Civil Code and Related Subjects: Sale

Alvin B. Rubin
Indemnity bond for mortgage cancellation

It is the duty of the recorder of mortgages to cancel a mortgage upon proof of the payment or extinction of the principal indebtedness for which the mortgage was security. He is responsible for the improper cancellation of a mortgage without adequate evidence. In State ex rel. Hope v. Hickey, the recorder of mortgages of Orleans Parish was requested to cancel a mortgage without the production of the cancelled mortgage note which, it was alleged, had been lost or destroyed. His refusal to do so without the posting of an indemnity bond was not supported by the trial court but on appeal his position was sustained by the Supreme Court. The recorder performs a very important and responsible function, and it would facilitate the possibility for abuse to compel him to cancel a mortgage without adequate evidence or security.

If a written instrument has been lost or destroyed, there is a legal procedure to reestablish it with a judgment which then has the same force and effect as the original instrument. But if the evidence tends to show that there never was a mortgage note (as in present case), there seems to be no other way to have the mortgage cancelled than by posting an indemnity bond—unless the recorder is willing to make the erasure on his own personal responsibility.

Sale

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Formalities

In Lemoine v. Lacour, plaintiff sued for specific performance of an alleged contract to sell immovable property. The only written evidence was a receipt which read “Received from Mr. Clifton Lemoine $35.00 for payment on place.” The court held that the petition stated no cause of action because it attempted to enforce a verbal sale of immovable property in contravention of the provisions of Civil Code Article 2440. However, the court allowed plaintiff to supplement his pleadings and to interrogate

7. 36 So. (2d) 5 (La. 1948).
8. La. Act 57 of 1886, §§ 3-12 (Section 3 as amended by La. Act 30 of 1900, § 1) [Dart’s Stats. (1939) §§ 7862-7861].
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1. 213 La. 109, 34 So. (2d) 392 (1948).
defendant on oath regarding the verbal sale, pursuant to the provisions of Article 2275. The court distinguished other cases in which a receipt was relied upon to support a contract to sell immovable property on the ground that "In each of them the writing relied upon contained a substantial description of the affected property." The distinction drawn appears entirely sound.

Earnest Money

In *Johnson v. Johnson*, plaintiff had contracted to sell a house and lot to defendant. For reasons discussed in the section of this article dealing with community property, defendant refused to accept title, and the court affirmed the correctness of defendant's position. A year after institution of a suit by plaintiff for specific performance, and a reconventional demand by defendant, plaintiff remedied the title defect, but the court refused to require defendant to accept title at that belated time.

The contract between plaintiff and defendant contained the provision that "In the event that the seller does not comply with this agreement to sell within the time specified, the purchaser shall have the right, either to demand the return of double the deposit, or specific performance." The court held that this clause did not justify an award of double the deposit under the facts of the case because, "Sellers are attempting to enforce specific performance of the contract. It cannot be said that they have arbitrarily refused to convey title, when in truth, they are, even now, willing to comply with the contract. . . ."

Right of View and Trial

Generally speaking, in Louisiana risk of loss follows title. Article 2460 of the Civil Code provides that where the buyer reserves "the view and trial of" the thing sold, this is a suspensive condition of the sale. This therefore defers passage of title, and therefore passage of the risk of loss.

In *American Creosote Works v. Boland Machine & Manufacturing Company* the supreme court found that the provisions of a contract to sell creosoted fir pilings reserved to the buyer a "right to check and inspect" and therefore held that "delivery

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2. See Note (1947) 21 Tulane L. Rev. 706.
3. 34 So. (2d) 392, 393 (La. 1948).
4. 35 So. (2d) 396 (La. 1948).
5. See St. Landry Oil & Gas Co. v. Neal, 166 La. 799, 118 So. 24 (1928).
6. 36 So. (2d) 396, 400 (La. 1948).
7. 213 La. 534, 35 So. (2d) 749 (1948).
was never completed under the terms of the contract.” Or, to put the matter in other words, title did not pass prior to the exercise of the right of view and trial. Therefore a loss of the fir pilings by fire after they had been loaded on the buyer’s barge, but before they had been inspected by him, fell upon the seller since title had not yet passed.

Redhibitory Defects

In Savoie v. Snell,8 the court held a cracked engine block to be a redhibitory defect in a second-hand automobile and rescinded the sale. However, since the seller was in good faith, consequential damages were not awarded. The buyer had been granted in addition damages by the court of appeal under the provisions of the Emergency Price Control Act9 for an overcharge, since the ceiling price for an automobile not in good running order was less than the price actually charged—the ceiling price for an automobile in good condition. The supreme court amended the decision to reject this award, since rescission placed both parties in the status quo ante, and no additional relief appeared due under the code articles relating to redhibitory defects.

