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The Effect of Article 2462 of the Louisiana Civil Code

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to annul a judgment of an appellate court. Under the circumstances, it would appear that a more reasonable and workable interpretation was available. The court might well have interpreted the phrase "court which rendered the same" as meaning the court rendering the judgment which first had jurisdiction of the cause. Such a construction would do no violence to the letter of the law and furthermore comports well with the other provisions of the Code of Practice relating to the nullity of judgments.

Either of these arguments might have been seized upon by the court in the *Melançon* case in order to avoid creating this unfortunate hiatus in our law. If the ruling in that decision is to be followed, the only way remaining to obviate the difficulty is an amendment to Article 608 expressly empowering the district courts to annul judgments of appellate courts.

KENNETH J. BAILEY

THE EFFECT OF ARTICLE 2462 OF THE LOUISIANA CIVIL CODE

The meaning of Article 2462 of the Louisiana Civil Code and its equivalent¹ in the French Civil Code has been the subject of much controversy. It is the purpose of this study to consider the rules of agreements relating to sales in order to ascertain the meaning of the article and to see how it has been applied. It will first be necessary to examine briefly the theories of the French writers on the article from which Article 2462 was taken.

FRENCH LAW

ARTICLE 1589, FRENCH CIVIL CODE:

La promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur a la chose et sur le prix.

(Translation) The promise of sale amounts to a sale, when there exists reciprocal consent of the two parties on the thing and on the price.²

In order to understand the interpretations that have been given to the above article, it is necessary to look briefly at the rules existing in French customary law. A sale or a contract of

1. Art. 1589, French Civil Code.

2. Cf. Art. 2437, La. Civil Code of 1825.

sale did not transfer ownership of the thing.³ It was necessary to have a clause of tradition which served as the conveyance. Although the writers did not except the sale of movables from this rule, it is difficult to believe that a clause of tradition was necessary if the sale was not required to be in writing. Under the maxim—*la promesse de vente vaut vente*—the promise of sale was equivalent to a sale and did not convey ownership. The difficulty at customary law centered around determining whether a unilateral promise of sale was obligatory. It was contended by some that the obligation to sell was an obligation to do and could not be specifically enforced. Pothier, in accord with the majority of customs, said that the obligation was one to give, and not to do, and that the promisor was obligated to perform, the promisee not being relegated to his action for damages.⁴

Article 1583 of the French Civil Code changed the effect of the contract of sale in customary law by providing that title would pass immediately. Notwithstanding this, the redactors included in Article 1589 the maxim, *la promesse de vente vaut vente*. This raises a problem relative to the intention of the redactors. Did they intend to retain the rule that had existed at customary law, under which the promise of sale did not transfer ownership; or did they intend that the promise of sale should be equivalent to a sale under the Code and that title should be thereby transferred? Another problem occasioning great difficulty is whether *promesse de vente* in Article 1589 includes both unilateral and bilateral promises of sale.⁵ Both these problems deserve consideration.

The majority of the writers,⁶ in accord with the jurisprudence

3. 1 Guillouard, *Traité de la Vente & de l'Exchange* (2 ed. 1890) 90, n° 77; 10 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1932) 185, n° 175, at n. 2.

4. 3 Pothier, *Oeuvres* (2 ed. 1861) 191, n° 487.

5. It is surprising that no one foresaw these difficulties. Little explanation of the article was given on its presentation by the redactors. For discussion of the presentation to the Conseil d'Etat, see 1 Guillouard, *op. cit. supra* note 3, at 84, n° 72. See 14 Fenet, *Recueil Complet des Travaux Préparatoires du Code Civil* (1836) 115; 14 Loaré, *La Législation Civile, Commerciale et Criminelle de la France* (1828) 133, 147; 1 Guillouard, *supra*, at 84, n° 72, in relation to the discussion before the Corps législatif. With regard to the presentation before the Tribunal see 14 Fenet, *supra*, at 153, 154, 189; 14 Loaré, *supra*, at 193, 224, 238. The Court of Appeal of Lyon criticized the article, but its remarks are of little value in clarifying it. 4 Fenet, *supra*, at 181-182.

