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THE TRANSFER OF LITIGIOUS RIGHTS
IN LOUISIANA CIVIL LAW *

III. THE EXERCISE OF LITIGIOUS REDEMPTION—

ARTICLE 2652

Article 2652 of the Louisiana Civil Code authorizes the person against whom a litigious right has been transferred to obtain a release therefrom by paying to the transferee the real price of the transfer, together with interest from its date.¹ A transfer which is subject to litigious redemption may also come under the prohibition of nullity found in Article 2447 when the litigious right is transferred to a public officer connected with a court.² In this latter instance the person against whom the litigious right is transferred has the option either to invoke the nullity of the codal provision or to exercise the litigious redemption.³ It has been previously pointed out that neither Article 2447 nor Article 2652 is applicable unless a "litigious right" is transferred and consideration has been given to the problem of determining the litigious character of the right.⁴ This portion of the comment will be devoted to a discussion of other problems incident to the application of Article 2652, assuming, first of all, that the right transferred has the necessary litigious character under the requisites previously discussed.⁵

Donations—Gratuitous Transfers

In order for the transfer of a litigious right to be subject to the provisions of Article 2652, it is necessary as a general rule that

284, 61 N.W. 971, 33 L.R.A. 492 (1895); *Beck v. Pennsylvania R. Co.*, 63 N.J. Law 232, 43 Atl. 908, 76 Am. St. Rep. 211 (1899); *Colaizzi v. Pennsylvania R. Co.*, 208 N.Y. 275, 101 N.E. 859 (1913); *Johnson v. Philadelphia & R. R. Co.*, 163 Pa. St. Rep. 127, 29 Atl. 854 (1894).

* This is the second and concluding installment of the present comment, the first part having appeared in the March 1939 issue, 1 LOUISIANA LAW REVIEW 593-607. For an excellent recent contribution to the legal literature on the same subject see Comment, *The Sale of a Litigious Right* (1939) 13 *Tulane L. Rev.* 448-460.

1. Art. 2652, La. Civil Code of 1870. See p. 593, *supra*.

2. Art. 2447, La. Civil Code of 1870. See discussion at pp. 602 et seq., *supra*.

3. 11 *Beudant, Cours de Droit Civil Français* (2 ed. 1938) 332, n° 402, note 2. In most cases it will be to the advantage of the party against whom the transfer has been made to exercise the litigious redemption of Article 2652 since invoking the nullity of Article 2447 does not terminate the litigation. *Ilig and Valentino v. Regan*, 166 La. 70, 116 So. 673 (1928).

4. See discussion at pp. 595-602, *supra*.

5. The principal inquiry is whether a contestation on the basis of the asserted right (*contestation sur le fond du droit*) existed at the time of the transfer. See p. 600, *supra*.

it be made in consideration of a price.⁶ From this it follows that only sales or onerous transfers (in which the equivalent of a price can be found) are contemplated. The donation of a right in litigation is not, therefore, subject to redemption.⁷ In fact, a gratuitous transfer is not only outside of the spirit of Article 2652 but furthermore the redemption is technically impossible in such a case for lack of a price or monetary consideration to be paid to the transferee.⁸

While it is unanimously admitted that the motive of Article 2652 (i.e., the suppression of the speculative purchase of litigation) does not apply to the case of a donation, difficulties arise when a litigious right is transferred by a donation imposing certain charges on the donee.⁹ According to the French commentators, the courts in such a situation must ascertain the intention of the transferor from the nature and extent of the charge imposed and from the circumstances of the particular case.¹⁰ If this objective test shows that the dominant intention was to make a true donation, the redemption of the litigious right should not be permitted despite the imposition of charges upon the donee.¹¹ On the other hand, if the onerous character of the transfer predominates, the redemption should be admitted under Article 2652.¹²

6. For example, in the case of the pact "*de quota litis*" (i.e., an agency coupled with an interest if suit by the agent is successful) litigious redemption is denied for lack of a "price." 19 Baudry-Lacantinerie, *Traité Théorique et Pratique de Droit Civil* (3 ed. 1908) 947, n° 935. But see contra: 2 Guilouard, *Traité de la Vente et de l'Échange* (2 ed. 1891) 433-434, n° 892.

7. 10 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1932) 358, n° 317; 5 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1907) 247, § 359*quater*, note 14; 19 Baudry-Lacantinerie, *op. cit.* supra note 6, at 944, n° 931: "*Il n'est pas admissible qu'on lui enlève le bénéfice de la cession, sans aucune restitution . . . le donataire d'un droit litigieux n'est pas l'acheteur de procès dont on a voulu enrayer la spéculation. Les motifs qui ont fait établir le retrait litigieux ne lui sont pas applicables.*"

"It is inadmissible that the benefit of the transfer be taken from him without any restitution . . . the donee of a litigious right is not the purchaser of lawsuits whose speculation it is desired to arrest. The motives which caused the establishment of litigious redemption are not applicable to him." (Translation supplied.)

8. *Independent Ice & Distilled Water Mfg. Co. v. Anderson*, 106 La. 95, 30 So. 272 (1901).

