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Civil Code and Related Subjects: Conventional Obligations

J. Denson Smith

per curiam opinion denying a rehearing declares the court's decision had been based on Richardson's inability "to purchase the stock for his own benefit without having given his principal *reasonable notice* of his intention to renounce the mandate," and on his acquisition of the stock "as trustee for the account of his principal, who became the rightful owner thereof."

Thus the supreme court resorted to the constructive trust in a case in which it considered the agent to have acted in violation of his fiduciary duty. The result is eminently fair and just, but the theory of the case demonstrates the inadequacy of our legislation in such situations. Perhaps a simpler solution would have been to deny that a denunciation with the intention of acting contrary to the interests of the principal can be effective and then to refuse to consider any act of the agent as being in violation of his obligations. In this way the constructive trust, with its non-civilian implications of separation of legal and equitable title and of formalism as opposed to substantivism in transactions, could be avoided.

CONVENTIONAL OBLIGATIONS

*J. Denson Smith**

Although not many cases falling within this classification were decided during the 1946-1947 session of the supreme court, there were a few of more than passing interest.

A very interesting situation developed in the case of *Mallet v. Thibault.*[1] An owner of two lots sold one to a Mrs. Rainey from whom the plaintiff inherited. It was agreed that Mrs. Rainey should have a servitude across the other lot for perpetual use as a driveway to her garage. However, this agreement was not written into the act of sale. Nevertheless, Mrs. Rainey and her tenant made use of the servitude as intended. Subsequently, the owner entered into a written agreement to sell the other lot to the defendant. This writing contained a recitation that the property was sold and purchased subject to "vendor's previous agreement to allow owner and tenant of house directly in rear use of driveway for entering and leaving their garage." But again when the act of sale was accomplished, this provision was not included therein. When plaintiff was thereafter notified to discontinue using the driveway, she filed this suit against the purchaser and the original owner seeking judicial recog-

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1. 31 So. (2d) 601 (La. 1947).

nition of the claimed right of passage. In sustaining the plaintiff's action, the court concluded that the provision contained in the preliminary contract to sell was a stipulation pour autrui which was not subject to revocation or abrogation by the failure of the owner and purchaser to include it in the subsequently executed act of sale. As such, it was sufficient to create a personal servitude, which was all that was necessary for the court to decide. Acceptance of the stipulation was found in the continuous use of the driveway by plaintiff even after the acquisition by the purchaser in question. To the defendant's contention that, under Article 2236 of the Louisiana Civil Code, the act of sale was full proof of the agreement contained therein, and that its provisions could not be enlarged by proof of the preliminary contract to sell, the court answered that Article 2236 applies only against the contracting parties and their heirs or assigns, therefore, plaintiff was not bound by it and was free to prove and enforce the stipulation contained in the original contract.

There was a dissenting opinion by Justice Hamiter who took the view that the preliminary contract was extinguished, as far as the owner was concerned, when it ceased to exist and became superseded by the notarial act of sale, and that the third party could be in no better position, because the stipulation "was for the exclusive benefit of [the owner], and plaintiff's claim under it could be and was no better than his."

In passing, the quoted language, as well as similar language in the majority opinion, seems to the writer to be inaccurate. It has a hoary background, stemming from a gratuitous expression in the early case of *Tiernan v. Martin*,[2] which has, unhappily, been too frequently repeated of late.[3] The statement that stipulations of the kind here in question are not pour autrui but are exclusively in favor of the party selling the property is usually followed by the proposition that if the third party accepts the stipulation, he may enforce it. These propositions are actually inconsistent, for if such a stipulation were not a stipulation pour autrui within the meaning and contemplation of Articles 1890 and 1902 of the Revised Civil Code as well as Article 35 of the Code of Practice, the third party would not have a power of acceptance and a right of action arising therefrom. That is, the only reason why such a third party acquires a right of action upon acceptance is that the stipulation is a stipulation

2. 2 Rob. 523 (La. 1842).

3. See Freedman v. Ratcliff, 183 La. 1, 162 So. 783 (1935); Moriarty v. Weiss, 196 La. 34, 198 So. 643 (1939).

pour autrui, which is another way of saying that it is for his benefit and not for the exclusive benefit of the other party. Of course, what the majority said in this connection was unimportant in view of its finding that the plaintiff had a cause of action to secure judicial recognition of the benefit provided in the preliminary contract to sell.

