13 La. Ann. 529 (1858)—all involving the application of Article 2652.

23. 38 La. Ann. 223 (1886).

24. "The impossibility of exercising the right without undergoing a lawsuit is never certainly ascertained until the lawsuit is commenced. . . . It is only when forced to commence a lawsuit, that it is ascertained that the claim cannot be exercised without undergoing a lawsuit, and it becomes a litigious right by the commencement and existence of the lawsuit. . . ." *Preston, J.*, in *Pearson v. Grice*, 6 La. Ann. 232, 237 (1851).

were not necessarily in conflict: that the only manner in which it could be determined whether or not it would be necessary to undergo a lawsuit in order to enforce a right was to have a lawsuit, and, consequently, that Article 2653 was the controlling definition. Chief Justice Bermudez, dissenting in *McDougall v. Monlezun*, went to the other extreme: that Article 3556 (18) must be treated as the exclusive controlling definition, and that Article 2653 was only an example of a "litigious right" and which was not even an exclusive definition for the application of Article 2652 (litigious redemption).

In the light of the French authorities, the holding of the majority here was doubtlessly correct as applied to the immediate facts involved, but it is interesting to note that, instead of adopting the extreme view of the dissenting opinion which advocated the application of Article 3556 (18) as an exclusive definition, the Supreme Court has relied upon the language in *McDougall v. Monlezun* to reach the conclusion that Article 2653 is an exclusive definition applicable to Article 2447 as well as Article 2652. Thus, *Sanders v. Ditch*,²⁵ a subsequent case involving Article 2447,²⁶ applied the definition of Article 2653 on this ground and also on the rather illogical reasoning that Article 3556 (18) is only applicable where there is no particular definition elsewhere in the Code, and as there is a definition of litigious rights in Article 2653, there is no need to refer to Article 3556 (18).²⁷ Since the issue involved is whether Article 2653 is intended as a definition for Article 2447, the theory advanced in *Sanders v. Ditch* obviously does nothing but beg the question.

A sound solution seems to have been advanced as dictum in *Spears v. Jackson*,²⁸ a case involving the application of Article

25. 110 La. 884, 34 So. 860 (1903).

26. *McClung v. Atlas Oil Co.*, 148 La. 674, 87 So. 515 (1921). *Gautreaux v. Harang*, 190 La. 1060, 183 So. 349 (1938), and *Succession of Landry*, 116 La. 970, 41 So. 228 (1906), involve Article 2447, La. Civil Code of 1870, but tacitly assume that a right in not litigious unless there exists litigation at the time of the transfer. These cases deal with contingency fee contracts between lawyer and client and will be more extensively discussed later in this comment. *Denton v. Willcox*, 2 La. Ann. 60 (1847), and *Marshall v. McCrea*, 2 La. Ann. 79 (1847), seem to be in accord but the problem is not there presented because there *was* litigation at the time of the transfer. *Duson v. Dupre*, 33 La. Ann. 1131 (1881), by dictum is to the contrary, advancing Pothier's view, but here also there was litigation at the time of the transfer.

27. The Court in *Sanders v. Ditch*, 110 La. 884, 900, 34 So. 860, 866 (1903) emphasized the provision of Article 3556, La. Civil Code of 1870: "*Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:*" (Italics supplied.)

28. 30 La. Ann. 523 (1878).

2652. According to this dictum, the term "litigious rights" is used in the Civil Code in two senses—depending upon the situation to which it refers. If it involves litigious redemption, the definition of Article 2653 is to be used. If the application of Article 2447 is involved, then the definition of Article 3556 (18) is applicable. The analysis in *Spears v. Jackson* is both historically and logically sound and presents the only manner in which these codal provisions may be reconciled without abusing the scope of either. The result of any other interpretation reads Article 3556 (18) out of the Code. Furthermore, as a matter of policy, Article 2447 requires the application of a more stringent rule as to what constitutes a litigious right.²⁹ The Louisiana cases which represent the contrary viewpoint seem entirely unsound and, it is submitted, the jurisprudence should return to a proper interpretation of Article 2447 which will recognize that its application is not controlled by the definition of Article 2653.