9. Cf. Arts. 1523, 1524, 1525, 1526, 1530, La. Civil Code of 1870.

10. 5 Aubry et Rau, *op. cit.* supra note 7, at 247, § 359*quater*, note 14; 10 Planiol et Ripert, *op. cit.* supra note 7, at 359, n° 317. Cf. Troplong, *Le Droit Civil Expliqué, de la Vente*, II (5 ed. 1856) 505-508, n° 1009.

11. 19 Baudry-Lacantinerie, *op. cit.* supra note 6, at 944-945, n° 932.

12. 19 Baudry-Lacantinerie, *op. cit.* supra note 6, at 945, n° 932, rejects the possibility of splitting the transaction into two separate contracts—one gratuitous and the other onerous—and treating each one separately. Such an arbitrary division would be contrary to the intention of the parties, and where only a single agreement was made the contract must be identified as one unit, either as gratuitous or onerous.

If a price has been paid secretly, this is a species of fraud and the litigious redemption may be exercised.¹³

Exchange

There is a sharp conflict in the French commentators on the question of whether litigious redemption can be effected when the transfer is by means of an exchange rather than a sale. A number of the French writers are inclined to extend the rule to cover such a situation.¹⁴ These authorities reason that Article 1707 of the Code Napoleon broadly declares all of the provisions relative to sale applicable to the contract of exchange and consequently the litigious redemption of Article 1699 should apply to an exchange. Under this view, since there is no monetary price, the redeptor may invoke Article 1699 by reimbursing the transferee the value in money of the thing given by the transferee to the transferor. A respectable group of the French commentators, however, express the contrary opinion, taking the view that the faculty of exercising the redemption ceases by virtue of the impossibility of reimbursing to the transferee the same thing ceded to the transferor.¹⁵

Only one decision appears to have raised this problem under the provisions of the Louisiana Civil Code, and here the court did not consider the point because on other grounds it refused to order the remand of the case in which this question of litigious redemption would have had to be considered.¹⁶ In the solution of this open question it is hard to escape the logical reasoning advanced by those French commentators who would permit litigious redemption in a case of exchange. A construction of the Louisiana codal provisions should lead to a similar result.¹⁷ Moreover,

13. Troplong, *op. cit. supra* note 10, at 504, n° 1009.

14. 5 Aubry et Rau, *op. cit. supra* note 7, at 253-254, § 359*quater*, note 32*ter*; Troplong, *op. cit. supra* note 10, at 498, n° 1002; 6 Marcadé, *Explication du Code Civil* (7 ed. 1875) 369.

15. 2 Colin et Capitant, *Cours Élémentaire de Droit Civil Français* (8 ed. 1935) 566, n° 623; 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 946, n° 933; 24 Laurent, *Principes de Droit Civil Français* (1877) 575, n° 582; 2 Guillouard, *op. cit. supra* note 6, at 429, 430, n° 838.

16. *Gulf Refining Co. v. Glassell*, 185 La. 143, 168 So. 755 (1936). The question was squarely presented by the facts and was fully discussed in the briefs filed in support of the motion to remand. The court's refusal to remand the case followed by affirmance of the lower court's judgment, *Gulf Refining Co. v. Glassell*, 186 La. 190, 171 So. 846 (1936), made it unnecessary for the court to consider the issue. The *Glassell* case also raised the problem of the applicability of Article 2652 to a universal transfer made pursuant to a corporate reorganization.

17. Art. 2667, La. Civil Code of 1870: "All the other provisions relative to the contract of sale apply to the contract of exchange. And in this last contract each of the parties is individually considered both as vendor and vendee."

if the transfer of a litigious right by exchange is to be excluded from the application of Article 2652, the necessary result is to add another exception to the limited enumeration of Article 2654. Since a contrary interpretation would open an easy avenue for avoiding the operation of Article 2652, the view which includes exchange in the category of transfers subject to litigious redemption should be adopted when this question is presented to the Louisiana courts for decision.

Public and Judicial Sales

Article 2652 does not, according to its terms, make any distinction between private sales and public sales and consequently suggests the problem of whether litigious redemption is admitted in judicial sales or in sales at public auction.¹⁸ The French jurisprudence now holds that a transfer made by means of a judicial sale gives rise to the litigious redemption.¹⁹ This view is, with only a slight exception,²⁰ supported by the commentators who consider that Article 1699 of the French Civil Code covers all public sales (i.e., sales at public auction and judicial sales) as well as private sales.²¹ The Louisiana jurisprudence is to the contrary, holding that Article 2652 has no application to judicial sales.²² The Louisiana cases do not directly raise the question of litigious redemption as applied to a sale at public auction not pursuant to an order of court. Language used in the Louisiana cases limiting the application of Article 2652 to "conventional sales" should be construed as including sales at public auction other than judicial sales within the scope of the litigious redemption. While the Louisiana cases do not appear to have given any adequate consideration to the French authorities dealing with the problem under discussion, there is much that may be said in favor of the

18. See Arts. 2601-2625, La. Civil Code of 1870.

19. Req. 14 juillet 1868, Dalloz 1871. 5. 342, Sirey 1869. 1. 28; Req. 30 juin 1880, Dalloz 1881. 1. 52, Sirey 1881. 1. 59; Req. 16 janvier 1883, Dalloz 1883. 1. 293, Sirey 85. 1. 111; Paris, 2 février 886, Sirey 1868. 2. 16.

