

# Louisiana Law Review

---

Volume 7 | Number 4  
May 1947

---

## Sales - Litigious Redemption

James R. Alexander

---

### Repository Citation

James R. Alexander, *Sales - Litigious Redemption*, 7 La. L. Rev. (1947)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol7/iss4/11>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kayla.reed@law.lsu.edu](mailto:kayla.reed@law.lsu.edu).

If the act committed were a single tort, it is clear the defendant would have to support his plea of prescription by proving the act was committed over one year before the suit was brought. Similarly, if the plaintiff were suing for damages inflicted by a series of separate torts, some, but not all, of which were committed more than a year prior to the date of institution of suit, it would be incumbent on defendants to show which of these torts were prescribed. Therefore, it follows that in cases involving continuing wrongful conduct, the defendant should prove what part of the damage was sustained prior to the period fixed for prescription. It has been suggested that the practice of requiring plaintiff, rather than defendant, to apportion the damage in order to avoid the plea of prescription is attributable to an erroneous interpretation of the misleading language of the 1902 amendment to Article 3537.<sup>9</sup>

J. LUTHER JORDAN, JR.

---

SALES—LITIGIOUS REDEMPTION<sup>1</sup>—Duncan R. Crain filed suit for partition by licitation, alleging himself to be owner of 32/33 interest in a tract of land. Defendants, plaintiff's children, admitted his right to a partition, but claimed that he was owner of only 135/264 interest and prayed that partition be in kind. After issue had been joined, three other parties, hereinafter referred to as plaintiffs, were substituted as parties plaintiff. They had acquired all of Duncan Crain's interest in the land by deed after the suit had commenced, pursuant to an option purchased and recorded prior to filing of Duncan Crain's petition.

At the trial, defendants tendered to the plaintiff the amount the latter had paid for Crain's interest, and asked that they be declared owners of plaintiffs' interest under Article 2652.<sup>2</sup> The trial court held that defendants had the right to acquire *all* of the plaintiffs' interest by tendering the amount paid by them to Crain.

---

9. Art. 3537, La. Civil Code of 1870, as amended by La. Act 33 of 1902, discussed by Malone, *The Work of the Louisiana Supreme Court for the 1945-1946 Term, Torts and Workmen's Compensation*, supra p. 246.

1. For a survey of the subject of litigious rights see Comments, *The Transfer of Litigious Rights in Louisiana Civil Law* (1939) 1 *LOUISIANA LAW REVIEW* 593 and 818, and *The Sale of a Litigious Right* (1939) 13 *Tulane L. Rev.* 448.

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

On appeal the supreme court found that only a 121/264 interest (256/264 claimed by Crain less the 135/264 conceded to him in defendants' answer) was in contestation and therefore litigious under Article 2653<sup>3</sup> and allowed defendants to redeem that part. *Crain v. Waldron*, 27 So. (2d) 333 (La. 1946).

The applicability of Article 2652 to the sale of a right which is only litigious in part had not been decided previously, although the question was raised in one case.<sup>4</sup>

The decision in the principal case is in harmony with the opinions of the French commentators, who assert that in a similar problem where several things have been sold at the same time, including a litigious right, and for a single price, the redemption could be exercised as to this right alone.<sup>5</sup> However, these writers point out that a separate valuation should be made in order to determine that part of the price paid for the litigious right.<sup>6</sup> The court in the present case made an arbitrary apportionment, finding 121/264 of the plaintiffs' interest litigious and reimbursing them 121/264 of the total price paid by them. Justice Fournet dissented on this point, stating that there was nothing in the record to guide the court in determining how much was paid for the portion of the property in contestation and how much for the portion not in contestation.

It would have been extremely difficult in this particular case to determine just what proportion of the purchase price was paid for that part of Crain's interest which was litigious, since plaintiffs purchased an undivided interest in a tract of land, of which an undivided 121/264 was litigious. The French writers obviously did not contemplate a transaction such as this, but were speaking of the situation in which a litigious right is sold along with other separate things for a single price, and where the litigious right could be easily distinguished and separately appraised.

The decision also follows the reasoning in *Smith v. Cook*,<sup>7</sup>

---

3. Art. 2653, La. Civil Code of 1870. A right is said to be litigious, whenever there exists a suit and contestation on the same.

4. *Gulf Refining Co. v. Glassel*, 185 La. 143, 168 So. 755 (1936).

5. 10 Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1932) 364, n. 936; 5 Aubry et Rau, *Cours de Droit Civil Français* (5 ed. 1907) 253, § 359, N. 32; 19 Baudry-Lacantinerie, *Traité Théorique et Pratique de Droit Civil* (3 ed. 1908) 948, n. 936.

6. "Si plusieurs choses ont été cédées en même temps que la créance litigieuse et pour un prix unique, le retrait doit être exercé pour cette seule créance litigieuse et une ventilation est nécessaire pour déterminer la part du prix qui correspond à la créance retrayée." 10 Planiol et Ripert, loc. cit. supra note 4.