In his dissenting opinion, Justice Hamiter was on normally solid ground in contending that if the promisee (owner) would not have a cause of action, the third party beneficiary would be in the same position. Such a rule is entirely applicable if the promisor has any substantive defense against the promisee on the contract containing the stipulation in favor of a third party. But there is considerable doubt concerning the propriety of its application to the instant facts.

Although the majority seemed to agree that, because of the failure to include the stipulation for the third party in the final act, the parol evidence rule would prevent the owner from proving that it was part of the contract, it is by no means clear that the patrol evidence rule is applicable. The question involves the problem of merger which in turn depends on the intention of the parties.[4] If they intended to restate their entire contract in the final act of sale, then anything previously agreed to would be superseded. But the facts do not make it clear that they so intended. If they did not, proof of the stipulation contained in the written contract to sell should be in order, even between the parties, as proof of one of the provisions of their agreement. Granting that they intended the final and formal act of sale to be a complete integration of their contract, superseding the preliminary contract in its entirety, the question of whether they could do so to the prejudice of a third party beneficiary whose right had become irrevocable by acceptance would still be open. The majority opinion held that they could not. If it be agreed that the fact that the provision beneficial to the third party was contained in what was viewed as a preliminary contract would not destroy its normal legal effect, the decision is sound. Further exploration of the ramifications of the case will appear subsequently in this review.

4. 196 La. 84, 198 So. 643, 646 (1939). The statement made in *Moriarty v. Weiss*, that an executory contract to sell ceases to exist when the formal act of sale is passed, can hardly be deemed conclusive on this point.

In *Davis v. Dees*,[5] the plaintiff was suing as the purchaser of a dry cleaning and laundry establishment on the theory that the contract covering the sale of the business had been violated by the vendor's entering into a competing business, enticing plaintiff's employees and actively soliciting his customers. The court found that the inclusion in the sale of the *good will* of the establishment did not preclude the vendor from entering into a competing business. With reference to plaintiff's claim that a sale of good will does preclude the vendor's enticing his former employees and actively soliciting former customers, the court, specifically reserving the question, found that the evidence did not sustain these claims. The opinion suggests that the supporting evidence was not properly presented to the trial court. Be that as it may, the court's disposition of the case seems to have been in order.

Prior Louisiana jurisprudence has definitely settled the proposition that a sale of good will does not preclude the vendor's entering into a competing business, even in the same locality.[6] It likewise has been held that the vendor in support of his new establishment may engage in the normal means of attracting customers such as by advertising, including the distribution of handbills, as long as it does not appear that his efforts are directed at drawing customers away from his vendee any more than from any other person engaged in the same kind of enterprise.[7] On the other hand, it has been held by the first circuit court of appeal[8] that the obligations of the vendor of an insurance agency including its good will were violated when he opened a new establishment and succeeded in rewriting more than sixty per cent of the renewals as shown on expiration lists sold to the purchaser, by advertising in a manner that constituted a direct appeal to former clients. Likewise, the Orleans Court of Appeal[9] found that a motorcycle dealer had offended against the sale of his franchise to deal in Harley-Davidson motorcycles, including good will, by continuing to inform the public that he was still engaged in the same business as agent for the same manufacturer of motorcycles. The line both here and at common law seems to be drawn at the point where the vendor will not be permitted to make a direct attempt to retain old customers or solicit them to trade with him.[10] The courts of appeal cases can be reconciled with the

5. 211 La. 229, 29 So. (2d) 774 (1947).
6. Bergamini v. Bastian, 35 La. Ann. 60 (1883).
7. Ibid.
8. Alfred Mouton, Inc. v. Hebert, 199 So. 172 (La. App. 1940).
9. Lindstrom v. Sauer, 166 So. 636 (La. App. 1936).
10. See Alfred Mouton, Inc. v. Hebert, 199 So. 172 (La. App. 1940).

Bergamini case on this basis; and it is believed that they provided a degree of protection to which the vendee of good will is entitled.