20. See criticism in 2 Colin et Capitant, op. cit. supra note 15, at 565, 566, n° 623.

21. 10 Planiol et Ripert, op. cit. supra note 7, at 358, n° 317: ". . . *l'intervention du juge ne supprime pas les chances de spéculation*" (the intervention of the judge does not eliminate the possibility of speculation). 19 Baudry-Lacantinerie, op. cit. supra note 6, at 947-948, n° 936; 5 Aubry et Rau, op. cit. supra note 7, at 247, § 359*quater*, note 14; 2 Guillouard, op. cit. supra note 6, at 431-433, n° 891. Baudry-Lacantinerie states that if litigious rights are sold at public auction with non-litigious rights the price shall be apportioned and the redemption admitted; see discussion at p. 823, *infra*.

22. Early v. Black, 12 La. 205 (1838); Succession of Tilghman, 11 Rob. 124 (La. 1845); D'Aprémont 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).

present Louisiana rule. In judicial sales the possibility of a redemption under Article 2652 might so seriously discourage bidders as to hamper a court in effecting a judicial sale that might be necessary for the orderly administration of justice.²³ On the other hand, in excepting even one form of public sale (judicial sale) from the application of Article 2652, the court in reality is adding to the enumerated exclusions listed in Article 2654.²⁴

Partial Transfer of a Litigious Right

A partial transfer of a litigious right may take place either when the sole owner of the right transfers a portion thereof or when one of several co-owners transfers his entire partial interest in the thing in litigation. In either case, the exercise of rights under Article 2652 will not operate to end the litigation, which is one of the principal objects of litigious redemption.²⁵ From this premise, it has been argued that the exercise of the redemption is not possible in the situation in which there is a partial transfer of a litigious right. In *Smith v. Cook*,²⁶ where a portion of the thing in litigation was transferred during the pendency of the suit, the court rejected this argument and permitted the defendant to avail himself of Article 2652. It was pointed out that any other decision would make it comparatively easy for a transferor to avoid the operation of the rule simply by retaining a small interest in the thing in litigation. While the redemption in this particular situation may not have the effect of ending the entire suit it does *pro tanto* operate to terminate the asserted right inso-

23. See Arts. 647, 690, La. Code of Practice of 1870.

24. Litigious redemption can also be exercised when the transfer is by means of compromise having for its purpose the ending of litigation, 10 Planiol et Ripert, op. cit. supra note 7, at 358, n° 317.

25. Cf. 19 Baudry-Lacantinerie, op. cit. supra note 6, at 964, n° 961: "*J'ai une créance litigieuse contre Paul; je meurs laissant deux héritiers, Primus et Secundus. Primus cède à Secundus sa part dans la créance litigieuse. Paul ne pourra pas exercer le retrait. . . le but du retrait, qui est l'extinction du procès, ne peut être atteint dans l'espèce proposée; car si le retrait était possible, il ne pourrait être exercé que pour la portion de créance qui a fait l'objet de la cession; Secundus conserverait donc l'autre portion qui lui appartient de son chef, et le procès continuerait pour cette portion.*"

"I have a litigious claim against Paul; I die leaving two heirs, Primus and Secundus. Primus transfers to Secundus his share of the litigious claim. Paul will not be able to exercise the redemption. . . the purpose of redemption, which is the extinction of litigation, cannot be attained in the case proposed, because, if redemption were possible, it could only be exercised for the portion of the claim which was the object of the transfer; Secundus would thus retain the other portion which belongs to him in his own right, and the suit would continue for that portion." (Translation supplied.)

26. 189 La. 632, 180 So. 469 (1938).

far as it pertains to the portion or interest which is the subject matter of the partial transfer.²⁷

Transfer of a Litigious Right Confusedly with Non-Litigious Rights

A similar problem of interest is the question of the applicability of Article 2652 to a situation in which a right in litigation is sold with other property or rights not litigious in character for a single and lump price. Can litigious redemption be invoked in this situation? No Louisiana authority has been found on this problem although the question was raised in one case.²⁸ The reasoning used in *Smith v. Cook* as to a partial transfer is likewise applicable to this situation; that is, the redelector has substantive rights under Article 2652 which should be protected against possible circumventing devices. Moreover, the French commentators express the opinion that redemption of the litigious right should be admitted in this situation and that an apportionment of the price must be made in order to determine the amount of reimbursement due to the transferee.²⁹ It is submitted that a similar result should be permitted under our codal provision and this seems to be a logical implication from *Smith v. Cook*.

