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Civil Code and Related Subjects: Sale

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case, the court did not find this necessary element of any outward sign or affirmative act which would have served as notice of terminating the precarious possession and of starting a new adverse possession as owner.

SALE

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Property Description

In the case of *Williams v. Bowie Lumber Company*[1] the plaintiffs were descendants of one Martin who had conveyed to one Dowman "all the property owned by him in the Parish of Lafourche" (except certain described units), and they now claim ownership on the basis of inadequate description of the property. Since heirs are included within the term "parties," it was held that they could not attack the conveyance of their ancestor, because an omnibus description is binding *between the parties.* Other cases which had held conveyances invalid for lack of adequate description were distinguished as involving the rights of third persons. If Martin would have made a subsequent sale of the same property to a third person, with full description and proper recordation, the claim of such person might have come into the latter category, but that is not what the court had to consider in the present case.

Merchantable title

Three cases reiterated the rule that a vendor does not have a right of action for specific performance or for damages against a vendee who refuses to accept a tendered title if this title is suggestive of serious litigation.

In the case of *Schaub v. O'Quin*,[2] the title which plaintiff was offering had been obtained at the private sale of a minor's immovable property, for which the tutor had obtained the undertutor's concurring affidavit instead of ruling him into court as required by Act 209 of 1932.[3] In the case at bar, the validity of this title was not in issue and the court could not pass upon it, but until there was an adjudication as to compliance or substantial compliance there remained the direct possibility of such a law suit. The title was therefore "suggestive of serious future lit-

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1. 214 La. 750, 38 So.(2d) 729 (1948).

2. 214 La. 424, 38 So. (2d) 63 (1948), noted in (1949) 9 LOUISIANA LAW REVIEW 563.

3. Dart's Stats. (1939) §§ 4844-4847.5.

igation"[4] and could not support a demand for specific performance.

Similarly, in *Lear v. Great National Development Company,*[5] the court held that the defendant could not be forced to accept a tract of land where title to a part of it rested upon the plaintiff's acquisitive prescription. The question of this prescriptive title was not before the court, nor were the necessary adverse parties; and since it could not be answered conclusively without a lawsuit, the title was "suggestive of future litigation" which precluded it from being merchantable.

Still another situation, in which specific performance was denied, was presented in *Doll v. Meyer.*[6] The question of the merchantability of the title to the property depended upon an interpretation of Act 106 of 1934[7] which is designed to quiet tax titles in accordance with Section 11 of Article 10 of the 1921 Constitution. The plaintiff had acquired the property from the state at public auction after it had been adjudicated to the state for nonpayment of taxes assessed against Romano. Then the plaintiff had instituted proceedings and obtained a judgment in accordance with the provisions of Act 106 of 1934, Romano and his heirs being represented by a curator ad hoc. However, the court felt that "we cannot say the title being tendered the defendant is not suggestive of litigation" because Act 106 of 1934 contemplates only tax sales to third persons and not tax adjudications to the state for want of a bidder. Thus, the proceedings under that statute did not preclude the possibility of a claim being made by Romano or his heirs, and final judgment was rendered for the defendant.

Warranty against eviction; Homestead Associations

In *Hausler v. Nuccio*[8] the court had occasion to reiterate the well-established rule that the vendee has a right of action against the vendor for cancellation of the sale and restitution of partial payment even though no actual eviction or physical disturbance has yet taken place. In this connection it may be indicated that the vendee-plaintiff in such a suit must discharge the burden of proving that there is an outstanding good title in the third person. In the present case, the plaintiff did show that part of the prop-

4. 214 La. 424, 431, 38 So.(2d) 63, 65 (1948).
5. 41 So. (2d) 668 (La. 1949).
6. 214 La. 444, 38 So. (2d) 69 (1948). See also discussion of this case in section on Taxation, supra p.—.
7. Dart's Stats. (1939) §§ 8502-8504.
8. 214 La. 1069, 39 So. (2d) 734 (1949).

erty was located on land which constituted a public street in the City of New Orleans, and judgment was rendered in his favor even though the city had not made any demands upon him.