7. 189 La. 632, 180 So. 469 (1938).

which held that where a portion of the thing in contestation was transferred during the litigation, litigious redemption could be exercised as to that portion. The court was of the opinion that not to allow the party against whom the right was held to redeem would make it easy for the transferrer to prevent the operation of Article 2652 by retaining a small portion of the thing. The same type of reasoning would apply in the present case. If a party were not allowed to redeem that part of the thing which is litigious, the vendor of a litigious right could prevent redemption by selling along with the right something non-litigious and receiving one price for the whole.

Another contention of the plaintiffs was based on Article 1289 of the Civil Code<sup>8</sup> and Article 1700 of the Code Napoleon.<sup>9</sup> The latter, from which Article 2653 of the Civil Code is derived, defines a right as litigious when there exists a suit and contestation on the existence of the right. Plaintiffs urged that since there was no dispute as to Crain's right to a partition (and this action was primarily one of partition), there was no contestation as to the existence of the right, thus putting the interest acquired by plaintiffs out of the purview of Article 2653. The court disposed of the contention by holding that there was a dispute as to part of the plaintiffs' interest, since the defendants asserted a claim to part of the right claimed by Crain.

It is interesting to note that there was also a dispute concerning the manner in which the partition was to be made, i. e., by licitation or in kind; and the lower court took cognizance of this fact in allowing defendants to redeem the *whole* of the interest purchased by plaintiffs.<sup>10</sup>

The supreme court, however, quite properly disregarded this point, and held plaintiffs' right to be litigious only as to the actual portion in dispute. This view is supported by Article 1335,<sup>11</sup> which

---

8. 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."

9. Art. 1700, French Civil Code. "*La chose est censée litigieuse des qu'il y a process et contestation sur le fond du droit.*" See also Comment (1939) 13 Tulane L. Rev. 448, 450.

10. "There are definitely two points which are contested. The first is the ownership of the property in question and the second is whether the property is to be divided in kind or by licitation." *Crain v. Waldron*, Supreme Court Record, Appeal from 14th Judicial District for the Parish of Cameron at page 43.

11. Art. 1335, La. Civil Code of 1870. "All points, arising before the judge having cognizance of the suit for partition, on the manner of making the collation or other operations relating to the partition, being merely incidental to the suit, shall be decided on the simple motion of the party inter-

states that in a suit for partition other operations are merely incidental to the suit.<sup>12</sup>

It is concluded from the above that in a suit for partition where the only point in dispute is the manner in which the partition is to be made, a purchaser of the interest of one of the parties to the suit will not be liable to litigious redemption.

Plaintiffs argued that since the sale was made pursuant to a written promise to sell acquired by them from Crain and recorded prior to the filing of the suit, title passed as of date of the prior agreement. The court repudiated this contention, stating that although a written promise to sell has been held to amount to a sale in the sense that it gives the purchaser the right to specific performance, the promise to sell in this case was an *option*, did not bind the plaintiffs, and *after suit had begun they still had the privilege of deciding whether or not they desired to make the purchase*. The language of the court indicates that Article 2652 would not apply where an executory contract of sale was entered into before the right became litigious.<sup>13</sup>

This decision, interpreting the applicable Articles of the Civil Code, adds to the previous jurisprudence on the subject of litigious rights the following conclusions:

(1) Where a thing<sup>14</sup> sold is partly litigious, redemption will be allowed for that part.

(2) In a suit for partition, where the only dispute concerns the manner of partition, sale of the thing subject to litigation will not constitute the sale of a litigious right under Article 2652.<sup>15</sup>

(3) There are indications that where a thing in litigation is sold pursuant to an executory contract of sale made before the commencement of the litigation, Article 2652 will not apply.

JAMES R. ALEXANDER

---

ested in having them decided, the same being duly notified to the other heirs or their attorneys, and a reasonable time being granted to answer thereto."

12. In *United States v. 12,918.28 Acres of Land in Webster Parish*, 50 F. Supp. 712,720 (D. C. La. 1943), the court, listing the four essential conditions of a litigious right, said: "(2) That the suit concerns fundamentally a right; not a suit wherein both parties are in agreement upon the substance (*fond*) of the right and are merely contesting auxiliaries or derivatives from the right, such as rank of claims, right of accounting, etc., under the right."

13. The language of the court, however, is not conclusive on this point; and such an indication would be contrary to the letter of Art. 2652, which states "He against whom a litigious right *has been transferred* . . ."

14. The Louisiana jurisprudence is in accord with the unanimous opinion of the French authorities to the effect that Article 2652 applies to immovables. See Comment (1939) 1 LOUISIANA LAW REVIEW 818, 823.

15. This rule should be applicable to Article 2447, La. Civil Code of 1870. "Public officers connected with courts of justice . . . can not purchase litigious rights, which fall under the jurisdiction of the tribunal in which they exercise their functions . . ."