Miscellaneous Problems

It will be noted that Article 2652 is found in the chapter of the Louisiana Civil Code dealing with the assignment or transfer of credits or other incorporeal rights.³⁰ This suggests the problem of whether Article 2652 is limited in its application to the transfer of a litigious right viewed solely in the sense of incorporeal property, or whether it also contemplates the transfer of a corporeal thing, the ownership of which is litigious.³¹ The French authorities unanimously agree that the corresponding provisions of the French Civil Code³² include not only the transfer of all kinds of litigious "rights"—movable, immovable, personal or real

27. 189 La. at 643-644, 180 So. at 473. See Symposium, The Work of the Louisiana Supreme Court for the 1937-1938 Term (1939) 1 LOUISIANA LAW REVIEW 314, 348.

28. Gulf Refining Co. v. Glassell, 185 La. 143, 168 So. 755 (1936).

29. 10 Planiol et Ripert, op. cit. supra note 7, at 364, n° 321; 19 Baudry-Lacantinerie, op. cit. supra note 6, at 948, n° 936.

30. La. Civil Code of 1870, Title VII, Chapter 12, "Of the Assignment or Transfer of Credits and Other Incorporeal Rights."

31. For example, if A is suing B in a petitory action claiming ownership of immovable property, does it make any difference if A transfers to X the ownership of the property claimed rather than transferring to him his "right" in the pending litigation with B? Should litigious redemption be admitted in both cases?

32. Arts. 1699, 1700, French Civil Code.

—but that the provisions apply equally where an immovable subject to litigation is sold, even though there may have been no express mention of the transfer of a “right.”³³ The Louisiana jurisprudence is in accord with this view.³⁴

The French authorities are divided on the availability of litigious redemption where a defendant in possession of an immovable transfers or sells it during the pendency of the plaintiff's action in revendication. One group of the commentators deny litigious redemption in this case.³⁵ Baudry-Lacantinerie argues that since the defendant in possession has sold an immovable which he has the power to deliver, a litigious “right” has not been transferred and, therefore, he concludes that the plaintiff in the revendication action cannot acquire the immovable by means of litigious redemption.³⁶ This viewpoint finds support in the French jurisprudence³⁷ but is severely criticized by a number of the commentators who argue that Article 1699 of the Code Napoleon makes no distinction between the transfer of a litigious right by the plaintiff or defendant and that, since the pendency of the ac-

33. 10 Planiol et Ripert, *op. cit. supra* note 7, at 359, n° 318; 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 948, n° 937; 2 Guillouard, *op. cit. supra* note 6, at 434-435, n° 893.

34. Litigious redemption has been admitted in the following cases: Langston v. Shaw, 147 La. 644, 85 So. 624 (1920) (transfer of immovable property); Smith v. Cook, 189 La. 631, 180 So. 469 (1938) (transfer of mineral rights and immovable property); Spears v. Jackson, 30 La. Ann. 523 (1878) (transfer of mortgage note). Redemption has been sought in many cases involving the transfer of a variety of rights corporeal and incorporeal, and although the provisions of Article 2652 have been deemed applicable the redemption was denied on the ground that the right was not litigious or that the redemption was not timely exercised. See Marshall v. McCrea, 2 La. Ann. 79 (1847); Billiot v. Robinson, 13 La. Ann. 529 (1858); Bernheim v. Pessou, 143 La. 609, 79 So. 23 (1918). See also Gilkerson-Sloss Commission Co. v. Bond, 44 La. Ann. 841, 11 So. 220 (1892); Independent Ice & Distilled Water Mfg. Co. v. Anderson, 106 La. 95, 30 So. 272 (1901); Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co., 133 La. 424, 63 So. 96 (1913).

35. 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 949-951, n° 938; 10 Huc, *Commentaire Théorique et Pratique du Code Civil* (1897) 320-322, n° 238.

36. 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 950, 951, n° 938, argues that litigious redemption is for the purpose of letting a person “get himself released” from the claim in litigation. With regard to the right in litigation, the redemptor's role is a passive one as where the transfer is made by a plaintiff in revendication and redemption is exercised by the defendant. Thus where a complete transfer of the property is made by the defendant in possession, there is nothing from which the plaintiff is to “get himself released” since no demand has ever been on him—he was the one who started the litigation. However, where suit is instituted to have a debt declared discharged and the defendant transfers his claim, litigious redemption may be exercised by the plaintiff.

37. Req. 22 juillet 1851, Dalloz 1851. 1. 265, Sirey 1851. 1. 567; Alger, 20 janvier 1866, Dalloz 1868. 1. 374, Sirey 1868. 1. 438; Req. 27 janvier 1931, Dalloz 1931. 97.

tion operates to make the ownership litigious, the redemption should be permitted.³⁸

There is no direct Louisiana authority discussing the effect of a transfer by a defendant in possession and the question may be regarded as an open one.³⁹ However, it must be recognized that, if Article 2652 is admitted to cover the sale of an immovable in litigation as well as a "right" in litigation, it is difficult to exclude the application of litigious redemption whether the sale be by a claimant plaintiff or by a defendant in possession. This is possibly the broad implication to be drawn from *Langston v. Shaw*.⁴⁰

