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Jerry Simon

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tions of the marital relationship should be considered as within the scope of community activities."[5]

The courts will no longer be required to deal with the question of what errands of the wife are of such benefit to the community as to come within the scope of community affairs under the criteria of *Adams v. Golson*.[6] Neither will the courts have to tangle with the question of just what was the wife's primary purpose where her purposes were several.[7]

Furthermore, sound public policy demands solvency behind automobile operators. The decision in the principal case is in accord with that policy.

William A. L. Crowe

PARTY IN DEFAULT—RIGHT TO PERFORM

A contract to sell real estate contained the provision, "possession to be given at act of sale." When the vendors failed to deliver the keys at the time set for the passage of the act of sale, purchaser sued for the return of twice his deposit. *Held*, recovery was allowed; defendants had breached the contract by not delivering the keys at the proper time. *Matthews v. Gaubler*, 49 So. 2d 774 (La. App. 1951).[1]

According to the rule laid down in *Southport Mills v. Ansley*,[2] in a commutative contract other than a completed sale of real estate, the delinquent party, while unable to perform *of right* after default, may nevertheless do so if the court, in its discretion, will allow performance.[3] This rule is based upon a literal inter-

5. See Brantley v. Clarkson, 39 So. 2d 617, 620 (La. App. 1948).

6. (a) Errands were within the scope of community affairs: Meibaum v. Campisi, 16 So. 2d 257 (La. App. 1944) (wife's trip to have coffee table repaired); Levy v. New Orleans & Northeastern R.R., 20 So. 2d 559 (La. App. 1945) (wife's trip to dressmaker).

(b) Errands were not within the scope of community affairs: Matulich v. Crockett, 184 So. 748 (La. App. 1938) (wife's trip for charitable works); Wise v. Smith, 186 So. 857 (La. App. 1939) (wife's visit to sick mother-in-law); Aetna Casualty and Surety Co. v. Simms, 200 So. 34 (La. App. 1941) (wife's visit to sick aunt).

All of these cases have relied on *Adams v. Golson*.

7. See Meibaum v. Campisi, 16 So. 2d 257 (La. App. 1944), for one example of difficulty in determining wife's primary purpose.

1. "In commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must, at the time and place expressed in, or implied by the agreement, offer or perform, as the contract requires, that which on his part was to be performed, otherwise the opposite party will not be legally put in default."

2. 160 La. 131, 106 So. 720 (1925).

3. See also Art. 2047, La. Civil Code of 1870.

pretation of Civil Code Article 2047, which states that while default of the person suing is a defense to the party sued, this defense may be overcome by obtaining the judge's permission to perform. As defendant offered to perform several times before the plaintiff brought suit, the instant case would seem to come under the *Southport Mills* rule; however, the court did not mention that doctrine. Its discussion was limited to a statement that Under Article 1913[4] defendants, being already in default, could not put plaintiff in default and hence were no longer in a position to secure compliance with the contract.

In previous cases our courts have held that a party in default could not sue for dissolution and damages[5] or for specific performance of the contract,[6] saying that Article 1913 cuts off these rights.

A literal application of that article would seem to bar a suit for dissolution by the party in default but only because he could not put the *other* party in default (a prerequisite to suits for dissolution and damages). Since a suit for specific performance is a putting in default according to Article 1911, it is also barred by a literal construction of Article 1913.

If the courts continue to apply Article 1913 strictly, it may well be that in a case in which both parties to a contract allow the time for performance to go unnoticed, neither will be allowed to sue the other for dissolution (since neither could put the other in default) and yet neither would actually be in default.[7] The anomaly becomes more apparent in the light of the court's language in *Di Cristina v. Weiser*[8] which might be used to deprive

4. "In commutative contracts, where reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must, at the time and place expressed in, or implied by the agreement, offer or perform, as the contract requires, that which on his part was to be performed, otherwise the opposite party will not be legally put in default."

5. Giammanchere v. Di Giovanni, 43 So. 2d 274 (La. App. 1949); Nettles v. Vignes, 49 So. 2d 371 (La. App. 1950).

6. Lamar v. Young, 211 La. 837, 30 So. 2d 853 (1947); Di Cristina v. Weiser, 215 La. 1115, 42 So. 2d 868 (1949).

7. A situation in which neither party is in default would arise only where both parties allowed time for performance to pass unnoticed and the court found neither (1) a contract provision making default automatic nor (2) a situation where time was of the essence. Thus far the courts have found one or both of the above elements and hence found one party in default. Lamar v. Young, 211 La. 837, 30 So. 2d 853 (1947); Di Cristina v. Weiser, 215 La. 1115, 42 So. 2d 868 (1949); Giammanchere v. Di Giovanni, 43 So. 2d 274 (La. App. 1949); Nettles v. Vignes, 49 So. 2d 371 (La. App. 1950).