6. 5 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1907) 4-5, § 349; 19 Baudry-Lacantinerie et Saignat, *Traité Théorique et Pratique de Droit Civil, De la Vente et de l'Exchange* (3 ed. 1908) 50, n° 69; 2 Colmet de Sarterre, *Manuel Élémentaire de Droit Civil* (4 ed. 1901) 134; 16 Duranton, *Cours de Droit Français* (3 ed. 1834) 76, n° 51; 1 Guillouard, *op. cit. supra* note 3, at 89, n° 77; 10 Huc, *Commentaire Théorique & Pratique du Code Civil* (1897) 41,

of France,⁷ contend that Article 1589 comprehends only synallagmatic promises. They point to the requirement that there must be reciprocal consent, which they interpret to mean that one party must promise to sell, the other to buy. Consequently, they conclude that unilateral promises are not governed by Article 1589 but by the general rules of obligations. These writers argue that title is transferred by the bilateral promise of sale and under their theory it therefore becomes unnecessary to distinguish between a sale as defined by Article 1583 and a synallagmatic promise of sale. Under this view the sale conveys title by virtue of Article 1583; the bilateral promise of sale transfers ownership by virtue of Article 1589; and the unilateral promise of sale is obligatory by virtue of the general rules of obligations.

In opposition to the above view, a few writers⁸ contend that a bilateral promise of sale, when there is consent as to the thing and price, is by definition a sale.⁹ They point out that the requirement of reciprocal consent in Article 1589 means only that the parties have agreed on and determined the thing and the price, although the future vendee has not yet promised to buy. They conclude that bilateral promises to sell are sales by virtue of Article 1583 and are not comprehended by Article 1589, which in modern language is applicable only to so-called options to sell. It is contended by these writers that Article 1589 was intended to provide that unilateral promises were obligatory and thus to avoid the dispute which, it has been shown, existed under early customary law.

The great majority of writers are of the opinion that the bilateral promise of sale transfers ownership. Some reach this conclusion by relying on Article 1589, while others base their contention on Article 1583. Likewise they agree that unilateral promises to sell are obligatory. In reaching this conclusion some

no 24; 1 Larombière, *Théorie et Pratique des Obligations* (nouvelle ed. 1885) 447, Art. 1138, no 11; 24 Laurent, *Principes de Droit Civil Français* (1877) 27, no 21.

7. Cass. 2 mai 1827, Dalloz 1827.1.226; Req. 26 mars 1884, Dalloz 1884.1.403, Sirey 1886.1.341; Chambéry 31 janvier 1894, Dalloz 1895.2.347, Sirey 1896.2.102.

8. 10 Planiol et Ripert, *op. cit. supra* note 3, at 184, no 175.

9. Art. 1583, French Civil Code: "*Elle est parfait entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.*"

(Translation) "It is perfect between the parties, and the ownership is acquired of right to the purchaser with regard to the seller, as soon as there exists an agreement as to the thing and as to the price, although the object has not been delivered nor the price paid." Cf. Art. 2456, La. Civil Code of 1870.

rely upon Article 1589, while others look to the general rules of obligations.

Still a third group,¹⁰ though taking the position that Article 1589 is applicable only to bilateral promises, contend that title is not thereby conveyed. They rely on the intention of the parties and say that if such intention is to transfer title immediately, the agreement is a sale. If, on the other hand, the intention is that title be not transferred until a future time, the agreement constitutes a promise to sell governed by Article 1589; that is, the contract does not serve to convey ownership but only to obligate the parties to perform.