Validity of Title

Mr. and Mrs. Atkins created a charitable trust, and conveyed immovable property to it, but failed to give the trustee authority to sell the real estate. Thereafter, the trustee and Mr. and Mrs. Atkins contracted to sell the immovable property to Johnson, who refused tender of a deed signed by the trustee and by Mr. and Mrs. Atkins in which Mr. and Mrs. Atkins warranted title. Thereupon Mr. and Mrs. Atkins instituted suit for specific performance. The supreme court, in Atkins v. Johnston,10 reversed the lower court and granted specific performance of the contract.

The court said, “Obviously there is no merit to the contention that the Trustee has no authority to sell the real estate. John B. Atkins and his wife, who alone established the John B. Atkins Foundation, are parties to the deed tendered to the defendants; and, if the trust instrument failed to authorize the Trustee to make the sale, authority is impliedly given by and through their concurrence in transferring the property.”

The court further held that no action in reduction or revaluation would lie under Article 1517 by the forced heirs of Mr.

8. 213 La. 823, 35 So. (2d) 745 (1948).
10. 213 La. 458, 35 So. (2d) 16 (1948).
and Mrs. Atkins. This ruling was the subject of a dissent by Chief Justice O'Neill and Justice McCaleb. This aspect of the case is discussed elsewhere in this Review.11

Time for Performance

In Davis v. Oaklawn,12 plaintiff was lessee of real estate. Defendant corporation was the lessor-owner. Plaintiff paid an additional consideration for an option to purchase, which was incorporated into the lease. On the last day for the exercise of his option, plaintiff gave written notice to defendant's president, who acknowledged in writing the exercise of the option. The acknowledgment stipulated that the act of sale was to be passed before December 21, 1945.

Since plaintiff required a loan to enable him to consummate the transaction, he negotiated with a lending agency suggested by defendant's agent, Jesse Jones. However, the loan was not approved by December 21, 1945. On that date, plaintiff's attorney (who, however, was not acting as attorney in the closing of the loan) telephoned defendant's agent, Jesse Jones, who informed him that the act of sale could not be passed that day. Plaintiff's attorney asked for an extension of time, "and Jones suggested . . . waiting until after the beginning of the year [1946] . . . and that no written extension or agreement was necessary."13 The plaintiff in a companion case14 later met Jesse Jones in a grocery store and Jones there thanked him for waiting until after January 1 to pass the acts of sale.

A check for the amount of the loan having been received from the lending agency, all parties were notified by the secretary of the attorney who was handling the loan to be at his office on January 8, 1946, to execute the act of sale. On this date, all the documents were prepared, and checks were available to pay the purchase price, but no representative of defendant appeared. Meanwhile, defendant had mailed notices to plaintiff that it did not intend to consummate the transaction "because the time granted for passing the acts of sale had elapsed."15

The court decided that plaintiff was entitled to specific performance because he had been "lulled into inactivity. . . . Certainly this defendant, whose agent had agreed to the delay and

11. See p. 182, supra, and p. 294 et seq., infra.
15. 212 La. 392, 399, 31 So. (2d) 837, 839.
had suggested that the acts of sale be passed after January 1, cannot now take the position that, because of such delay, these plaintiffs have lost their rights under the contracts to purchase.\textsuperscript{16}

The court apparently assumed, at least arguendo, that defendant had the authority to qualify its acknowledgment of plaintiff's exercise of the option by stating a date for passage of the act of sale. This proposition would appear to be debatable. But finding an estoppel against the defendant resolved the matter in plaintiff's favor.

The notice of exercise of the option created a contract to buy and sell as between plaintiff and defendant. Assuming that the time for execution of the option was a valid term of this contract, two questions concerning the estoppel approach suggest themselves. First, would an extension of time, gratuitously given, bind defendants? Under the facts found by the court, the extension was given as much for defendant's convenience as for plaintiff's and there was therefore a mutual consideration for it.

The second question is whether estoppel will suffice to eliminate the requirement of a written instrument as to the time for performance. The supreme court has previously assumed that an estoppel would be sufficient to extend the time specified for performance of a contract to sell.\textsuperscript{17} This approach would appear to be equitable, although somewhat difficult to reconcile logically with Article 2276.

