Louisiana Law Review

Volume 9 | Number 4
May 1949

Sales-Specific Performance - Outstanding Possible Claim in Favor of a Third Person

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owner. The defendant did not get the consent of the complainant as required by this statute. He did not receive the consent of the commissioner of conservation, who under the 1940 act had the sole authority to grant permission to conduct explorations on public roads, and who under the 1942 statute cannot issue such a permit without the consent of the abutting property owner. It would appear that within the meaning of these statutes the defendant might have been properly indicted for unauthorized exploration of either public or private lands.

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SALES—SPECIFIC PERFORMANCE—OUTSTANDING POSSIBLE CLAIM IN FAVOR OF A THIRD PERSON—The First National Bank of Shreveport, as tutor of minor children, petitioned the district court for permission to sell at private sale some land belonging to the minors. To this petition were attached the verifying affidavit of the tutor's acting trust officer and an affidavit executed by the minors' undertutor concurring in the tutor's recommendations and prayer and stating that he considered it to the evident advantage of the minors that the property be thus sold. On this showing judgment issued, pursuant to which the sale was made. Plaintiff purchased from the vendee of this sale and entered into a contract to sell with defendant, under which it was agreed that defendant would receive merchantable and valid title. Defendant refused to accept title and plaintiff sued for specific performance. *Held,* since the undertutor had not been ruled into court to show cause why the prayer of the tutor's petition should not have been granted, as required by the statute regulating the sale of minor's property by private act,[1] the title was burdened with a possible claim in favor of the minors. The validity of this claim could not be inquired into, as the minors were not parties to the suit; therefore, the title was "suggestive of serious future litigation" and defendant was not required to accept it. *Schaub v. O'Quin,* 38 So.(2d) 63 (La. 1948).

In the instant case the court did not hold that the proceedings by which the minors' property was sold were in fact invalid. The court held that it was not possible in this suit to inquire into the validity of the proceedings, as the minors were not parties to the action and would be unaffected by the judgment. It might well be, as the court pointed out, that in a proper proceeding, with the minors duly represented, the court would find that the

1. La. Act 209 of 1932 [Dart's Stats. (1939) §§ 4844-4847].

title was "good and valid." The basis of such a decision could be a finding by the court that the affidavit of the undertutor, concurring in the recommendation of the tutors' petition, was sufficient to dispense with the rule to show cause. Or the court might find that the minors could not contest the proceedings on the ground of unjust enrichment[2] or that the acts of the tutor had been such as to constitute him a negotiorum gestor.[3] However, in this case even a finding that the title was *good and valid* would not have affected the ultimate decision, as the agreement between the parties provided that the title to the property be *merchantable* and *valid.*

Merchantable title was defined in *Roberts v. Medlock*[4]: Justice Mills, speaking for the court of appeal, said, " 'merchantable title' is one which can be readily sold or mortgaged in the ordinary course of business, to a reasonable person familiar with the facts and apprised of the question of law involved. It need not be free from every technical defect, of all suspicion, or the possibility of litigation. . . . The word 'merchantable' implies something less than a perfect title and permits of defects which are not reasonably liable to result in assault." This definition recognizes the generally accepted distinction between *good* or *valid* title and *merchantable* title; the former being one which may in fact be good, but may require litigation to sustain it; the latter, one which is good on its face. The cases have not always made this distinction clear, and much loose language has been used in the decisions.[5] In sustaining a prospective vendee's contention that the title tendered was not merchantable, the court has held that

2. Which is based on the moral maxim of the law that no one should enrich himself at the expense of another. Art. 1965, La. Civil Code of 1870.

3. Where one undertakes on his own account to manage the affairs of another, equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager in his name. Art. 2299, La. Civil Code of 1870. Article 2300 indicates that a third person may be bound regardless of whether or not the owner is incapacitated, if the gestor has the requisite capacity. (This doctrine has found little application in Louisiana, but is amply supported by French authority. Arts. 1371, 1375, French Civil Code; Colin et Capitan, Cours Elementaire de Droit Civil Français (18 ed. 1935) 2, § 952; Planiol, Trait Elementaire de Droit Civil (11 ed. 1939) 2, § 2273; Planiol et Ripert, Traite Pratique de Droit Civil Français (12 ed. 1931) 7, § 730.)

4. 148 So. 474, 476 (La. App. 1933).

5. See Praegner v. Kinnebrew & Ratcliff, 156 La. 132, 100 So. 247 (1924), where the contract required title to be "good and merchantable" and the court held it was not "good and valid"; Tessier v. Roussel, 41 La. Ann. 474, 6 So. 542, 824 (1889), where on appeal it was held that the title was not "good and clear," while on rehearing the court said it could not pronounce the title "perfect and unquestionable."

the title "must be legal from every point of view,"[6] and that it must not be "reasonably suggestive of litigation"[7] and that what the vendee purchased was "the property—not the property plus a probable law suit."[8] The test most consistently applied by the court has been whether the title is suggestive of serious future litigation.[9] However, the court has repeatedly held that one refusing to accept title must show some substantial threatening danger, not a mere remote possibility.[10]

While it is practically impossible to categorize all the cases, due to the myriad factual situations presented, a glance at a few of the more commonly occurring ones will serve to illustrate the factors considered by the court in determining whether or not the title is sufficiently free of question to be merchantable.