It is generally held in France that an agreement to sell in the future transfers title at the time of the agreement, if there is consent as to the thing and price.¹¹ However, the parties may agree expressly that the property shall be at the risk of the vendor until a future time. Under such an agreement the vendor retains the risk, although title is transferred by operation of law.¹² When the parties agree to reduce the contract to an authentic act in the future, the question of whether the passage of title will in the meantime be suspended is one of intention.¹³ If the court finds that the parties intended that title should not pass until the execution of the authentic act, this intention will control. On the other hand, if it is found that the intention was that the future instrument should be a complimentary formality, passage of title will not be suspended.

It is difficult to justify the existence of Article 1589 in the French Civil Code. Without it a bilateral promise of sale in which there was consent as to the thing and price would be a sale under Article 1583 unless the parties expressed an intention that the sale should not be complete until a later time. The parties in the latter case would be obligated to perform under the rules of obligations relating to contracts to give. Likewise, a unilateral promise to sell would be obligatory under such rules. Since Article 1589 is applicable only when there is a determined thing and

10. 6 Marcadé, *Explication Théorique et Pratique du Code Civil* (7 ed. 1875) 163, Art. 1589; Troplong, *Le Droit Civil Expliqué*, 1 De la Vente (5 ed. 1856) 148-164, nos 125-132.

11. 5 Aubry et Rau, *op. cit. supra* note 6, at 5, § 349, n. 8; 1 Guillouard, *op. cit. supra* note 3, at 93, n° 73; 24 Laurent, *op. cit. supra* note 6, at 30, n° 22; 3 Moulon, *Répétitions Ecrites sur le Troisième Examen du Code Napoléon* (4 ed. 1856) 183-184. Contra: 2 Colmet de Santerre, *loc. cit. supra* note 6; 7 Demante, *Cours Analytique de Code Civil* (2 ed. 1887) 19, n° 10bis II.

12. 1 Guillouard, *loc. cit. supra* note 11.

13. See *supra* note 11.

price, it has no application to promises to sell undetermined goods. Consequently, it seems necessary to conclude that Article 1589 serves no useful purpose and has only confused matters which otherwise would have been sufficiently clear.

LOUISIANA LAW

Article 1589 of the French Civil Code was copied into our Code of 1825,¹⁴ with the addition of the requirement that the promise be in writing in certain cases. Consequently, what was said with respect to that article of the French Code is equally applicable to Article 2462. The Louisiana courts, however, in attempting to attribute some meaning to the article, have given it a reasonable interpretation—at least insofar as it relates to immovables.

The courts have never given any clear definition of the terms they employ. For the purpose of this discussion, therefore, it will be necessary to define and distinguish several kinds of agreements as they will be used here.

A *sale* or a *contract of sale*¹⁵ will be treated as a transaction in which there is agreement by both parties as to the thing and the price, and a consent that title be presently transferred. *Contracts to sell*¹⁶ are bilateral promises to sell in which the intention is that title shall not pass immediately but in the future. In one type of contract to sell there is a determined thing and price; in the other type there is lacking agreement as to either the thing or price. A *promise to sell* (promise of sale) will be regarded as a unilateral promise which is binding on the promisor, even though at the time it is given the promisee does not bind himself to buy. The meaning of the expression *promise to sell* as used in Article 2462 of the Civil Code will be dealt with below.

Immovables

The Louisiana courts have interpreted Article 2462 as being applicable to contracts to sell. Of course, in order that there may be a contract to which the article will apply, the agreement must meet the requirements for definiteness necessary for a contract.¹⁷ Thus, where a contract does not provide for the terms of the

14. Art. 2437, La. Civil Code of 1825.

15. This definition is based on that given in the Uniform Sales Act, § 1 (2), 1 U.L.A. 1 (1931).

16. Uniform Sales Act, § 1 (1), 1 U.L.A. 1 (1931).

17. *Young v. Cistac*, 157 La. 771, 103 So. 100 (1925); *Dunn v. Spiro*, 153 So. 316 (La. App. 1934).

credit portion of the price, the price is indefinite and specific performance cannot be decreed under the article.¹⁸