In *Lamar v. Young*,[11] the court refused to enforce specifically an agreement to sell certain property as a consequence of the failure of the purchaser to secure the execution of the formal act of sale within thirty days from the date of the contract to sell as provided therein.[12] The court took the view that there was no basis for holding the vendor estopped to set up the expiration of the thirty-day period, and found in the vendor's suggestion that it was his desire to count the income derived from the sale in one calendar year instead of another "an excellent reason why it was necessary to complete the sale" within the stated period.

It is settled jurisprudence in this state that a failure to perform a contract at a time specifically agreed upon does not ipso facto constitute a default in the absence of a stipulation to such effect, unless, to use the customary expression, "time is of the essence."[13] The only suggestion that time was of the essence lies in the evidence that the vendor wanted the income to fall in the year 1944 instead of the year 1945. It is doubtful that the court considered that this fact would make time of the essence as a matter of law, there being no stipulation to such effect in the contract. At any rate, the court did not take the position that the plaintiff's action could not stand because he was himself in legal default. Its position, apparently, was that since plaintiff had not undertaken to secure performance within the thirty-day period he could not be entitled to specific performance without showing in some way that the defendant was estopped to set up the failure.

If the defendant had brought suit against the plaintiff to dissolve the contract, the court would have had the power to permit the vendee to perform, notwithstanding that the time for performance stated in the contract had expired.[14] This being true, it seems that the same power would rest in the court regardless of whether the case came before it as an action for specific performance or an action to dissolve for non-performance. Indeed, the effort by defendant

11. 211 La. 837, 30 So. (2d) 858 (1947).

12. The court did not recognize the possibility that the thirty-day period might have been intended to run from the time the title was found to be valid. However, the plaintiff's delay was not founded on this point.

13. Erwin v. Fenwick, 6 Mart. (N. S.) 229 (La. 1827); Flournoy v. Miller, 114 La. 1028, 38 So. 818 (1905).

14. Arts. 2046, 2047, La. Civil Code of 1870; Southport Mill, Ltd. v. Ansley, 160 La. 131, 106 So. 720 (1925). See also with reference to completed sales Arts. 2561, 2562, La. Civil Code of 1870.

to resist performance was in effect a demand that the contract be dissolved. The court's action, therefore, simmers down to a finding that there was sufficient reason for not allowing the vendee any time for performance beyond the contract period. Yet, the plaintiff apparently acted in complete good faith, and there is an absence of any suggestion that he was trying to take advantage of a delay that might inure to his benefit. On the other hand, the increase in value of the property afforded a good reason why the vendor might have desired to change his mind in addition to his suggestion concerning his income tax. By and large, the substantial equities seemed to be with the plaintiff-vendee. Instead of taking the view that there was no basis for holding the defendant estopped to set up the expiration period by way of defense, the court would have been on sounder ground by considering whether there was any basis for denying the plaintiff the right to perform after the stated time had expired. This approach would have been consonant with the provisions of the Code as well as prior jurisprudence, and the shift of emphasis might have resulted in a different holding. In seemingly suggesting that a vendee's demand for specific performance will be in order only if he can show that he called upon the vendor to perform within the time stated in the contract, the court apparently ignored the matter of legal default and went considerably beyond any prior holdings.[15]

Two cases were decided during the period involving the principle of reformation which seems to have been borrowed from the common law although there is, perhaps, sufficient basis for it in our Code.[16] In *Weber v. H. G. Hill Stores, Incorporated*,[17] the trial court's action in dismissing plaintiff's suit on an exception of no cause of action was reversed and the case was remanded for trial to afford plaintiff the opportunity to introduce evidence to support its prayer that a contract of lease be judicially reformed to show the actual intention of the contracting parties concerning the application of a provision for determining the monthly rental thereunder. The plaintiff's petition was entirely adequate, as the court found, to allege mutual error in the reduction to writing of the agreement reached, and the only question involved was whether he could produce evidence of the different antecedent agreement and of the error in

15. George v. Lewis, 11 La. Ann. 654 (1856); Joffrion v. Gumbel, 123 La. 391, 48 So. 1007 (1909); Powell v. Codifer & Bonnabel, 167 La. 97, 118 So. 817 (1928); Davis v. McCain, 171 La. 1011, 132 So. 758 (1931).

