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Civil Law Property - Immovables by Destination

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Notes

CIVIL LAW PROPERTY—IMMOVABLES BY DESTINATION—Plaintiff sold an apartment building to the defendant, leaving five venetian blinds in one of the apartments. Subsequently she sought to recover these blinds, alleging they were her personal property. The defendant contested the removal on the ground that the blinds had become immovable by destination. *Held,* the blinds did not become immovable and could be removed by the plaintiff. *Kelieher v. Gravois,* 26 So. (2d) 304 (La. App. 1946).

This recent court of appeal case involves the interpretation of Articles 467, 468, and 469 of the Revised Civil Code of 1870.

As the court pointed out, Article 468 provides for two distinct methods of immobilization.[1]

(1) By the owner's placing the movable in the *service* of the "tract of land."[2]

(2) By his *permanent attachment* of the movable to a tenement[3] or building.

The first paragraph of Article 468 gives the essentials for immobilization by the first method. It states: "Things which the *owner* of a *tract of land* has placed upon it for its *service and improvement* are immovable by destination." In the case at bar, it was conceded that the blinds were placed on the building, by the *owner,* thus meeting the initial requirement for immobilization by destination.[4]

The court then discussed the problem under the premise that "tract of land" as used in Paragraph 1 of Article 468, would include the building in question.[5] This view is supported by the

1. See Folse v. Triche, 113 La. 915, 37 So. 875 (1904); Bank of Lecompte v. Lecompte Cotton Oil Co., 125 La. 844, 51 So. 1010 (1910).

2. Translation of French word *Fonds,* found in Article 524 of the French Civil Code, corresponding to Article 468 of the La. Civil Code of 1870. For a history and comparison of the two articles see Comment (1930) 5 Tulane L. Rev. 90.

3. See Judge O'Niell's comment on this word in Straus v. City of New Orleans, 166 La. 1035, 1050, 118 So. 125, 130 (1928).

4. Immobilization by destination always requires an act of the owner. Hall and Lisle v. Mrs. Mary P. Wyche, 31 La. Ann. 734 (1879); Townsend v. Payne, 42 La. Ann. 909, 8 So. 626 (1890); Richardson v. Item Co. Ltd., 172 La. 421, 134 So. 380 (1931); Folse v. Loreauville Sugar Factory, Inc., 156 So. 667 (La. App. 1934).

5. Supported by French commentators. See 1 Planiol, Traite Elementaire De Droit Civil (12 ed. 1939) §2219. See also Tulane L. Rev. note 2, supra.

broad language used in *Straus v. City of New Orleans*,[6] which case implies that the term, "tract of land," would include factories, office buildings, and residences as well as land itself. However, that case dealt with machinery in a cotton mill so it would not necessarily be authority for extending the application of Paragraph 1 of Article 468[7] to an apartment house. A search of the cases fails to reveal one in which a movable was declared immovable simply because it was in the service of a commercial or residential building. All cases noted involving such buildings have been grounded on the method of attachment of the movable to the building.[8] In the case of *Scovel v. Shadyside*,[9] it was stated that Paragraph 1 of Article 468 is not applicable to a residential building.

Though the court conceded that an apartment building would fall within the scope of a "tract of land" they nevertheless found that venetian blinds were not immovable by destination under Paragraph 1 of Article 468, as they were not for the use or service of the building but rather for the convenience of its occupants. The court has previously considered this distinction as a valid criterion of immobilization by destination;[10] but the distinction is somewhat illusive. It is easy to see that a horse used only for the pleasure of the owner of a plantation would not be in the service of the plantation, whereas a horse belonging to same plantation owner and used by the overseer to supervise the work of the plantation would be in the service of the plantation and thus an immovable by destination.[11] It is not so clear, however, whether venetian blinds serve the building or its occupants.