Determination of Litigious Right under Article 2447

If the proper scope is given to the application of Article 3556 (18) it logically follows that this provision, which does not require the pendency of contested litigation, should be interpreted in the light of the French authorities dealing with Article 1597 of the French Civil Code. A right should, therefore, be considered as litigious in the sense of this article not only when a contested suit is pending but also when the circumstances are of such a nature as to create a presumption that the acquired right will give rise to a serious contestation.³⁰ Necessarily the result is to leave a wide latitude with the courts for the determination of when there is

29. See 24 Laurent, *op. cit. supra* note 14, at 69, n° 58: "*Enfin, il y a une considération de fait qui est décisive; c'est que, dans l'hypothèse de l'article 1597, il n'y a pas lieu de distinguer le procès engagé du droit qui peut donner lieu à un procès; les magistrats, avocats, officiers ministériels peuvent abuser de leur influence avant que le procès soit commencé, aussi bien que pendant l'instance: il faut dire plus, c'est ordinairement avant de porter l'affaire devant les tribunaux que les parties viendront consulter les hommes de loi, c'est donc surtout avant le procès que leur influence est à craindre.*"

"Finally, there is one consideration of fact which is decisive; it is that, in the theory of Article 1597, there is no occasion to distinguish an instituted suit from a right which can give rise to a lawsuit; judges, lawyers, and ministerial officers can abuse their influence before the suit is begun as well as during the proceedings. It must even be said that it is ordinarily before taking the matter to court that the parties will come to consult the men of the profession, and therefore it is especially prior to suit that their influence is to be feared." (Translation supplied.)

30. 5 Aubry et Rau, *op. cit. supra* note 20, at 245; 10 Planiol et Ripert, *op. cit. supra* note 20, at 367, n° 325. This is substantially equivalent to stating that a right is litigious "which can not be exercised without undergoing a lawsuit." Cf. Art. 3556 (18), La. Civil Code of 1870.

a transfer of a "litigious right" in violation of Article 2447.³¹ The litigious character of the right must exist at the moment of the sale,³² and from the foregoing it can be seen that when the purchase is by a court officer it should be a question of fact in each case whether the right can be said to have a litigious character at the time of the sale.³³

Requisites of a Litigious Right under Article 2652

For the purposes of litigious redemption the Louisiana codal provision makes it clear that there must exist "a suit and contestation on the same."³⁴ The French authorities discussing the corresponding article of the French Civil Code point out that the requisites which must exist at the time of the transfer are (1) a pending suit seeking enforcement of the right; and (2) a contestation on the basis of the right (*sur le fond du droit*).³⁵ Therefore, if a transfer is effected prior to the existence of suit and contestation or after the termination of the litigation, litigious redemption cannot be effected.

Apparently, merely filing suit will not suffice to call into application Article 2652. The defendant must have contested the right asserted by the plaintiff.³⁶ Exceptions of form, exceptions directed against the competency of the tribunal, declinatory exceptions and dilatory exceptions which do not contest the validity

31. 5 Aubry et Rau, *op. cit. supra* note 20, at 245, § 359 *quater*, note 5, and authorities cited.

32. 10 Planiol et Ripert, *op. cit. supra* note 20, at 367, n° 325; 24 Laurent, *op. cit. supra* note 14, at 71, n° 61.

33. See 11 Beudant, *op. cit. supra* note 8, at 331, n° 402: "Every right which the parties know to be doubtful, subject to litigation, and which has been transferred as such, is considered as litigious." (Translation supplied.)

34. Art. 2653, La. Civil Code of 1870. It should be noted that the French text of the Civil Code of 1825, Art. 2623, read: "*La chose est censée litigieuse, dès qu'il y a procès et contestation sur le fonds du droit.*" The English text as it appears in the Codes of 1825 and 1870 reads: "A right is said to be litigious whenever there exists a suit and contestation on the same." "*La chose*" is translated as "the right" instead of "the thing," and the latter part of the article "*sur le fond du droit*" is translated as "on the same" instead of "on the basis of the right." See *Prevost's Heirs v. Johnson*, 9 Mart. (O.S.) 123 (La. 1820).

