Louisiana Law Review

Volume 13 | Number 2
The Work of the Louisiana Supreme Court for the 1951-1952 Term
January 1953

Substantive Law - Private Law: Conventional Obligations

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prove this. Assuming, without deciding, that the chattel mortgage would be enforceable in Missouri, the court cut directly to the question of burden of proof. Without the benefit of any authorities,[9] the court reached the logical and reasonable conclusion that "since plaintiff is seeking to have Louisiana recognize and enforce an unrecorded foreign chattel mortgage against an innocent purchaser of the automobile, a plain duty rested upon it to prove that it was without knowledge that the car had been brought to Louisiana as it is only in such circumstances that it can be excused for its failure to comply with our laws of registry."[10]

There still appears to linger the tendency to call it a "rule of comity"[11] when a claim asserted to have originated under the laws of another state (or foreign country) is recognized in the forum. It is submitted that designating the governing precept as the appropriate "Louisiana rule of conflict of laws" would be more specific. Whereas comity looks only to a recognition through courtesy, a rule of conflict of laws would have the advantage of a concrete assertion which can operate not only towards an affirmative protection to an asserted claim but also towards a negative denial. At the same time, it offers more stability and predictability than the constantly shifting sands of the pure discretion or courtesy implied in the idea of comity. In the absence of comprehensive legislative coverage, it is within the authority and responsibility of the court to develop and formulate these Louisiana rules of conflict of laws.

CONVENTIONAL OBLIGATIONS

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The number of cases wherein the court is called upon to adjust the differences between the parties to contracts to sell real estate has apparently not fallen off despite the fact that the course of decision has of late been particularly clear. Four such cases were presented during the last term.

9. This specific question of burden of proof does not seem to have given much cause for concern because it is not mentioned in the usual conflict of laws references. Stumberg, Principles of Conflict of Laws 396-399 (2 ed. 1951); Goodrich, Handbook of the Conflict of Laws 486-488 (3 ed. 1949); Jones, Chattel Mortgages and Conditional Sales; Restatement, Conflict of Laws, §§ 266, 268, 275; 68 A.L.R. 554, 87 A.L.R. 1298, 148 A.L.R. 375.

10. 59 So. 2d 108, 110.

11. 59 So. 2d 108, 109.

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In *Hoth v. Schmidt*[1] the court reaffirmed its position that in a contract to sell real estate the time fixed for the passage of the act of sale is of the essence. The purchaser was suing for a return of double the deposit. The seller had made overtures to the buyer designed to buy off the contract, and it was while these negotiations were pending that the time stipulated in the contract to sell expired. The court pointed to a contract provision giving the vendor the right to declare the deposit forfeited without placing the purchaser in default "in the event the purchaser fails" to comply with the agreement within the time specified. And the court observed that it was only where "the vendor refuses to comply with the agreement within the time specified" that the purchaser had the right to claim the return of double the deposit. It was also found that there had been neither an extension of time in writing nor a putting in default by the buyer.

A similar holding was made in *Harrell v. Stumberg*,[2] where the court further added that an extension of time cannot be established by estoppel.

Another such case was *Kenney v. Wedderin*.[3] Here the contract to sell allowed the purchaser fifteen days from the date of acceptance to secure a homestead loan. The court said that the provision for the loan was for the benefit of the buyer but that the time limit was for the benefit of the seller. It refused to enforce the agreement notwithstanding the fact that the buyer had tried frantically to get the loan and actually had succeeded the day after the period expired.

A related problem was presented in *Fox v. Doll*,[4] where a purchaser recovered double the amount deposited. Here no time for the conveyance was fixed in the contract. The seller had not removed a paving lien, and the purchaser refused to go through with the contract after the lapse of a two and a half months period. The evidence showed that the purchaser persisted in his refusal even after the vendor agreed to cancel the lien.

To say that the *Hoth* case was a hard one for the buyer is only to point up the obvious. He was the one who within the time allowed had insisted upon going through with the sale while the vendor wanted to get out. Indeed, the petition showed

1. 220 La. 249, 56 So. 2d 412 (1951).
2. 220 La. 811, 57 So. 2d 692 (1952).
3. 220 La. 285, 56 So. 2d 550 (1951).
4. 221 La. 427, 59 So. 2d 443 (1952).

that it was the vendor's efforts to cancel that brought about the delay that defeated the purchaser. The result of the court's holding was that the vendor not only secured his release without having to pay for it as he had been offering to do, but he also retained the deposit put up by the purchaser. In the *Harrell* case, the court seemed to find that a thirty-day period for the passage of title was twice fixed in the contract and that this clearly showed time to be of the essence. An examination of the contract indicates that two different thirty-day periods were involved, one during which the offer would remain open for acceptance and the other for the passage of the act of sale after the contract to sell had been completed by acceptance. It is interesting to notice that the vendor gave the real estate broker a ninety-day listing and the broker found the plaintiff purchaser within a few days after the listing was given. If a thirty-day period was of so much concern to the vendor, one may wonder why he was willing to list his property for ninety days with the real estate broker.