Conditions to the Exercise of Litigious Redemption

Reimbursement. In order to permit the exercise of litigious redemption the Louisiana codal provision requires reimbursement to the transferee of "the real price of the transfer, together with interest from its date."⁴¹ If the price mentioned in the sale is not the "real price" but has, through simulation, been augmented to make litigious redemption more difficult, this is a species of fraud which may be established by parol evidence since the article re-

38. 10 Planiol et Ripert, op. cit. supra note 7, at 359, n° 318: "*En ce qui concerne le droit de propriété, la jurisprudence paraît exiger, pour l'exercice du retrait, que le cédant ne soit pas, au jour de la cession, en possession du bien sur lequel porte le droit cédé. Cette solution doit être critiquée; si le cédant est un possesseur poursuivi en revendication par un tiers, pourquoi le tiers ne pourrait-il pas exercer le retrait contre le cessionnaire? Le Code a parlé de retrait des droits litigieux et non pas des créances litigieuses.*"

"Concerning the right of ownership, the jurisprudence apparently exacts, for the exercise of redemption, that the transferor on the day of the transfer be not in possession of the property to which the ceded right appertains. This solution must be criticized; if the transferor is a possessor pursued in an action in revendication by a third person, why cannot this third person exercise the redemption against the transferee? The Code speaks of redemption of litigious rights and not of litigious credits." (Translation supplied.)

See also 2 Guillouard, op. cit. supra note 6, at 437, n° 893.

39. The Louisiana cases have not discussed the effect of the defendant's possession. In *Langston v. Shaw*, 147 La. 644, 85 So. 624 (1920), it was held that, since Articles 2652 and 2653 make no distinction between the plaintiff and defendant, the plaintiff was entitled to exercise the litigious redemption under Article 2652. The facts of the case seem to indicate that the defendant transferor was in possession of the property transferred but no consideration was given to that fact by the court.

Query: When an immovable is transferred by a defendant pending litigation, does the failure of the plaintiff to file a notice of lis pendens under La. Act 22 of 1904 affect in any manner the plaintiff's right to litigious redemption? Cf. 19 Baudry-Lancantinerie, op. cit. supra note 6, at 962, n° 957.

40. 147 La. 644, 646, 85 So. 624, 625 (1920): "The articles of the Code, dealing with the purchase of a litigious right, do not seem to be confined to either side of a lawsuit."

41. Art. 2652, La. Civil Code of 1870.

quires only reimbursement of the "real price."⁴² If a "real price" larger than that set forth in an act of sale is established by a counter-letter, the price named in the act of sale, rather than the price fixed in the counter-letter will control as the party exercising the redemption is considered a "third person" against whom the counter-letter cannot have effect.⁴³

If a transferee of the litigious right has resold the right for a different price than that of the original transfer, there is a conflict in the French authorities regarding which price is to be reimbursed. According to one viewpoint, the second transferee cannot acquire greater rights than his transferor and the redemption may be effected upon payment of the price of the first transfer.⁴⁴ On the other hand, some commentators consider that, since full reimbursement is a condition of litigious redemption, repayment must be made of the actual price paid by the second transferee in order that he sustain no loss.⁴⁵

Interest on the price of the transfer must also be reimbursed to the transferee under the Louisiana article.⁴⁶ The corresponding provision of the French Civil Code specifically provides that interest is to be computed from the day on which the transferee has paid the price.⁴⁷ While our Article 2652 indicates that the interest is to be computed from the *date of the transfer*,⁴⁸ it is sub-

42. 11 Beudant, *op. cit. supra* note 3, at 333, n° 403; 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 953, 954, n° 943; 10 Planiol et Ripert, *op. cit. supra* note 7, at 364, n° 321(1).

43. 11 Beudant, *op. cit. supra* note 3, at 333, n° 403. Cf. Art. 2239, La. Civil Code of 1870, as amended by La. Act 5 of 1884.

44. 2 Guillouard, *op. cit. supra* note 6, at 448-450, n° 903.

45. 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 955, n° 945; 10 Planiol et Ripert, *op. cit. supra* note 7, at 364, n° 321(1).

46. Art. 2652, La. Civil Code of 1870.

47. French Civil Code, Art. 1699: "*Celui contre lequel on a cédé un droit litigieux peut s'en faire tenir quitte par le cessionnaire, en lui remboursant le prix réel de la cession avec les frais et loyaux coûts, et avec les intérêts à compter du jour où le cessionnaire a payé le prix de la cession à lui faite.*"

Art. 1699: "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 the expenses and fair costs and with interest to be calculated from the time that the transferee paid the price of the transfer made to him." (Translation supplied.)

Cf. 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 955-956, n° 947.

48. The Civil Codes of 1808, 1825 and 1870 have all differed from the phraseology of Art. 1699, French Civil Code, in this respect. See La. Civil Code of 1808, pp. 368, 369, 3. 7. 130; Art. 2622, La. Civil Code of 1825; and Art. 2652, La. Civil Code of 1870. "Interest from its date" as used in the Louisiana article may, however, be given the construction of referring to the "price" rather than the "transfer," and this interpretation would be in harmony with the French authorities.