35. 6 Marcadé, *op. cit. supra* note 20, at 368; 19 Baudry-Lacantinerie, *op. cit. supra* note 20, at 937-940, nos 920-922; Troplong, *op. cit. supra* note 9, at 484-486, n° 986.

36. 24 Laurent, *op. cit. supra* note 14, at 586, n° 594; 11 Beudant, *op. cit. supra* note 8, at 330-331, n° 401. Cf. *Prevost's Heirs v. Johnson*, 9 Mart. (O.S.) 123, 183 (La. 1820): "It seems that a suit brought does not alone suffice—that it is not enough that there should be a petition, that a copy of it and a citation should be served on the defendant—it is necessary there should be an answer—perhaps any plea will not suffice. In the words of the statute, there must be a contestation."

of the plaintiff's asserted right do not make the right litigious.³⁷ Consequently an assignment made after such a defensive pleading would not be within the scope of litigious redemption. On the other hand, there is a contestation on the basis of the right when a denial of liability is pleaded by the defendant. Thus, a plea of payment, a plea of prescription or an attack on the basis of the plaintiff's title constitute contestation on the basis of the right, and a transfer thereafter made is subject to litigious redemption.³⁸ The entry of a judgment by default, although technically a joining of issue (*contestatio litis*), does not render a right litigious.³⁹

If there is a contestation on the basis of the right it should be immaterial whether or not that contestation is well founded. However, this principle seems not to have been considered in the recent case of *Gulf Refining Co. of La. v. Glassell*.⁴⁰ The plaintiff had appealed from the judgment of a trial court sustaining exceptions of no cause of action and no right of action. In the Supreme Court a motion to remand was filed based on the allegation that the plaintiff had transferred its rights in the lease while the appeal was pending and that the transfer was subject to litigious redemption. The court ruled that it should first pass on the exceptions for if they were properly sustained by the trial court there would be no necessity for the defendant to exercise his rights under Article 2652 since the plaintiff would have had nothing to transfer. Since the peremptory exceptions before the court were directed at the basis of plaintiff's asserted rights, the decision in the *Glassell* case was directly contrary to the French authorities⁴¹ and also opposed to the Louisiana jurisprudence which requires a prompt and timely exercise of the litigious redemption.⁴²

After litigation is terminated, litigious redemption is no

37. 19 Baudry-Lacantinerie, op. cit. supra note 20, at 939-940, n° 922; 24 Laurent, op. cit. supra note 14, at 584, n° 592.

38. 19 Baudry-Lacantinerie, op. cit. supra note 20, at 940, n° 922. If the contestation relates merely to the means of execution the right is not litigious: 11 Beudant, op. cit. supra note 8, at 300, n° 401. Resisting a demand for partition is not a contestation on the basis of the right: Troplong, op. cit. supra note 9, at 490, n° 991.

39. 19 Baudry-Lacantinerie, op. cit. supra note 20, at 941, n° 924. See, however, Billiot v. Robinson, 13 La. Ann. 529 (1858). Arts. 357, 358, 359, 360, La. Code of Practice of 1870.

40. 185 La. 143, 168 So. 755 (1936); 185 La. 147, 168 So. 756 (1936).

41. 24 Laurent, op. cit. supra note 14, at 583, n° 590; 19 Baudry-Lacantinerie, op. cit. supra note 20, at 943, n° 929.

42. Cucullu v. Hernandez, 103 U.S. 105, 26 L.Ed. 322 (1880); Leftwich v. Brown, 4 La. Ann. 104 (1849); Salbadore v. Crescent Mutual Insurance Co., 22 La. Ann. 338 (1870); Mohawk Oil Co. v. Layne, 270 Fed. 851 (W.D. La.) 1921.