There is another aspect of this decision, however, which may have far-reaching practical repercussions. The real parties in this case were Nuccio as vendor and Hausler as vendee. But Hausler had to borrow some money from a homestead association, and the latter employed the usual sale and resale transaction in order to obtain the vendor's privilege as a security device in addition to the regular mortgage. The present suit was brought by Hausler against both Nuccio and the Pelican Homestead Association and the significance of the supreme court's decision is that it applies to the homestead which alone appealed from the adverse judgment of the lower court.

In view of the prominent part that has been played by the homestead associations in facilitating the extensive private ownership of homes, there has been a generous legislative policy with reference to their operation and their necessary regulation. In one matter particularly, there has been legislative recognition of a customary practice, and that has been the homestead's vendor's lien and privilege arising from the customary sale and resale transaction.[9] At the same time, in the ordinary case of a loan, the homestead was usually not considered as the vendor for other purposes, but rather as the creditor in a pignorative or security transaction. Consequently, the present decision holding the homestead responsible for an eviction—despite the routine clause "without warranty"—on the ordinary vendor's necessary obligation of warranty[10] will hit the homestead associations a blow they did not expect. More developments on this point are likely to follow and may very well be watched carefully—in the homestead practices, in further litigation, and possibly also in the legislature.

Rescission for nonperformance; Testimony outside of contract

In the case of *Lohman v. Lonergan*[11] the plaintiff sued a real estate agent for the recovery of a deposit made as part payment for the purchase of a property. The plaintiff's contract with the agent and the owner was in the nature of a mutual promise of purchase and sale, and contained a special provision stipulating possession within thirty days of one of the two dwelling units.

9. La. Act 140 of 1932 [Dart's Stats. (1939) § 716 et seq.].
10. Art. 2505, La. Civil Code of 1870.
11. 215 La. 406, 40 So.(2d) 801 (1949).

At the end of this period, plaintiff offered to conclude the sale, provided he could get possession, but the owner had taken no steps to have the occupying tenant vacate the premises. The court of appeal's judgment[12] in favor of plaintiff was affirmed on the ground that the primary motive or cause of the contract was to obtain within thirty days the possession of which was not tendered; nor was the failure to do so excusably explained. It is interesting to note, however, that the conclusion regarding the important significance of the thirty-day possession provision in the contract was reached by the court mainly on the basis of testimony and evidence outside of the contract itself.[13]

Lesion beyond moiety

The Civil Code provides a number of protective devices both for the vendor and the vendee. One of the special protections for the vendor is the relief for lesion in the sale of immovables where "the vendor has been aggrieved for more than half the value."[14] A question regarding the scope of the application of this relief was presented in *Jones v. First National Bank, Ruston, La.* The majority held that relief for this kind of lesion was available to the person who had conveyed a property by a giving in payment *(dation en paiement)*, and that mineral values[16] are to be included in determining the true value of the property at the time of the transfer. This position is grounded on the code provision that, except as otherwise provided, the giving in payment is governed by the rules of sale[17] and on the classification of mineral values as immovable within the meaning of Article 1862.

The dissenting opinion disagrees with the applicability of lesion to a giving in payment, on the basis of a strict and limited interpretation of the relevant code provisions. Article 1861 lists sale but not giving in payment; Articles 1863 and 2664 define the very narrow limits of lesion in the case of exchange; this type of law is not susceptible of extension by interpretation; and the specific restrictive language of these articles should not be superseded by a broad interpretation of Article 2659 which is

12. 33 So.(2d) 705 (La. App. 1948).
13. See Art. 2276, La. Civil Code of 1870. Cf. Lamar v. Young, 211 La. 837, 30 So. (2d) 853 (1947), commented upon in (1948) 8 LOUISIANA LAW REVIEW 230.
14. Art. 2589, La. Civil Code of 1870.
15. 41 So.(2d) 811 (La. 1949).
16. For a discussion of this point see section on Mineral Rights, supra p.
17. Art. 2659, La. Civil Code of 1870.

the general incorporation by reference of the rules of sale to a giving in payment.