A very recent case, *Noto v. Blasco*,¹⁹ reaffirms what was said in *M'Donald v. Aubert*²⁰ in 1841 with regard to the effect of contracts to sell in Louisiana:

"We understand article 2437 [2462] to mean that a promise to sell, when the thing to be sold and the price of it are agreed upon, is so far a sale that it gives to either party a right to claim *rectâ viâ*, the delivery of the thing or payment of the price; but such a promise does not place the thing at the risk of the promisee, nor does it transfer to him the ownership of dominion of it. If by consent of both parties a promise to sell is cancelled, such an agreement could not be viewed as a retrocession of the property; and third persons having a general mortgage recorded against the promisee would have acquired no right or lien on the same, because it never belonged to their debtor."²¹

It will be noticed that the term promise to sell is here used by the court to describe a contract to sell as defined above.

Since the *M'Donald* case Article 2462 has been relied upon repeatedly to sustain the principle that a contract to sell immovables does not transfer the ownership to the contemplated vendee,²² but that by virtue of this article the parties have a right to specific performance, and are not restricted to damages.²³

18. *Ibid.*

19. 198 So. 429 (La. App. 1940).

20. 17 La. 448 (1841).

21. 17 La. at 450-451. The language in Troplong, *op. cit. supra* note 10, at 157, n^o 130, is substantially the same.

22. *Peck v. Bemiss*, 10 La. Ann. 160 (1855); *Knox v. Payne & Harrison*, 13 La. Ann. 361 (1858); *Garrett v. Crooks*, 15 La. Ann. 483 (1860); *Broadwell v. Raines*, 34 La. Ann. 677 (1882); *Thompson v. Duson*, 40 La. Ann. 712, 5 So. 58 (1888); *Baldwin v. Morey*, 41 La. Ann. 1105, 6 So. 796 (1889); *Collins v. Desmaret*, 45 La. Ann. 108, 12 So. 121 (1893); *Girault v. Feucht*, 117 La. 276, 41 So. 572 (1906); *Capo v. Bugdahl*, 117 La. 992, 42 So. 478 (1906); *Lehman v. Rice*, 118 La. 975, 43 So. 639 (1907); *Smith v. Hussey*, 119 La. 32, 43 So. 902 (1907); *Stafford v. Richard*, 121 La. 76, 46 So. 107 (1908); *Nosacka v. McKenzie*, 127 La. 1063, 54 So. 351 (1911); *Page v. Loeffler*, 146 La. 890, 84 So. 194 (1920); *Pruyn v. Gay*, 2 La. App. 787 (1925); *McMillan v. Lorimer*, 160 La. 400, 107 So. 239 (1926); *Richmond v. African Methodist Church*, 4 La. App. 191 (1926); *Cusachas v. Columbia Fire Ins. Co.*, 6 La. App. 15 (1927); *Joe Dover v. Atlas Assur. Co.*, 15 La. App. 132 (1930); *Succession of Premeaux*, 17 La. App. 360 (1931); *Bandel v. Sabine Lumber Co.*, 194 La. 31, 193 So. 359 (1940); *Cerami v. Haas*, 197 So. 752 (La. 1940).

23. *Girault v. Feucht*, 117 La. 276, 41 So. 572 (1906); *Lehman v. Rice*, 118 La. 975, 43 So. 639 (1907); *Nosacka v. McKenzie*, 127 La. 1063, 54 So. 351 (1911); *Richardson v. Widow Rosey Caloavello*, 3 La. App. 535 (1926); *Amacker v.*

As early as 1903 Article 2462 was also relied on by the court to support a holding that a promise to sell in the form of an option was binding on the promisor.²⁴ Thus, prior to 1910, Article 2462 had been applied by the courts to hold that both contracts to sell and promises to sell in the form of options were binding and could be specifically enforced.