In the case of *Spears v. Jackson*, 30 La. Ann. 523 (1878), the sale was obviously on a cash basis, and therefore this decision is not an obstacle to the above suggestion. See notes 56, 64, *infra*.

mitted that this article should be construed in harmony with the French authorities so as to allow interest only from the date on which the price has been paid and not from the date of the transfer when there has been a sale with a term for payment.⁴⁹ Interest, where payable, would be computed at the legal rate.⁵⁰

It should be observed that the French Civil Code, in addition to reimbursement of the price and interest, requires the redeemptor to pay to the transferee "expenses and fair costs."⁵¹ "Expenses" means the expenses of the transfer contract in the sense of Article 1593 of the French Civil Code, and does not include the transferee's loss of profit.⁵² The "costs" to be reimbursed are those incident to the conduct of the pending litigation from which the redemption is effected.⁵³ The Louisiana codal provision is silent on the reimbursement of "expenses" and "costs," but the practice has been to order the reimbursement of costs as a condition to the exercise of the redemption.⁵⁴ It is very probable that the expenses of the sale should also be paid by the redeemptor.⁵⁵

Timely Exercise of the Redemption. The Louisiana jurisprudence construing Article 2652 has adopted a strict view requiring the redeemptor to act with diligence in exercising the redemption. Thus it is well settled that a person entitled to invoke litigious redemption may not fight the case on its merits until it is apparent that the case is lost and, at the last moment, exercise the redemption.⁵⁶ Some of the French commentators indi-

49. Since the redeemptor assumes the arrangement of the transferee, he must make payment to the transferor (instead of to the transferee) and he can take advantage of the term granted for payment. However, he must protect the transferee and present adequate surety against any loss that might be incurred by his non-payment. 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 954, n° 944. See also 10 Planiol et Ripert, *op. cit. supra* note 7, at 364, n° 321.

50. Art. 2924, La. Civil Code of 1870.

51. "*Les frais et loyaux coûts.*" Art. 1699, French Civil Code.

52. 11 Beudant, *op. cit. supra* note 3, at 333, n° 403; 2 Guillouard, *op. cit. supra* note 6, at 451, n° 906. Cf. the corresponding provision of Art. 2466, La. Civil Code of 1870: "The expenses of the act or other incidental costs of sale are chargeable to the buyer, unless some agreement be made to the contrary."

53. 2 Planiol, *Traité Élémentaire de Droit Civil* (11 ed. 1937) 604, n° 1655; 2 Guillouard, *op. cit. supra* note 6, at 451, n° 906; 10 Planiol et Ripert, *op. cit. supra* note 7, at 364, n° 321(4).

54. In *Spears v. Jackson*, 30 La. Ann. 523 (1878), it was held that the transferee could recover the price paid, legal interest from the date of the transfer and costs up to the date on which the redeemptor filed his answer urging the plea of litigious redemption.

55. The expenses would apparently be those for which the transferee as a buyer had been responsible under Art. 2466, La. Civil Code of 1870.

56. *Leftwich v. Brown*, 4 La. Ann. 104 (1849); *Rhodes v. Hooper*, 6 La. Ann. 355 (1851); *Salvadore v. Crescent Mutual Ins. Co.*, 22 La. Ann. 338 (1870); *Evans v. De L'Isle*, 24 La. Ann. 248 (1872); *Cucullo v. Hernandez*, 103 U.S. 150,

cate that the redemption may be exercised at any time before judgment and that it may be invoked even on the eve of the adjudication that will terminate the litigation.⁵⁷ The stricter Louisiana rule, which requires prompt and timely exercise of the redemption, seems preferable. Although, as a general rule, redemption must be exercised before the termination of the litigation, an exception must be recognized when the transferee has kept the transfer a secret or off the records for the purpose of avoiding redemption.⁵⁸

Manner of Exercising Litigious Redemption. No particular formality is required in order to exercise litigious redemption.⁵⁹ When the transfer is effected while the suit is pending, the redeemer may usually raise the issue by motion setting forth the facts of the transfer, coupled with a prayer to be relieved under Article 2652.⁶⁰ The issue may even be raised in the defendant's answer.⁶¹ A real tender, while not required, may be made, and a tender made in open court coupled with a prayer for redemption will stop the running of interest and subsequent costs.⁶² If the transfer is effected subsequent to judgment, the redemption may be exercised, during the delays for appeal, by appropriate motion in the lower court. But if an appeal is already pending, it is necessary to remand the case, upon simple motion of the party in

26 L.Ed. 322 (1880); Troplong, *op. cit. supra* note 10, at 494-495, n° 999. See also *Marshall v. McCrea*, 2 La. Ann. 79 (1847).

57. 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 943, n° 930. Cf. 6 Marcadé, *op. cit. supra* note 14, at 370.

58. 10 Planiol et Ripert, *op. cit. supra* note 7, at 363, n° 321; 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 943, 944, n° 930; 6 Marcadé, *op. cit. supra* note 14, at 370-371.

59. 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 951, n° 939; 10 Planiol et Ripert, *op. cit. supra* note 7, at 364, n° 321(4). But the action cannot be exercised collaterally as by intervention or third opposition, a direct civil action being necessary. *Gilkerson-Sloss Commission Co. v. Bond*, 44 La. Ann. 841, 845, 11 So. 220, 221 (1892).