In deciding the issue, it might be helpful to look to the rea-

6. Cited note 3, supra.

7. Note the examples under this paragraph in Article 468: cattle intended for cultivation, implements of husbandry, seeds, plants, fodder and manure, pigeons in a pigeon house, beehives, mills, kettles, alembics, vats, and other machinery made use of in carrying on the plantation work, the utensils necessary for working cotton, and saw-mills, taffia distilleries, sugar refineries, and other manufactures.

8. Mackie v. Smith, 5 La. Ann. 717, 52 Am. Dec. 615 (1850); Folger v. Kenner, 24 La. Ann. 436 (1872); L'Hote v. Fulham, 51 La. Ann. 780, 25 So. 655 (1899); Scovel v. Shadyside, 137 La. 918, 69 So. 745 (1915); Keifer v. Bradford, 3 Orl. App. 351 (1906); Day v. Goff, 2 La. App. 75 (1925).

9. 137 La. 918, 69 So. 745 (1915).

10. Ibid. Morton Trust Co. v. American Salt Co. 149 Fed. 540 (C.C.E.D. La. 1906).

11. The majority opinion cites this example 26 So.(2d) 304, 306 (La. 1946).

soning of the French commentators in declaring a movable to be immovable. Planiol[12] states,

> "It was desired to obviate the separation from a *fonds*[13] of things that are its compulsory accessories, when such a separation is contrary to the will of the owner and detrimental to the general good. It is necessary that these accessories follow the *fonds* in order that it may attain its maximum efficiency."

It can hardly be said that blinds in the case at bar are a compulsory accessory of the house, for the house would serve its purpose with or without them. Thus the most logical conclusion would be that the venetian blinds are for the service of the occupants only.

The second method of immobilization is found in the last paragraph of Article 468, which states: ". . . All such movables as the owner has attached permanently to the tenement or building, are likewise immovable by destination." Although there may be a tendency to confuse the issue, the better view appears to be that *service* of the building is not requisite.[14]

The test of immobilization under this second part of Article 468 is *permanent attachment* and Article 469[15] is considered as establishing the essentials of such attachment.[16] In brief, if a movable is attached to a building by the owner, in such a manner that its removal would cause appreciable damage to either the building[17] or the movable, or would leave the building in a rough or unfinished condition,[18] it is said to be immobilized by destination under the idea of permanent attachment.

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12. 1 Planiol, op. cit. supra note 5, at §2212. Since the French law relative to immovables is similar to that of Louisiana, French authorities have often been consulted. Straus v. City of New Orleans, 166 La. 1035, 1054, 118 So. 125, 132 (1928)" '. . . the opinions of the French commentators, on Article 524 of the Code Napoleon, are as appropriate to article 468 of the Revised Civil Code of Louisiana as they are to the article of the Code Napoleon' . . ."

13. See note 2, supra.

14. See 5 Laurent, Principes De Droit Civil Francais (2 ed. 1876) § 441; Morton Trust Co. v. American Salt Co., 149 Fed. 540 (C.C.E.D. La. 1906).

15. Article 469 La. Civil Code of 1870: The owner is supposed to have attached to his tenement or building forever such movables as are affixed to the same with plaster or mortar, or such as can not be taken off without being broken or injured, or without breaking or injuring the part of the building to which they are attached.

16. Folger v. Kenner, 24 La. Ann. 436 (1872); L'Hote v. Fulham, 51 La. Ann. 780, 25 So. 655 (1899).

17. Scovel v. Shadyside, 137 La. 918, 69 So. 745 (1915); Keifer v. Bradford, 3 Orl. App. 351 (1906).

18. Mackie v. Smith 5 La. Ann. 717 (1850).

In the principal case, the blinds were attached by small metal brackets in much the same manner as ordinary window shades. The damage, if any, occasioned by their removal would be negligible.[19]

Judge Janvier, in a concurring opinion, carefully pointed out that in some modern buildings venetian blinds may be so built into the building itself as to become immovable by destination under the idea of permanent attachment, but such was not the fact in the case under consideration.