Article 2462 was amended in 1910.²⁵ The phrase "promise to sell" was retained in the amended article, but the right to enforce specific performance was given to "either party." As a result the first paragraph of the amended article necessarily referred to contracts to sell. However, a second paragraph was added in order to allow either party to an option contract to enforce it upon acceptance. This amendment at least indicates that there was some doubt whether promises to sell (options) were comprehended by the article before amendment. Since 1910, however, it is clear that the first paragraph of the article provides for specific performance of only contracts to sell; the second paragraph governs options, that is, binding promises to sell.

Although specific performance will usually be granted, conveyance to a third person terminates the right to specific performance if the contract to sell is unrecorded.²⁶ But if the contract to sell has been recorded, third persons must take notice of it and the sale to a third person can be annulled, the records cancelled, and title conveyed according to the contract to sell.²⁷ Furthermore, when the agreement is to sell upon the happening of some condition, title does not immediately pass upon the happening of the condition. The parties then have the right to sue for specific

McCarty, 8 La. App. 70 (1928); Yates v. Batteford, 19 La. App. 374 (1932); Bandel v. Sabine Lumber Co., 194 La. 31, 193 So. 359 (1940); Cerami v. Haas, 197 So. 752 (La. 1940).

24. Magruder v. Hornot, 110 La. 585, 34 So. 696 (1903).

25. La. Act 249 of 1910. This act was passed without a title and La. Act 3 of 1910 (2 E.S.) was enacted to remedy it.

26. Knox v. Payne & Harrison, 13 La. Ann. 361 (1858). It is obvious that a purchaser without notice of the contract would secure the property free from any unrecorded claim of the promisee. Art. 2266, La. Civil Code of 1870. It is also clear that the promisor must be the owner and able to convey, or specific performance cannot be decreed, the relief being only by way of damages. Walshe v. Endom, 124 La. 697, 50 So. 656 (1909), where the promisor was not owner of the land and specific performance was refused. Damages were allowed in a subsequent trial. (129 La. 148, 55 So. 744 (1911)).

27. Lehman v. Rice, 118 La. 975, 43 So. 639 (1907); Whited & Wheless v. Calhoun, 122 La. 100, 47 So. 415 (1908). But where the third party transferee was not made a party defendant, the court refused to order the property conveyed to the promisee. Richmond v. African Methodist Church, 4 La. App. 191 (1926). In Kinberger v. Drouet, 149 La. 986, 90 So. 367 (1922), it was held that even a recorded option to buy served to protect the promisee's right as against third party purchasers.

performance of the obligation to convey;²⁸ but until this conveyance is made, either voluntarily or by the court, title remains in the original owner.²⁹

The Louisiana courts have not been so much troubled in making a determination of the effects of a contract to sell as in their efforts to distinguish a completed sale from a contract to sell. However, the rule appears to be that the parties must clearly intend that title shall pass immediately in order that the contract may constitute a sale; otherwise it will be considered a contract to sell.³⁰ The intention of the parties is determined from the entire contract, and the words used in the contract are not always decisive.³¹ The latest expression on the subject by a Louisiana court sums up the principle accurately:

"An agreement for the sale of real estate, which contemplates the passing of the property not immediately and by virtue of the agreement, but by an act to be executed at a later date, and which contains all the elements of a sale, such as the price, the property and the consent of the parties, is merely a promise of sale, unless the intention of the parties clearly indicates that the agreement is to constitute a completed sale."³²

Again, the court is referring to what has been called above a contract to sell, and is not speaking of promise of sale as we have

28. *Foreman v. Saxon*, 30 La. Ann. 1117, 1118 (1878). But see *Barfield v. Saunders*, 116 La. 136, 40 So. 593 (1906), where it was held that upon the promisee's paying one of five notes given for the property and tender of payment of the other four amounted to a completion of the sale. What served as the act translatif of title? Why would not tender of performance under any bilateral contract serve to transfer title if this case is correct? In such event, there would be no need for specific performance.