longer possible. Thus if a suit is ended by a compromise agreement or through a voluntary nonsuit taken by the plaintiff, it seems clear that the right is no longer litigious.⁴³ However, if a judgment has been rendered and an appeal taken the right is still litigious. But if no appeal has been taken, and the delay for appeal has not elapsed—is the right still litigious? No Louisiana cases have been found which deal with this problem. Some of the French authorities take the view that the mere possibility of appeal suffices to make the right litigious. According to this view, a suit continues to be litigious as long as it is possible by appeal to continue the suit.⁴⁴ A more practical solution for Louisiana might be to consider the right litigious during the delay for a suspensive appeal but not thereafter unless an appeal is actually taken. Mere possibility of further review by extraordinary relief should not be considered as continuing the litigious character of the right.⁴⁵

II. PURCHASE OF LITIGIOUS RIGHTS BY COURT OFFICERS—

ARTICLE 2447

The prohibition under pain of nullity found in Article 2447 is directed against the purchase by public officers connected with courts of justice "such as judges, advocates, attorneys, clerks and sheriffs" of litigious rights within the jurisdiction of the tribunal in which they exercise their functions.⁴⁶

The application of Article 2447 has arisen more frequently in cases involving the purchase, by attorneys, of judgments obtained in the lower courts and upon which an appeal to the Supreme

43. 19 Baudry-Lacantinerie, *op. cit. supra* note 20, at 936, n° 919.

44. The contemporary French authorities distinguish between the delay accorded for the exercise of appeal by means of ordinary recourse in which case the litigious character continues and the delays accorded for review by extraordinary means of recourse (*requête civile*) during which delays the right ceases to be litigious. 2 Colin et Capitant, *Cours Élémentaire de Droit Civil Français* (8 ed. 1935) 563, n° 623; 10 Planiol et Ripert, *op. cit. supra* note 20, at 361, n° 319.

45. For example, the mere possibility of review by application for writs of certiorari to review a decision of the Court of Appeal should not be considered as continuing the litigious character of the right.

46. Is the enumeration in Article 2447 exclusive? It seems that the language of the article "such as" means that the enumeration is rather illustrative and that all officers connected with courts of justice would be included within the scope of the prohibition. By interpretation, Article 1597 of the French Civil Code has been extended to include judges of administrative tribunals, judges of commercial tribunals and justices of the peace. *Conseillers* of the Courts of Appeal and of the Court of Cassation, although not specifically mentioned, are likewise included within the scope of the article. 10 Planiol et Ripert, *op. cit. supra* note 20, at 367, 368, n° 326.

Court is pending.⁴⁷ Such judgments are, of course, rights in litigation⁴⁸ even where they are not technically purchased but are given in payment for the attorney's services.⁴⁹ Many of the cases involve the problem of whether the right acquired by the attorney is litigious under the definition of Article 2653 which, as pointed out above, has been erroneously applied for the purposes of Article 2447. Thus, the transfer of a judgment from which a devolutive appeal has been taken is within the prohibition.⁵⁰ Likewise, a Supreme Court judgment upon which a rehearing has been granted⁵¹ and a judgment upon which an action to annul has been brought,⁵² are also considered litigious. No cases have been found considering the nature of the lower court judgments from which no appeal has been taken and in which the time for such appeal has not elapsed.⁵³ On the basis of the French authorities and from other expressions of the Louisiana courts, it appears that until the judgment has become final and definitive, it is classed as a litigious right.⁵⁴ Since a judgment subject to a devolutive appeal is not final it appears that the right is litigious until the time for such appeal has elapsed. From a jurisdictional viewpoint it has been decided⁵⁵ that a lawyer may not purchase a litigious right in another judicial district from that in which he usually exercises his functions since, by virtue of his Supreme Court license, he may practice anywhere in the state. No other Louisiana cases raise the various problems that may revolve

47. Although of course the prohibition is also applicable to rights in litigation which have not gone to judgment in the lower court. *Morris v. Covington*, 2 La. Ann. 259 (1847); *Succession of Powers v. Howcott*, 137 La. 813, 69 So. 198 (1915).

48. *M. & B. Mullen & Co. v. Amas & Roe*, 7 La. Ann. 71 (1852); *Pipes v. Norsworthy*, 25 La. Ann. 557 (1873).

49. *Seagull Gasoline Co. v. Tieuel*, 19 La. App. 642, 141 So. 422 (1932).