Where the legal defect raised is a slight discrepancy in the description or designation used in a previous act of sale of the property involved,[11] the proposed vendee will be required to accept title. The same result is reached where it is claimed that title is subject to attack by forced heirs because it has been the subject of a donation, and it is not shown that there are "in esse or posse" forced heirs in whose favor such right of revocation exists or is likely to arise.[12] On the other hand the proposed vendee will not be compelled to comply with the agreement to purchase where property has been sold by one of the marital partners, allegedly as his or her separate property, if it was purchased by such party during the existence of the community. It is so held even if the act of purchase, joined in by the other spouse, contains a recital that the property is being purchased with separate funds.[13] The vendee can also avoid specific performance if the property was acquired in a judicial separation of property

6. Bodcaw Lumber Co. v. White, 121 La. 715, 46 So. 782 (1908).
7. Marsh v. Lorimer, 164 La. 175, 113 So. 808 (1927).
8. Neuhauser v. Barthe, 110 La. 825, 34 So. 793 (1903).
9. Bachino v. Coste, 35 La. Ann. 570 (1883); James v. Mayer, 41 La. Ann. 1100, 7 So. 618 (1890); Lyman v. Stroudback, 47 La. Ann. 71, 16 So. 662 (1895); Neuhauser v. Barthe, 110 La. 825, 34 So. 793 (1903); Praegner v. Kinnebrew & Ratcliff, 156 La. 132, 100 So. 247 (1924).
10. In re Louisiana Savings Bank and Safe-Deposit Co., 48 La. Ann. 1428, 20 So. 909 (1896); Woolverton v. Stevenson, 52 La. Ann. 1147, 27 So. 674 (1900); Grasser v. Blank, 110 La. 493, 34 So. 648 (1903); Norton v. Enos, 158 La. 423, 104 So. 194 (1925).
11. Lassus v. Gourgott, 169 La. 577, 125 So. 623 (1929); Roberts v. Medlock, 148 So. 474 (La. App. 1933).
12. In re Louisiana Savings Bank and Safe-Deposit Co., 48 La. Ann. 1428, 20 So. 909 (1896); Woolverton v. Stevenson, 52 La. Ann. 1147, 27 So. 674 (1900).

in a divorce action, and the legality of the divorce obtained is not settled.[14]

Though there are no cases so holding where merchantable title was specifically required, it is well settled that the vendee will be required to accept title if the vendor can show a prescriptive title.[15] The court has indicated, in dicta, however, that even where merchantable title was required a prescriptive title would be sufficient.[16]

The court declined in the instant case (as the minors were not parties to the cause) to go into the question of whether or not substantial compliance with the statute regulating the sale of minors' property by private act was sufficient to render the title merchantable. This raises the question of when, if ever, the court will inquire into the merits of an outstanding claim in favor of a party not before the court. Although in a suit for specific performance, the court cannot pass directly on the question of title between plaintiffs and third persons who are not parties to the suit, as the decision would not be binding upon the latter,[17] it can consider such questions so far as they affect merchantability of title.[18]

With regard to the outstanding claims of minors who are not before the court, the leading cases of *Spence and Golstein v. Clay*[19] and *Abraham v. Loeb*[20] would seem decisive. From an analysis of these two cases, the following may be concluded: if on the face of the record it appears that the proceedings were regular, third parties will be protected by the judgment; but if the record does not reflect such regularity of proceedings, third parties will not be protected by the judgment and therefore will

13. Bachino v. Coste, 35 La. Ann. 570 (1883); Gogreve v. Dehon, 41 La. Ann. 244, 6 So. 31 (1899); Bartels v. Souchon, 48 La. Ann. 783, 19 So. 941 (1896). The court holding in these cases that where the property is purchased during the marriage there is a presumption of law in favor of the community, which can be rebutted only by extraneous proof, that the declaration of origin of the price in the act of purchase does not make the property paraphernal, and binds neither the creditors nor forced heirs; the latter only to the extent of the disposable portion.

14. Carter v. Morris Building and Land Improvement Ass'n, 108 La. 143, 32 So. 473 (1902); Bonfield v. Trichenor, 189 So. 635 (La. App. 1939).

15. Pattison v. Maloney, 38 La. Ann. 885 (1886); Johnson v. Carrere, 45 La. Ann. 847, 13 So. 195 (1893); Meibaum v. Brennan, 49 La. Ann. 580, 21 So. 853 (1897); Westerfield v. Cohen, 130 La. 533, 58 So. 175 (1912); Metairie Park Inc. v. Currie, 168 La. 588, 122 So. 859 (1929).