From the point of view of legal analysis, both positions can be considered as well taken, and the question is a close one. From the point of view of policy, the preference seems to be in favor of the majority. If lesion were not applicable to giving in payment, a way would be opened for fraud to defeat this protection intended for a vendor, and the scope of Article 2659 is cut down beyond the mere differences there referred to; the way would also be opened to question the applicability of other rules of sale so as to defeat the stability of sale as well as giving in payment.

Public records

An unusual application of the principle of public recordation was made in the case of *Humphreys v. Royal.*[18] In 1936, many years after a voluntary separation of the spouses, the husband purchased a tract of land which automatically became a community asset despite his description in the deed as a "single man." In 1938 he obtained a divorce and in 1941 he sold the land to the defendant. In 1946, the plaintiff sought out and purchased from the ex-wife an undivided one-half interest in this property; and then instituted the present petitory action to establish his title. Although the lower court gave a judgment in favor of the plaintiff, this was annulled and set aside by the supreme court. The majority opinion is predicated upon the public policy that any transaction or judgment concerning immovable property cannot affect the rights of third persons unless properly recorded; and since the 1938 divorce was not recorded in the parish where the land was situated the defendant was protected in his purchase. This must be considered either as the purchase from a "single man" or as from the husband still acting as master of the community. The former would not be a desirable ground on which to base this decision because it would protect fraudulent self description in deeds of acquisition; the latter seems rather to be the basis of the court's position because the lack of recordation is directed at the divorce decree.

The dissenting opinion acknowledged the public policy of the registry rule but maintained that in the event of conflict, the preservation of the community interest was paramount, placing upon a purchaser the full burden and responsibility of ascertaining the exact marital status and history of the vendor.

18. 41 So.(2d) 220 (La. 1949).

The majority opinion does not disclose any extent to which it may have been influenced by the fact that the husband acquired the property seventeen years after the separation, or by what looked like the prefabricated litigation of the alert plaintiff. On the other hand it would hardly seem desirable to let a person derive a benefit from his own failure (or deliberate omission) to record his divorce judgment. However, the principle of public recordation does reflect one of the strongest policies in Louisiana law, and it should require a very clever and deliberate superior expression to avoid or supersede it.[19]

LEASE

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In the case of *Lingle v. Wainright*,[1] the lease contract contained one provision (printed) requiring written notice of renewal to lessor prior to a certain date, and also another provision (typewritten) giving lessee the option of renewal for a four-year period at a stipulated increased rental. The lessee gave written notice of renewal for the four year period at the higher rental, but sent it *later* than the date in the first provision; and the lessor accepted the new rent payments for nearly a year after the original lease expired. When the lessor sold the property, the new owner brought this suit to evict the lessee, and the dispute centered on the question of renewal. By reading both renewal provisions together and interpreting the contract as a whole, the court found that the lessor had waived his right to insist on written notice prior to the designated date, and that there had been a good renewal for the four-year period.

Another question of waiver was presented in the case of *Redon v. Armstrong*.[2] The lessor sued for cancellation of the lease on the ground of the lessee's failure to make prompt payment of a certain monthly rent note. The lessee pleaded that there had been a waiver of the contract promptness by the lessor's acceptance of several payments a few days late. However, the court

19. Cf. the protection of third person's recorded purchase in conflict with succession policies in Chachere v. Superior Oil Co., 192 La. 193, 187 So. 321 (1939), noted in (1940) 2 LOUISIANA LAW REVIEW 387. However, the forced heirs were given the protection where the third person had only a recorded option to purchase (as distinguished from a record title) in Thompson v. Thompson. 211 La. 468, 30 So. (2d) 321 (1947), noted in (1948) 8 LOUISIANA LAW REVIEW 429.

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1. 215 La. 117, 39 So. (2d) 843 (1949).

2. 215 La. 307, 40 So. (2d) 474 (1949).