50. *Kuck v. Johnson*, 114 La. 781, 38 So. 559 (1905).

51. *State v. Nix*, 135 La. 811, 66 So. 230 (1914).

52. *Buck & Beauchamp v. Blair & Buck*, 36 La. Ann. 16 (1884).

53. If the time for appeal has expired, it would seem that such lower court judgment would thereby become final and definitive. In *Castelluccio v. Cloverland Dairy Products Co.*, 165 La. 606, 115 So. 796 (1928), which involved the inheritance of a cause of action arising out of Art. 2315, La. Civil Code of 1870, Chief Justice O'Niell, in dissenting, pointed out the inconsistency between the treatment here given a lower court judgment obtained under Article 2315 and that given a lower court judgment involving the transfer of a litigious right. In his dissent he stated that lower court judgments regarding litigious rights are not treated as final or definitive as long as there is an appeal pending. This language cannot be taken to mean that a judgment from which no appeal is taken cannot be considered as litigious.

54. *Denton v. Willcox*, 2 La. Ann. 60 (1847); *McMicken v. Ferrin*, 59 U.S. 507, 15 L.Ed. 504 (1855); *Saint v. Martel*, 122 La. 93, 47 So. 413 (1908).

55. *Denny v. Anderson*, 36 La. Ann. 762 (1884).

around the jurisdictional aspects of Article 2447.⁵⁶ It is not necessary that the purchasing attorney be himself involved in the litigation for the prohibition of Article 2447 to apply.⁵⁷ It is, however, necessary that the right purchased by an attorney be the one in litigation. Thus, the purchase by an attorney, who is engaged in the litigation as counsel for one of the parties, of the outstanding title to the property in litigation from a third person not involved in the suit is not prohibited.⁵⁸

Article 2447 is extended even to judicial sales,⁵⁹ although the redemption of litigious rights under Article 2652 has been limited to conventional sales.⁶⁰

It is the transfer which is nullified by the prohibition of Article 2447. The right itself is not affected and if the transfer, which was without legal effect is rescinded, then the person against whom it was transferred no longer has any reason to complain.⁶¹ The nullity of such a transfer is relative rather than absolute and only the person against whom the right thus transferred, when attempted to be enforced by the transferee, may raise the nullity as a defense.⁶² Being only a relative nullity, it

56. The prohibition of Article 2447, La. Civil Code of 1870, extends only to litigious rights within the jurisdiction in which the court officer exercises his functions. By analogy to the interpretation placed on Article 1597 of the French Civil Code, territorial jurisdiction should determine the application of the prohibition. Members of the Supreme Court of Louisiana, therefore, could not purchase any litigious right in Louisiana; Judges of the Courts of Appeal cannot purchase litigious rights that would be within the territorial jurisdiction of the courts subject to their appellate jurisdiction; district judges could not purchase litigious rights within their jurisdiction. Similar rules should be applicable to purchases by sheriffs and clerks. For a full discussion see 19 Baudry-Lacantinerie, *op. cit. supra* note 20, at 256-259, n^o 259-262.

57. *Watterston v. Webb*, 4 La. Ann. 173 (1849).

58. *Evans v. Wilkinson*, 6 Rob. 172 (La. 1843). See also *Consolidated Association v. Comeau*, 3 La. Ann. 552 (1848).

59. *Copley v. Lambeth*, 1 La. Ann. 316 (1846); *Lane & Husband v. Cameron & McNeely*, 36 La. Ann. 773 (1884); *Copley v. Moody*, 2 La. Ann. 487 (1847); *McCarty v. Splane*, 8 La. Ann. 482 (1852).

60. *Early v. Black*, 12 La. 205 (1838); *Succession of Tilghman*, 11 Rob. 124 (La. 1845); *D'Apremont v. Berry*, 6 La. Ann. 464 (1851); *Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co.*, 133 La. 424, 63 So. 96 (1913). These Louisiana cases are all contrary to the French commentators who with practical unanimity take the view that litigious redemption may take place even in judicial sales since the intervention of the judge does not suppress the chances of speculation. See authorities cited in 10 Planiol and Ripert, *op. cit. supra* note 20, at 358, n^o 317, note (4). This view is, however, criticized in 2 Colin et Capitant, *op. cit. supra* note 44, at 565-566, n^o 623.