16. Lassus v. Gourgott, 169 La. 577, 125 So. 623 (1929).

17. Praegner v. Kinnebrew & Ratcliff, 156 La. 132, 100 So. 247 (1924); Broussard v. Succession of Broussard, 164 La. 913, 114 So. 834 (1927).

18. Roberts v. Medlock, 148 So. 474 (La. App. 1933).

19. 169 La. 1030, 126 So. 516 (1930).

20. 35 La. Ann. 377 (1883).

not be required to accept title. This conclusion would seem supported by the case under discussion, as here it was apparent from the record that the proceedings were not regular, and the court declined to consider whether or not the judgment was *proper* (from the standpoint of whether the judgment actually worked to the best interests of the minors).

Most instances in which the court has considered the merits of the claim of a third party, when such party was not before the court, have been those in which the court found that the claim was without sufficient validity to render the title suggestive of serious future litigation. These have most often been cases in which, on the legal issue raised by the prospective vendee, it could be determined (1) that the vendor or his authors in title had a prescriptive title which the court felt could not be successfully attacked;[21] (2) that the court had jurisdiction over the proceedings, which were regular, even though the judgment may not have been the proper one;[22] or (3) that the status of the law on the issue raised was well settled.[23] However, it appears equally probable that the court will not inquire into the merits of the claims of third parties not before the court if, on the legal issue raised by the proposed vendee, it appears (1) that the law on the question is not well settled,[24] or (2) that the proceedings which were required by law were not regular.[25]

If the suit under discussion had been one by the vendee against the vendor to rescind the sale for breach of the warranty against eviction,[26] would the decision have been different? The

21. The absence of cases on the point indicates that this will not apply where the contract between the parties specifically requires that the title be *merchantable.*

22. Spence and Golstein v. Clay, 169 La. 1030, 126 So. 516 (1930).

23. Bachino v. Coste, 35 La. Ann. 570 (1883); Norton v. Enos, 158 La. 423, 104 So. 194 (1925); Roberts v. Medlock, 148 So. 474 (1933). In these cases the court found the law on the point clear to the effect that (1) failure to attach certificates of non-alienation or of encumbrances to an act of sale was not fatal to the sale (*Norton v. Enos*); (2) that an heir could dispose of his interest in a succession by general description (*Roberts v. Medlock*); and (3) that property purchased during marriage is presumed to be community property, until proved otherwise by evidence de hors the recital of a deed (*Bachino v. Coste*).

24. Bodcaw Lumber Co. v. White, 121 La. 715, 46 So. 782 (1908), where the question was then being litigated in another suit pending before the court. The instant case appears to support this theory, as indicated by the court's statement: "The conclusion is inescapable [that the title was suggestive of serious future litigation] . . . when it is realized that there exists no jurisprudence previously determining the question of whether or not a substantial compliance with those statutory provisions will suffice."

25. Abraham v. Loeb, 35 La. Ann. 377 (1883).

26. Arts. 2500-2501, La. Civil Code of 1870.

early jurisprudence as exemplified by *Bonnable v. First Municipality*[27] was to the effect that a vendor warranted his vendee only peaceable possession of the property sold. The present rule, interpreting Civil Code Articles 2500-2501, that an eviction is not a prerequisite to an action in warranty by the vendee against his vendor as long as there exists a perfect outstanding title in a third person, was established in *Bonvillain v. Bodenheimer*[28] (which overruled the *Bonnable* case). It has since been held that when the vendee fails to prove an outstanding title in a third person he cannot successfully sue to resolve.[29] Since under the facts of the instant case the minors probably did not have a perfect title, it is doubtful that the vendee would have been sustained in his action. It is interesting to note that in order to determine whether there was perfect outstanding title in the minors the court would probably have had to decide whether substantial compliance with Act 209 of 1932[30] was sufficient.

The agreement between the parties herein provided that the title must be merchantable. A title is not merchantable if it is suggestive of serious future litigation. As the minors were shown to have a claim with a substantial basis for future litigation, the decision is in accord with the prior jurisprudence. However, it is submitted that the court was not justified in refusing to determine whether or not substantial compliance with Act 209 of 1932 was sufficient. The fact that there was no jurisprudence previously determining the question should not deter the courts of a civil law jurisdiction. Had the court decided this question in the affirmative, a more equitable result might have been reached.

J. DOUGLAS NESOM

TORTS—RIGHT OF PRIVACY—An innocent citizen had been charged with and acquitted of the supposed murder of the plaintiffs' father, though the body had not been discovered. Twenty-five years later, the father's body, together with a will, was returned from another state. It was thus revealed that he had not been murdered but had been residing in another state since his disappearance. Years after his actual death, defendant's radio station produced this story concerning the plaintiffs' father, and the plaintiffs sued for invasion of their right of privacy. *Held*, the passage of time could not give privacy to the acts of their father

27. 3 La. Ann. 699 (1848).
28. 117 La. 793, 42 So. 273 (1906); Comment (1940) 15 Tulane L. Rev. 122.
29. Kuhn v. Breard, 151 La. 546, 92 So. 52 (1922).
30. Dart's Stats. (1939) § 4844-4847.