29. However, the contemplated buyer acquires a real right in the property. *Whited & Wheless v. Calhoun*, 122 La. 100, 47 So. 415 (1908) (where such a promisee was allowed to bring a petitory action). Furthermore, the right that a person has under a contract to sell or an option to buy community property is not destroyed by the dissolution of the community. *Magruder v. Hornot*, 110 La. 585, 34 So. 696 (1903); *Provansano v. Glaesser*, 122 La. 378, 47 So. 688 (1908) [this case was expressly overruled on another point by *Maloney v. Aschaffenburg*, 143 La. 507, 78 So. 761 (1918)]. Contra: *M'Donald v. Aubert*, 17 La. 448 (1841).

30. *Smith v. Hussey*, 119 La. 32, 43 So. 902 (1907).

31. The following expressions have been held to be only contracts to sell and not sales: "I have this day agreed to sell." [*Peck v. Bemiss*, 10 La. Ann. 160 (1855)]; "I have this day bargained, sold, and delivered . . . titles to said property to be made at our convenience." [*Broadwell v. Raines*, 34 La. Ann. 677 (1882)]; "Sold this day [list of descriptions and conditions] when done, Baldwin, or his heirs, will give good deed." [*Baldwin v. Morey*, 41 La. Ann. 1105, 6 So. 796 (1889)]; "This is to certify that I have this day sold my house . . . balance when act of sale is passed." [*Capo v. Bugdahl*, 117 La. 992, 42 So. 478 (1906)]; "I have this day sold . . ."; "The act of sale . . . is to be passed within the next 15 days . . ." [*Millaudon v. Brenan*, 5 La. App. 583 (1927)].

32. *Noto v. Blasco*, 198 So. 429, 432 (La. App. 1940).

defined that term. In a few very early cases the court took the position that the intention to reduce the contract to another instrument did not prevent the passage of title by the first agreement.³³ These cases, however, are superseded by the many later decisions to the contrary.³⁴

With regard to unilateral promises to sell, the rules in Louisiana are rather clear. Of course a mere promise, unaccepted, never transfers title. If accepted during the existence of the offer, such a promise ripens into a bilateral contract to sell,³⁵ which may be specifically enforced by either party. The most usual type of unilateral promise to sell is known as an option, frequently granted in connection with a lease.

The question of whether a simple promise to sell during a certain period is binding on the promisor during that time has been discussed elsewhere.³⁶ In France, such an offer is binding during the term and it has been suggested that the same result should be reached in Louisiana.³⁷ Pretermittting this question, if the offer is accepted before retraction, a contract to sell is created. Such acceptance has the same effect as acceptance under an option, and the result is the same as if a bilateral contract to sell had originally existed. In other words, a contract to sell is formed and it may be specifically enforced.

Prior to the amendment to Article 2462 in 1910, the rules of Articles 2440³⁸ and 2275³⁹ were applicable equally to contracts to

33. *Crocker v. Neiley*, 3 Mart. (N.S.) 583 (La. 1825) (which interpreted a contract entered into in 1811, prior to the adoption into our Code that a contract to sell amounts to a sale); *Pignatit v. Drouet*, 6 Mart. (N.S.) 432 (La. 1828); *Joseph v. Moreno*, 2 La. 460 (1831); *Stephens v. Chamberlin*, 5 La. Ann. 656 (1850).

34. *M'Donald v. Aubert*, 17 La. 448 (1841); *Peck v. Bemiss*, 10 La. Ann. 160 (1855); *Knox v. Payne & Harrison*, 13 La. Ann. 361 (1858); *Broadwell v. Raines*, 34 La. Ann. 677 (1882); *Thompson v. Duson*, 40 La. Ann. 712, 5 So. 58 (1888); *Baldwin v. Morey*, 41 La. Ann. 1105, 6 So. 796 (1889); *Collins v. Desmaret*, 45 La. Ann. 108, 12 So. 121 (1893); *Capo v. Bugdahl*, 117 La. 992, 42 So. 478, (1906); *Whited & Wheless v. Calhoun*, 122 La. 100, 47 So. 415 (1908); *Noto v. Blasco*, 198 So. 429 (La. App. 1940).