61. *Illg & Valentino v. Regan*, 166 La. 70, 116 So. 673 (1928).

62. *New Orleans Gas Light Co. v. Webb*, 7 La. Ann. 164 (1852). A majority of the French commentators are in accord to the effect that the nullity is relative. Laurent and Guillouard favor absolute nullity. See 10 Planiol et Ripert, *op. cit. supra* note 20, at 369, n^o 327, note (2), citing authorities.

must be attacked directly⁶³ or raised as a defense against the transferee on appeal, thus preventing the further prosecution of the suit by such transferee.⁶⁴ The transferee himself is not permitted to raise the nullity of the transfer,⁶⁵ nor is an intervenor in the suit.⁶⁶

Contingency Fee Contracts Distinguished

By an act of the Territorial legislature of 1808,⁶⁷ contingency contracts between lawyer and client (whereby the attorney received an interest in the proceeds of the litigation) were made null and void and also grounds for disbarment of the attorney. As to the nullity provision, it was held that the statute was only declaratory and made no alteration in the already existing law.⁶⁸ Because of the penal provision of disbarment, however, the statute was strictly interpreted and not extended to cases not within its letter and its spirit.⁶⁹ It was held inapplicable to a contingency fee contract whereby the attorney was to receive a payment of money if the suit was successful and not an interest in the suit itself.⁷⁰ A distinction was also drawn in the case of collections on a percentage fee on the amount collected, which was held not to be prohibited.⁷¹

Act 115 of 1855 re-enacted most of the provisions of the Act of 1808 but omitted that section which made such contingency fee contracts a ground for disbarment and null and void.⁷² Had there been no other provisions which related to such contracts, this omission would have tacitly legalized them just as it removed

63. *Kuck v. Johnson*, 114 La. 781, 38 So. 559 (1905).

64. *Stafford v. National Fire Ins. Co.*, 164 La. 409, 114 So. 78 (1927).

65. *Swords v. Cortinas*, 4 La. App. 145 (1926).

66. *Gilkeson-Sloss Commission Co. v. Bond & Williams*, 44 La. Ann. 841, 11 So. 220 (1892).

67. Act of March 31, 1808, No. 30, § 4.

68. *Livingston v. Cornell*, 2 Mart. (O.S.) 281 (La. 1812).

69. *Brent v. Reeves*, 3 La. 5 (1831), in which it was held that a transfer of an interest to the property in litigation to an attorney in payment of his services in acquiring a confirmation of title on the property was not prohibited because this service rendered by the attorney was not within the field of his duties as an attorney at law.

70. *Clay v. Ballard*, 9 Rob. 308, 41 Am. Dec. 328 (La. 1844).

71. *Flower v. O'Conner*, 7 La. 198, 207 (1834). There is disagreement among the French commentators on the question of whether the "*pacte de quota litis*" is within the prohibition of nullity under Art. 1597, French Civil Code. 19 Baudry-Lacantinerie, op. cit. supra note 20, at 264-265, n° 268 takes the view that the "*pacte de quota litis*"—although technically not a sale but a mandate is forbidden by Art. 1597, French Civil Code. But see contra, 24 Laurent, op. cit. supra note 14, at 70-71, n° 60.

72. The statute of 1808 was again applied in *Mazureau & Hennen v. Morgan*, 25 La. Ann. 281 (1873), but this case was begun in 1832.

them as a ground for disbarment. But as was pointed out in a case decided under the Act of 1808,⁷³ this statute was merely declaratory of the law as to the nullity of such contracts, which was drawn from the Articles prohibiting the transfer of such rights. Thus, although this statutory prohibition was removed, the law remained the same under the codal provision.