As was pointed out in the dissenting opinion by Judge McCaleb, the majority view ignored Article 467 of the Civil Code. As amended by Act 51 of 1912,[20] this article provides that some eighteen enumerated fixtures[21] are immovable by nature when attached to the building by the owner for the use and convenience of the building. The court has found this article to be illustrative and not exclusive.[22] Wire screens are specifically enumerated, and in his dissenting opinion Justice McCaleb, reasoning by analogy, states that venetian blinds would fall within the scope of this article and should be declared immovable by nature.

Although Article 467 purports to establish immovables by nature,[23] it requires that the attachment be made by the owner, for the use and convenience of the building. Apparently the same difficulties would be met, under this article, in determining

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19. In deciding that venetian blinds did not come under the purview of this method of immobilization, the court applying literally the requisites for attachment set forth in Article 469 said, "they are held in place by brackets attached to the window frames by screws and are in no sense attached to the building by plaster or mortar." 26 So. (2d) 304, 306 (La. 1946).

20. Article 467 originally provided "The pipes made use of for the purpose of bringing water to a house or other estate, are immovable and are part of the tenement to which they are attached."

21. Wire screens, water pipes, gas pipes, sewerage pipes, heating pipes, radiators, electric wires, electric and gas lighting fixtures, bathtubs, lavatories, closets, sinks, gasplants, meters and electric light plants, heating plants and furnaces, when actually connected with or attached to the building by the owner for the use of or convenience of the building are immovable by their nature.

22. Scott v. Brennan, 161 La. 1017, 109 So. 822 (1926).

23. In deciding that a vendors lien on a sprinkler system was not lost by immobilization under Article 467, the court states "immovable by nature" as here used could be considered as interchangeable with term "immovable by destination" under Article 468. Tangipahoa Bank and Trust Co. v. Kent, 70 F. (2d) 139 (1934). Also see Cottonport Bank v. Dunn, 21 So. (2d) 525 (La. App. 1945).

whether the blinds were for the use of the building or its occupants as were discussed previously in connection with Paragraph 1 of Article 468 and the same conclusion would be reached.

In conclusion, it is believed that venetian blinds could not be held immovable under any of the articles discussed in the light of prior jurisprudence interpreting these articles. It appears that in determining what movables have become immobilized by destination in an apartment house or residence, the most practical test would be whether or not they are *permanently attached* by the owner.

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EXCEPTION OF NO CAUSE OF ACTION—AFFIRMATIVE DEFENSES—Plaintiff and defendant executed a solidary note which was to be repaid by them jointly. After having called upon defendant unsuccessfully for payment of one-half of the debt, the plaintiff paid the note in full and brought this action for contribution. The petition, after stating facts sufficient to constitute a prima facie case, further alleged that the funds borrowed were used in a joint venture which plaintiff and defendant had undertaken. This surplusage was the basis of an exception of no cause of action, filed on the theory that the petition disclosed a partnership, the dissolution of which is prerequisite to suit by one partner against another on partnership debts. *Held,* there being exceptions to the general rule prohibiting actions by one partner against the other prior to partnership dissolution,[1] the plaintiff's petition did not show unequivocally that a cause of action could not be maintained under one of these exceptions. Hence the defendant's exception of no cause of action should be overruled. *West v. Ray,* 26 So. (2d) 221 (La. 1946).

Two different procedural rules compete for supremacy within the area occupied by this case. The first, that of construing all ambiguities against the pleader,[2] would seem to clamor for a strict construction of the petition. The second, throwing upon the defendant the burden of pleading and proving affirma-

1. Where the relief sought does not involve the taking of an accounting of complicated or numerous partnership transactions, a partner may sue another before dissolution. 21 A.L.R. 60. Also, an action may be maintained before dissolution on a note given in pursuance of the articles of partnership. Rondeaux v. Pedesclaux, 3 La. 510, 23 Am. Dec. 463 (1832).

2. Southport Mill v. Friedricks, 167 La. 101, 106, 118 So. 818, 820 (1928), and cases cited therein.