60. *Lavigne v. Louisiana Ry. & Navigation Co.*, 12 La. App. 275, 124 So. 609 (1929). See also *Marshall v. McCrea*, 2 La. Ann. 79 (1847).

61. *Spears v. Jackson*, 30 La. Ann. 523 (1878). See also *Sanders v. Ditch*, 110 La. 883, 34 So. 860 (1903), in which the pleadings set forth in the answer were dealt with as an exception.

62. See Arts. 166, 404, 415-417, La. Code of Practice of 1870. In *Spears v. Jackson*, 30 La. Ann. 523, 528 (1878), the court said: "Scott's administrator [Jackson] was entitled to get himself released by paying the real price of the transfer, as provided by article 2652 of the Code; and if he had made a real tender of the amount, with interest and costs up to the date of the tender, and had deposited the money, subject to the order of King, he would have been discharged from all liability. Not having done this, the intervenor [King] is entitled to recover the price paid by him for the claim, with legal interest from the date of the transfer, and the costs up to the date of the filing of Jackson's answer setting up the plea of litigious right, as decided by the district court." See also *Billiot v. Robinson*, 13 La. Ann. 529, 536 (1853).

interest, for appropriate proceedings designed to effect the redemption.⁶³ Litigious redemption may be effected by voluntary agreement between the transferor and transferee, and such an amicable agreement will terminate the suit under the conditions of Article 2652.⁶⁴

Legal Effects of Redemption

According to the commentators, litigious redemption effects a retroactive substitution of the redemptor for the transferee.⁶⁵ The redemptor is considered as having been the initial purchaser of the litigious right rather than a transferee of the right. Since in legal theory the original transferee is considered as never having had any rights, the commentators express the view that all rights created by or against the transferee in the interim between the sale of a litigious right and the date of its redemption are considered as non-existent. Thus a seizure of the right or a mortgage will be without effect against the redemptor.⁶⁶ A similar result would follow with regard to any real right established by the original transferee.⁶⁷ The redemption does not operate as a novation and, accordingly, has no effect upon the relationship between the transferor and the transferee.⁶⁸ If the price has not been paid at the time of redemption the transferor may still exact payment from the transferee,⁶⁹ and there is also authority supporting a direct action by the transferor against the redemptor in this situation.⁷⁰ Finally, the transferee against whom the redemption is exercised has no action against the transferor for the damage sustained as a result of the redemption in the absence of a special express warranty applicable to litigious redemption.⁷¹

63. See Art. 906, La. Code of Practice of 1870; *Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co.*, 133 La. 423, 63 So. 96 (1913); *Langston v. Shaw*, 174 La. 644, 85 So. 624 (1920); *Smith v. Cook*, 189 La. 631, 180 So. 649 (1938). Cf. *Gulf Refining Co. v. Glassell*, 185 La. 143, 168 So. 755 (1936), where the Supreme Court refused to remand prior to passing upon the trial court's action in sustaining an exception of no cause of action. For a criticism of the holding of this case, see Comment (1939) 1 *LOUISIANA LAW REVIEW* 593, 601.

64. See 19 *Baudry-Lacantinerie*, op. cit. supra note 6, at 951, n° 939.

65. 10 *Planiol et Ripert*, op. cit. supra note 7, at 365, n° 322; 11 *Beudant*, op. cit. supra note 3, at 334, n° 404; 19 *Baudry-Lacantinerie*, op. cit. supra note 6, at 959-960, n° 953.

66. 10 *Planiol et Ripert*, op. cit. supra note 7, at 365, n° 322.

67. 19 *Baudry-Lacantinerie*, op. cit. supra note 6, at 960, n° 953; 11 *Beudant*, op. cit. supra note 3, at 334, n° 404; 2 *Colin et Capitant*, op. cit. supra note 15, at 567, n° 625.

68. 19 *Baudry-Lacantinerie*, op. cit. supra note 6, at 960-961, n° 954.

69. 11 *Beudant*, op. cit. supra note 3, at 335, n° 405.

70. 10 *Planiol et Ripert*, op. cit. supra note 7, at 366, n° 322; 2 *Colin et Capitant*, op. cit. supra note 15, at 567-568, n° 625.

71. 10 *Planiol et Ripert*, op. cit. supra note 7, at 365, n° 322; 19 *Baudry-Lacantinerie*, op. cit. supra note 6, at 961, n° 955, suggests that there might

Transfers Excepted from Litigious Redemption

Article 2654 recognizes three exceptions to the application of litigious redemption. First, "when the transfer has been made to a coheir or to the coproprietor of the right." This exception is founded upon a policy of encouraging the peaceable settlement of interests represented by ownership in indivision⁷² and also recognizes that the element of speculation is not so likely to be present in a transfer to a coproprietor of the right.⁷³ Although no such restriction is expressly included in Article 1701 of the French Civil Code (corresponding to Article 2654, Louisiana Civil Code of 1870), the commentators deny the application of this particular exception to a transfer by a third person to one of the coproprietors of the right.⁷⁴ In other words, it is considered that the exception was intended to adopt the view of Pothier who denied litigious redemption when the transfer was to a coheir or coproprietor *by his coproprietor*.⁷⁵ This exception would include any form of co-ownership, even coproprietorship resulting from a contract of partnership or joint adventure.⁷⁶