8. 215 La. 1115, 42 So. 2d 868 (1949).

both parties of the right to sue for specific performance, leaving them without a remedy of any kind.

Thus, under a strict application of Article 1913 the party in default would have no right to sue on the contract; and Article 2047, allowing the court to grant "the party in default" further time to perform, could apply only to defendants, as that party would not be allowed to maintain an action as plaintiff.[9]

Another view, and perhaps a more realistic one, is that Article 2047 and the *Southport Mills* rule have not been so restricted but apply to any party in default, whether plaintiff or defendant. The extension of time is not granted, however, except where the circumstances justify it; and in those cases in which the court did *not* offer the defaulting party further time for performance, the logical explanation would be that such a grant was not, in the court's judgment, warranted by the facts.[10] Language is found in some of these cases which would tend to support this view.[11]

This theory would necessarily restrict the application of Article 1913 to damages for *delay* in performance, or moratory damages. On the other hand, in the field of compensatory damages, for definitive non-performance, Article 2047 would control.

This would seem to be a logical solution, for if a party sues for damages *for delay*, it is reasonable that he be required to show that he put the other party in default and thus warned him that the period of delay, for which penalty would be exacted, had begun. On the other hand, as applied to claims for definitive non-performance, Article 1913 only results in depriving a person of a cause of action. This criticism was voiced by the court in

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9. This idea would seem to be supported by the fact that in the *Southport Mills* case, where the court actually cited and used Article 2047, the party applying for further time was a defendant. It is also noteworthy that Code Napoleon Article 1184, the French equivalent of our Civil Code Article 2047, provides that "a delay may be granted to the defendant according to circumstances."

10. By way of comparison, this is the view expressed in the American Law Institute's Restatement of Contracts, § 276, which provides that unless immediate performance is of vital importance, failure of one party to perform immediately will not discharge the other party.

11. "The testimony convinces us that the time element of 30 days was material, particularly as to defendant Young, who advanced an excellent reason why it was necessary to complete the sale within the calendar year 1944. . . ." Lamar v. Young, 211 La. 837, 852, 30 So. 2d 853, 857 (1947). "As a matter of fact there is no showing whatever that the sale could not have been passed within the time specified in the agreement. . . ." Di Cristina v. Weiser, 215 La. 1115, 1126, 42 So. 2d 868, 871 (1949).

Watson v. Feibel,[12] when, after defending the doctrine of default from the assaults of its many critics, it added:

> "But if putting in default were to be wrenched from its proper function of giving warning in order that the debtor may perform, and converted into an instrument for destroying the right to perform, it would deserve, and richly so, this severe arraignment of it."[13]

It may be argued that default has no place whatsoever in compensatory damage suits,[14] but this is not necessary in order to avoid the inequities resulting from an overzealous application of Article 1913. A restriction of that article to cases involving moratory damages would accomplish the same thing without injury to our code or jurisprudence. The courts would then be free to exercise the control given them in Article 2047 and decide whether or not to allow the party in default additional time for performance according to the materiality of the delay in the light of the nature of the contract and the attendant circumstances.

Jerry Simon

PRESCRIPTION OF JOINT MINERAL LEASES—INTERRUPTION

Plaintiff brought a concursus proceeding to determine the rights of the several defendants to royalties from the plaintiff's well. Defendant Davis owned a forty acre tract of land. Defendant George and defendant Oil Investment, Incorporated, each owned a one-quarter interest in the mineral rights of this land. Plaintiff secured voluntary pooling or unitization agreements for exploration purposes from the owners of the entire section in which Davis' land lay.[1] The defendant Davis in signing one of the agreements specifically deleted a paragraph which stated that any drilling on any part of the pooled land would constitute an interruption of prescription of ten years liberandi causa and that any payment of royalties would be considered as a new acknowledgment made for the purpose of interrupting prescription. *Held*,

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12. 139 La. 375, 71 So. 585 (1916).

13. 139 La. 375, 390, 71 So. 585, 590.

14. This is the view taken by many French commentators. Hubert, S. 1926.1.17, Planiol, S. 92.1.117, 2 Colin et Capitant, Droit Civil Francais, § 99 (1945).

1. The effects of a forced pooling agreement are beyond the scope of this note.