35. *Magruder v. Hornot*, 110 La. 585, 34 So. 696 (1903); *Kinberger v. Drouet*, 149 La. 986, 90 So. 367 (1922); *Moresi v. Burleigh*, 170 La. 270, 127 So. 624 (1930); *Chauvin v. Theriot*, 180 So. 847 (La. App. 1938).

36. Comment (1938) 1 *LOUISIANA LAW REVIEW* 182. Although the writer of this comment leaves open the discussion concerning offers to sell in view of the option amendment, the present paper will not cover that subject.

37. *Ibid.*

38. La. Civil Code of 1870. This article makes all verbal sales of immovables null, except as provided by Article 2275.

39. La. Civil Code of 1870. Verbal sales of immovables are good as between the parties if confessed when interrogated on oath, provided actual delivery has been made.

sell and to sales, under the express wording of Article 2462.⁴⁰ Consequently it was held that both the offer to sell immovables and the acceptance must be in writing and an oral acceptance was insufficient. Furthermore, the acceptance in writing must be made before withdrawal of the offer.⁴¹ There are two cases which hold that the acceptance need not be in writing but can be proved by evidence *aliunde*.⁴² However, later cases state that the acceptance must be in writing except in those cases falling within Article 2275.⁴³ However, in a 1940 case, *Cerami v. Haas*,⁴⁴ the court held that a recordation of a written offer to sell amounted to an acceptance. Though the recordation was not a written acceptance, it served all the purposes of a writing in the matter of proof and the ability to enforce it against the acceptor; and the decision seems entirely sound.

Thus, it can be said briefly that in Louisiana a bilateral agreement concerning immovables, otherwise containing the requirements of a sale, will be treated as a contract to sell, rather than a sale, unless it is clear that the parties intended that the agreement itself should transfer title. A unilateral promise to sell becomes a bilateral contract to sell upon acceptance before revocation and has the same effect. An option to buy is binding during the term given if it is supported by consideration, and upon acceptance a bilateral contract is formed. Although title does not pass by the contract to sell, both parties are obligated to convey and specific performance may be required by either party under the authority of Article 2462. Furthermore, when the contract to sell is recorded, a third party cannot acquire title. The court may order its judgment to stand as title and make further conveyance unnecessary.⁴⁵

40. Cf. *Mason v. Towne*, 12 La. Ann. 194 (1857), where the court indicated that had delivery been made, the verbal contract might have been good if proved by interrogatories. See also cases decided since the article was amended in 1910. *Larido v. Perkins*, 132 La. 660, 61 So. 728 (1913); *Rubenstein v. Files*, 146 La. 727, 84 So. 33 (1920); *Kidd v. Talbot*, 147 So. 825 (La. App. 1933).

41. *Levy v. Levy*, 114 La. 239, 38 So. 155 (1905); *Barchus v. Johnson*, 151 La. 985, 92 So. 566 (1922); *Conklin v. Caffall*, 189 La. 301, 179 So. 434 (1938). See also *Landreneau v. Perrou*, 174 So. 140 (La. App. 1937), where it was said that the agreement to transfer immovables must be in writing but that failure to allege that the contract was in writing did not furnish grounds for sustaining an exception of no cause of action.

42. *Crocker v. Neiley*, 3 Mart. (N.S.) 583 (La. 1825) (which interpreted a contract made in 1811); *Joseph v. Moreno*, 2 La. 460 (1831).

43. See note 39, *supra*.

44. 197 So. 752 (La. 1940).

45. *Barfield v. Saunders*, 116 La. 136, 40 So. 593 (1906); *Murphy v. Hussey*, 117 La. 390, 41 So. 692 (1906); *Kinberger v. Drouet*, 149 La. 986, 90 So. 367 (1922); *Jaenke v. Taylor*, 160 La. 109, 106 So. 711 (1926).