The second exception enumerated in Article 2654 is that of a *dation en paiement* to a creditor as payment for a debt due to him.⁷⁷ This exception is founded upon the theory that the element of speculation is not likely to be present in a *dation en paiement*, but that the creditor has accepted the only thing that the debtor could give to him in payment of the debt.⁷⁸ The *dation en paiement* must be in good faith; if the parties have fraudulently or fictitiously created a debtor-creditor relationship as a means

be an action for breach of warranty when the transferor has failed to make it known to the transferee that the right is being contested by litigation. This would seem to follow from Arts. 2475, 2476, La. Civil Code of 1870.

72. Cf. Art. 1289, La. Civil Code of 1870: "No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition."

73. 11 Beudant, *op. cit. supra* note 3, at 336, n° 406; 2 Colin et Capitant, *op. cit. supra* note 15, at 565, n° 623; 10 Planiol et Ripert, *op. cit. supra* note 7, at 366, n° 323.

74. 5 Aubry et Rau, *op. cit. supra* note 7, at 254, § 359*quater*, note 33.

75. 1 Pothier, *Treatise on the Contract of Sale* (Cushing's Translation 1839) 358, n° 594.

76. 10 Planiol et Ripert, *op. cit. supra* note 7, at 366, n° 323.

77. The *dation en paiement* is dealt with in Arts. 2655-2659, La. Civil Code of 1870.

78. 24 Laurent, *op. cit. supra* note 15, at 597, n° 608; 19 Baudry-Lacantinerie, *op. cit. supra* note 6, at 966, n° 963. 1 Pothier, *op. cit. supra* note 75, at 359, n° 594, admitted the application of this exception only if it appeared that the creditor could not otherwise receive payment. This limitation on the operation of the exception was not, however, incorporated into Art. 1701, French Civil Code.

of avoiding litigious redemption, the court, upon proper proof, should refuse to recognize the exception.⁷⁹ Finally, if in a *dation en paiement* a balance in money is paid, it is a question of fact to determine, in the light of the circumstances of the case, whether the transaction should be classified as a *dation en paiement* within the scope of the exception.⁸⁰

The third exception ("when the transfer has been made to the possessor of the estate subject to the litigious right") has given rise to criticism and to speculation regarding its application.⁸¹ It is generally supposed that this exception was designed to cover the case in which a mortgage is in litigation and the defendant in possession of the mortgaged property acquires the mortgage debt for the purpose of confirming his right to possession and hence there is no element of speculation present.⁸² It has been suggested that this third exception is meaningless and unnecessary and is the result of legislative inadvertence in the framing of the Code Napoleon.⁸³

Regarding the scope of application of Article 2654, it has been indicated that the exceptions enumerated are exclusive rather than illustrative,⁸⁴ and also that the enumerated exceptions have no application to the purchase of litigious rights by a court officer under Article 2447.⁸⁵

The discussion in this comment has indicated the variety of problems and results which flow from the application and interpretation of the codal articles bearing upon the transfer of litigious rights in Louisiana civil law. The importance of this transac-

79. 19 Baudry-Lacantinerie, op. cit. supra note 6, at 966, n° 964.

80. 10 Planiol et Ripert, op. cit. supra note 7, at 366, n° 323. For a full discussion see 19 Baudry-Lacantinerie, op. cit. supra note 6, at 966-968, n° 965.

81. 19 Baudry-Lacantinerie, op. cit. supra note 6, at 968, n° 966: "*Il est difficile de trouver des cas d'application de cette exception.*" (It is difficult to find cases of application of this exception.) 2 Colin et Capitant, op. cit. supra note 15, at 565, n° 623: "*Ici il est à peu près impossible de comprendre quelle hypothèse la loi a voulu viser.*" (Here it is almost impossible to understand what hypothesis the law wished to provide for.)

82. 10 Planiol et Ripert, op. cit. supra note 7, at 366, n° 323.

83. 2 Colin et Capitant, op. cit. supra note 15, at 565, n° 623.

84. 2 Guillouard, op. cit. supra note 6, at 440-441, n° 897; 2 Colin et Capitant, op. cit. supra note 15, at 565, n° 623; 24 Laurent, op. cit. supra note 15, at 597-598, n° 610.

85. See *State v. Nix*, 135 La. 811, 815, 66 So. 230, 232 (1914). Under this view if an attorney at law purchased a litigious right from his coheir, redemption would not be permitted by reason of the exception under Article 2654, but the nullity of Article 2447 would apparently apply.

tion and its consequences is particularly increased by the large number of transfers of interests in oil and gas lands that are taking place at the present time. It may fairly be asserted that many questions affecting the transfer of litigious rights will be submitted to the Louisiana courts in the near future. It is hoped that this comment will serve the purpose of furnishing the civil law viewpoint regarding such problems.

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