The plaintiff in \textit{Peacock v. Oaklawn}, the companion case, had asked for specific performance, and, in addition, for damages resulting from loss of profits on a projected resale of the property to a third person. The court dismissed this demand as of non-suit because there was not sufficient evidence in the record to determine the exact profit which plaintiff would have made. Justice McCaleb dissented from this portion of the decision. Quoting Articles 1926 and 1927 of the Civil Code, he urged that an injured party has an election to sue either for resultant damages or for specific performance, but not for both. Justice McCaleb pointed out quite cogently that "the recognition by the majority of a right in Peacock to recover his alleged lost profit in addition to a specific performance places him in a better position than he would have been if the defendant had complied with his agreement."\textsuperscript{18}

\textsuperscript{16} 212 La. 392, 400, 31 So. (2d) 837, 840.
\textsuperscript{17} See Lamar v. Young, 211 La. 837, 30 So. (2d) 853 (1947). See also Bonfield v. Tichenor, 189 So. 635 (La. App. [Orl.] 1939).
\textsuperscript{18} 212 La. 392, 405, 31 So. (2d) 837, 841 (1947).
The case of Johnson v. Shreveport Properties, Incorporated,\textsuperscript{19} presented a somewhat similar problem with regard to a failure to consummate a sale of real estate within the specified time. The court again did not consider the question whether a written extension of time was necessary, saying, "If time were of the essence of the contract under consideration the argument thus made might be effective. But the pleadings... together with the annexed documents, do not show this to be true. In fact, incidentally, on the trial of the case it was clearly and definitely disclosed that the fifteen day period stipulated for consummation of the sale was of no importance and further that it had been waived by the parties."\textsuperscript{20}

That case further involved a problem of offer and acceptance discussed in the obligations section of this article. The court concluded that an offer, made in writing, had been accepted. The plaintiff, who was the prospective vendee, had deposited $5,000.00 earnest money and the court awarded plaintiff double this amount for non-performance of the contract by the vendor, under the provisions of Civil Code Article 2463.

In the companion case of Stoer v. Shreveport Properties, Incorporated,\textsuperscript{21} the court held that since the real estate agent who handled the transaction had succeeded in completing a valid contract to sell the property, he was entitled to be paid his commission.

\textit{After-Acquired Title}

In the case of Watermen v. Tidewater Associated Oil Company\textsuperscript{22} the court held that the doctrine of after-acquired title does not apply to a sale by quitclaim deed. The after-acquired title rule, briefly stated, is that where a vendor sells property which he does not own and thereafter acquires title, his "after-acquired" title vests immediately in his vendee.\textsuperscript{23} The court said that the doctrine is based on the theory of warranty and "is really nothing more than an enforcement of the grantor's obligation to deliver a good title. And it may even be proper to extend application of the doctrine to a sale without warranty where

\textsuperscript{19} 213 La. 485, 35 So. (2d) 25 (1948).
\textsuperscript{20} 35 So. (2d) 26.
\textsuperscript{21} 213 La. 503, 35 So. (2d) 31 (1948).
\textsuperscript{22} 213 La. 588, 35 So. (2d) 225 (1948).
\textsuperscript{23} See Guice v. Mason, 156 La. 201, 100 So. 397 (1924); St. Landry Oil and Gas Co. v. Neal, 166 La. 798, 118 So. 24 (1928).
the land conveyed is adequately described. In such a case, it might be argued that the vendor would be precluded from subsequently acquiring . . . title to the prejudice of the vendee under Article 2504 of the Civil Code . . . . On the other hand, it is quite manifest that the doctrine of after-acquired title should not be expanded to include a quitclaim deed, primarily for the reason that a conveyance of that character transfers only the present interest of the vendor in the land and does not convey the property."

In a brief dissent, Justice Hamiter stated his opinion that the doctrine of after-acquired title should have been applied. The problem presented to the court was one of no little logical difficulty and the solution reached is probably a tenable one, pursuant to the logic already stated. However, it can be forcibly argued that the civil law concept of the obligations of the vendor, and the scope of his warranty, should be more embracive. Article 2504 of our Civil Code provides that the warranty of the vendor against his personal acts cannot be waived: "Any contrary agreement is void." The result reached in Waterman v. Tidewater Associated Oil Company means that this provision can be largely circumvented by the simple expedient of phrasing a conveyance as a quitclaim.

The reasoning of the majority is perhaps exemplified by one expression made in reference to an earlier decision: "We are unable to discern why Rapp should have been barred from buying the property merely because he had previously sold it to Towny in 1870." Article 2504 viewed in the light of the obligations of the seller under our code would seem to imply that "merely because he had previously sold" the same property might be sufficient reason to bar a vendor from later acquiring a title superior to his vendee's whether the original sale had been by quitclaim or by warranty act.

Several other problems involved in the Waterman case were disposed of by reference to the particular facts involved. The court held that a statute conveying title from the state to a levee district did not convey the lands in question; that plaintiff could not claim an "equitable title in the land; that an attacked tax sale had been valid; and that there was no title based on 10 year acquisitive prescription."

24. 35 So. (2d) 225, 233 (La. 1948).
25. 35 So. (2d) 225, 234.