16. Art. 1762, La. Civil Code of 1870; Ker v. Evershed, 41 La. Ann. 15, 6 So. 566 (1889).

17. 210 La. 977, 29 So. (2d) 33 (1946).

committing it to writing sufficiently clear to warrant granting the relief sought. Like action was taken in *Lindsey v. Caraway*,[18] where the question involved the inclusion in a mineral lease of a proviso not contained in the original agreement. The court found its earlier decision in the case of *Tate v. Ludeau*[19] controlling. Its refusal to find a charge of fraud sufficient to support plaintiff's claim of cancellation was in order.

A plaintiff's attempt to secure a mineral lease without running any risk thereunder by providing that the only penalty for a failure to drill would be the ipso facto determination of the lease backfired on him in *Noxon v. Union Oil Company of California*.[20] The lower court's finding that he had no cause of action for an alleged conspiracy arising from the granting by his lessor of a subsequent lease to the other defendant was affirmed on the ground that plaintiff's contract of lease was a nullity and unenforceable. Of course, the defendant's obligation which the plaintiff was seeking to enforce was not subject to a potestative condition but the plaintiff's obligation to drill was. The contract failed, therefore, because the plaintiff's unenforceable obligation could not support the lessor's obligation under the lease. Such a case actually involves an absence of cause.

The case of *Crosby v. Little River Sand and Gravel Development*[21] involved only a question of interpretation of an agreement between the parties covering the repair of certain machinery and the admissibility of certain secondary evidence. In admitting the evidence the court recognized that there has in recent years been some relaxation in the stringent rule of Article 2248[22] providing that books of merchants cannot be given as evidence in their favor. The suit was for a balance due for labor and materials furnished.

The court found it unnecessary to refer to any authority in adjusting the rights between a building contractor suing for a balance due on a construction contract and an owner who resisted on the ground of the contractor's failure to properly fulfill his contract in *Wilson v. Peak*.[23] The dispositions made by the court had ample support in the evidence.

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18. 211 La. 898, 30 So. (2d) 182 (1947).
19. 195 La. 954, 197 So. 612 (1940).
20. 210 La. 1074, 29 So. (2d) 67 (1946).
21. 31 So. (2d) 226 (La. 1947).
22. Art. 2248, La. Civil Code of 1870.
23. 210 La. 969, 28 So. (2d) 677 (1946).

As far as the present classification is concerned, the case of *Thompson v. Thompson*[24] is relevant because of its position that the holder of a valid option to purchase certain lands would not be entitled to specific performance against the claims of certain heirs that the transfer to his vendor, although in the form of a sale, was in fact a disguised donation. The court recognized that if the option holder had secured a conveyance of the property before the claims of the heirs were judicially asserted he would have had a title that was unassailable under the doctrine of *McDuffie v. Walker*.[25] Its decision rested on the proposition that as the holder of an option, plaintiff had merely a right, less than absolute, to specific performance which was inferior to the real interest held by the heirs in the property transferred by their ancestor by disguised donation. A dissenting opinion by Justice Hamiter reminded the court that its position might be difficult to defend in view of the fact that the holder of an option has a right superior to that of a transferee of the property who takes after recordation of the option, and yet the transferee's right would be superior to the rights of the heirs thereafter asserted. There was no suggestion from the court as to how it would solve this problem if and when it should arise.

It is perhaps too late to suggest that traditionally specific performance is viewed in French-civilian law as the normal remedy for the breach of such an obligation, with damages as the exceptional case where obligations to do are involved.[26] Treating the right to specific performance as an exceptional remedy is just another surrender to the pressure of common law influences. It is not suggested, however, that a civilian view of the nature of specific performance in obligations of this character would have conduced to a different result. One can hardly read the opinion without feeling that the parties who were really entitled to profit from the discovery of oil on the land were protected, yet there is a strong indication that the set-back administered to faith in the public record may be the making of bad law.

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24. 211 La. 468, 30 So. (2d) 321 (1947).
25. 125 La. 152, 51 So. 100 (1909).
26. See Note (1947) 21 Tulane L. Rev. 499.