Movables

There is nothing in the articles, nor in the writings of the French commentators, to indicate that there should be any difference in treatment between promises and contracts to sell movables and those to sell immovables. The difficulties in Louisiana appear to be based principally on the different rules of proof and the recordation laws with respect to the two classes of property. The cases dealing with contracts to sell movables are very unsatisfactory and lend very little to an understanding of the problem. The court has several times stated that a contract to sell movables could not be enforced specifically if the goods were perishable or readily merchantable articles fluctuating in price.⁴⁶ In these cases the court did not rely on Article 2462 but on the practical expediency of the situation.

Suppose, however, it were agreed that the vendor, A, should perform some act, such as a repair, before title should pass. If the repair were made, title would pass ipso facto, as was explained above. But suppose A refuses to repair. The vendee would sue for performance, not of the obligation to sell, but rather of the obligation to repair. This, of course, is an obligation to do and is controlled by Articles 1926 and 1927. Consequently, Article 2462 is again unnecessary and has no application.

Thus, though there may exist a valid contract to sell, in which event title does not pass by the contract, there is no need to seek specific performance under Article 2462.⁴⁷

Unlike title to immovables, which is transferred only by an instrument, title to movables may be transferred by mere oral

46. *Landèche v. Sarpy*, 37 La. Ann. 835 (1885); *Mutual Rice Co. v. Star Bottling Works*, 163 La. 159, 111 So. 661 (1927); *Leon Godchaux Clothing Co. v. DeBuys*, 10 La. App. 635 (1929). The court in the latter case said that when the "vendee" refuses delivery, the "vendor" has the option to "resell" or to demand specific performance. This, of course, is not based on Article 2462 which has no application to a completed sale, but is based on the obligation of the vendee to accept delivery under Article 2549. The case is unsatisfactory in that the court does not make clear whether it considered the transaction a sale or a contract to sell.

Although the above limitations may be sound as a matter of policy, there appears to be no justification for the doctrine under the articles of the Civil Code. This principle, in effect, adopts the equity rule of specific performance and makes our Code articles unnecessary. Although the result may be desirable, it is wholly unjustified by our codal provisions.

47. Although the doctrine of earnest money is very important to this subject, a discussion thereof has been omitted here because it is treated in Hebert, *The Function of Earnest Money in the Civil Law of Sales* (1930) 11 *Loyola L. J.* 121.

However, it may be added here that the doctrine of earnest money is not applicable to options. *Moresi v. Burleigh*, 170 La. 270, 127 So. 624 (1930).

consent. The remedy would be therefore to enforce delivery of the thing under Article 2475 or the payment of the price under Articles 2549 to 2555. The same would be true under an option to buy.

Conclusion

The ownership of immovable property is transferred by virtue of a written title. Title to movables is conveyed by the agreement itself when there is an agreement as to the thing and price. When there is such a transfer of ownership, the vendor is obligated to deliver under Article 2475 and the vendee is bound to pay the price under the authority of Articles 2549 and 2550. Consequently, Article 2462 has no application to a completed sale of movables or immovables.

The obligation to transfer the ownership of movables in the future is executed by the mere passage of time, so there is no need for seeking specific performance of the obligation to convey. When it is agreed that there will be another instrument executed, title to immovables does not transfer until the execution of such instrument. In other words, it is presumed that the parties intended that title should pass until then. This is only giving effect to the presumed intention of the parties, and such contract could be specifically enforced under Articles 1905 to 1925. The courts created this presumption at an early time in an attempt to ascribe some meaning to Article 2462.

It is concluded that Article 2462 gives no remedy not provided for elsewhere in the Code. The courts in interpreting it have achieved results that would have been reached without the article. It is fortunate that the article has not been interpreted in Louisiana as it was in France so as to deviate from the intention of the parties and do violence to the other codal provisions. Although the article is ambiguous and unnecessary, its application in Louisiana has been wise.

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