In the application of this provision (Article 2447, Louisiana Revised Civil Code of 1870) the definition of litigious rights as set out in Article 2653 has been used. Thus, such contracts have been held valid and enforceable where they were entered into before the litigation was begun because under that definition this is not then considered the transfer of a litigious right.⁷⁴ In like manner such a contract was upheld where it was entered into in a compromise agreement which ended the suit.⁷⁵ On the other hand, where there was litigation existing at the time of the execution of the contract making the transfer, such a contract was held to be unenforceable.⁷⁶ In such cases, the same distinction has been made as to collections by attorneys⁷⁷ as was made under the Act of 1808.⁷⁸

By Act 124 of 1906 another relevant statutory provision was enacted. This act allows an attorney to acquire an interest in the subject matter of the *suit, proposed suit or claim*, for this payment. It further provides that in such a contract conferring an interest, *it may be stipulated*⁷⁹ that neither attorney nor client shall have the right to settle, release, compromise, discontinue or otherwise dispose of such suit or claim without the consent of the other.⁸⁰

This act has been held not to authorize the purchase of litigious rights by an attorney, but only provides for the acquisition

73. *Livingston v. Cornell*, 2 Mart. (O.S.) 281 (La. 1812).

74. *Succession of Landry*, 116 La. 970, 41 So. 226 (1906). Rendered in 1906 but Act 124 of 1906 was not mentioned. *Taylor v. Bemiss*, 110 U.S. 42, 3 S.Ct. 441 (1884); *Semmes v. Whitney*, 50 Fed. 666 (C.C.E.D. La. 1892) are federal cases arising out of Louisiana in which such contracts were held valid but without any discussion of Louisiana law.

75. *La Société de Bienfaisance v. Morris*, Man. Unrep. Cas. 1 (La. 1877).

76. *Buck & Beauchamp v. Blair & Buck*, 36 La. Ann. 16 (1884).

77. *Martinez v. Succession of Vives*, 32 La. Ann. 305 (1880).

78. *Flower v. O'Conner*, 7 La. 198 (1834).

79. *Succession of Carbajal*, 139 La. 481, 71 So. 774 (1916) requires that there be an express stipulation in the contract to this effect in order to establish this right.

80. This Act also provides a privilege of first rank for the lawyer for payment of his professional fees on the judgments or property recovered in the litigations. La. Act 124 of 1906 [Dart's Stats. (1932) § 455].

of an interest by the attorney in payment for professional fees.⁸¹ As the definition of litigious rights contained in Article 2653, Louisiana Revised Civil Code, has been applied to cases involving Article 2447, Louisiana Revised Civil Code, where there was no litigation at the time of the transfer, this has not been considered the transfer of a litigious right and Act 124 of 1906 was not invoked as authorizing such a transfer.⁸²

Since the passage of Act 124 of 1906 there has not been a case involving a contract for such an interest which was entered into after the litigation was begun. Where entered into before the litigation it has not been treated as the transfer of a litigious right. In the light of the view already advanced herein as to the proper solution of the conflict as to the definitions of the term litigious right in the articles of the Code, this theory is in error. But the same result can be reached without abusing the definition provisions by simply looking to the terms of Act 124 of 1906. It provides for the transfer of an interest in the *suit, proposed suit or claim*. This language clearly takes the subject of contingency fee contracts out of the scope of the codal provisions in regard to litigious rights. It covers the case of such a contract executed after as well as before the commencement of the litigation. Such transfers are clearly within the definition of litigious rights under Article 3556 (18), but Act 124 of 1906 specifically takes this particular type of transfer out of the application of Article 2447.⁸³

[To be concluded]

MARLIN RISINGER*

81. *State v. Nix*, 135 La. 811, 815, 66 So. 230, 232 (1914). "Act 124 of 1906 goes no further than to permit attorneys to acquire, by *written contract* signed by the client, *as their fee*, an interest in the subject-matter of the suit."

82. *McClung v. Atlas Oil Co.*, 148 La. 674, 87 So. 515 (1921); *Gautreaux v. Harang*, 190 La. 1060, 183 So. 349 (1938).

83. The Code of Ethics of the American Bar Association, Canon 13 provides: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a Court as to its reasonableness." This should be carefully compared with Canon 10: "The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting." For a discussion of these two provisions see Radin, *supra* note 10, at 48, 74-75.

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