It is not clear why in contracts to sell real estate the time for the conveyance is considered so important in Louisiana when it is not so treated elsewhere.[5] Even if a party who fails to perform on time is automatically in default when time is of the essence, the express language of Article 2047 of the Louisiana Civil Code shows that the power of the court to grant further time to the "party in default" is not cut off. And granting that the parties may effectively provide to the contrary, the fixing of a time for performance plus a general provision that time is of the essence is ordinarily not considered sufficient to deprive the court of the power to enforce the contract, notwithstanding default.

Adverting to the court's finding in the *Hoth* case that there was no extension of time in writing, it is to be observed that the plaintiff was not relying on a claimed agreement to extend time, where a question of form might arise, but was asking the court to adjust the rights of the parties in keeping with its authority under Article 2047. The holding in the *Harrell* case that an extension of time cannot be established by estoppel seems likewise to be based on the same questionable notion that only the parties can allow further time for performance and that the court has no authority to do so unless there is a basis for finding an estoppel. This, again, seems to overlook the fact that the code expressly

5. 5 Corbin on Contracts 780, § 1177; 3 id. at 805, § 716 (1951).

authorizes the court to grant further time for performance to the party in default.

The judgment in the *Fox* case giving the plaintiff a return of double the earnest money deposited was, in effect, a judgment of resolution with damages.[6] Under Article 2047 of the code, when the court is presented with a demand for resolution it may allow the defendant further time for performance. Therefore the question was whether the court should allow the vendor further time for performance or whether it should dissolve the contract. Judicial resolution of this kind of problem calls for a determination of just how vitally important the time element is under the facts and circumstances of the case, how serious the delay has been, whether the party in default was in good or bad faith, and whether the contract, despite the delay, can be enforced substantially as written. This was the approach of the court in *Southport Mills v. Ansley.*[7]

One might wish that the court had dealt at greater length with the problem it had before it in *Corona v. Corona.*[8] Plaintiff, who had sold his interest in certain realty and a poultry business conducted thereon, brought an action of lesion beyond moiety. His suit was dismissed on the ground that the action of lesion does not apply to a sale of movables and immovables combined. In support the court referred to Louisiana Civil Code Articles 1861 and 2594. It appears, however, that under Article 2666, if, say, *A* transfers to *B* immovable property worth $100 and movable property worth $1,501 and receives in return immovable property worth $1,000, *A*, the transferor of the movable and immovable property, may claim lesion beyond moiety. If this be true, then the question that naturally arises is what difference it should make if instead of receiving in return an immovable worth $1,000, *A* received $1,000 in cash? Article 2666 indicates that *A*'s claim of lesion is supported by the fact that he is the transferor of an immovable and it does not deny relief to him because he also transfers as part of the transaction movable property.

It was particularly interesting to find that in *Martin-Parry*

6. See 11 Beudant, Cours de Droit Civil 261 (1938): *"La remise des arrhes est l'indice que les parties ont entendu se réserver l'une et l'autre le droit de se dédire; il y a faculté de résiliation avec réglement anticipé des dommages-intérêts."*

7. 160 La. 131, 106 So. 720 (1926).

8. 221 La. 576, 59 So. 2d 889 (1952).

Corporation v. New Orleans Fire Detection Service[9] the court took advantage of an opportunity to say a further word concerning potestative conditions and the enforceability of agreements of noncompetition, and certain earlier cases dealing therewith, notably *Blanchard v. Haber*.[10] There it was held that an agreement of noncompetition was unenforceable because it was contracted "under a potestative condition." The case shows that Dr. Haber gave his promise of noncompetition in return for Dr. Blanchard's promise of employment. If he was willing to do so, notwithstanding that the employment could be terminated by Dr. Blanchard on thirty days' notice, he was also free to do so short of running afoul of an overriding public policy. Actually the latter is believed to have been the true basis of the decision. All contracts of noncompetition are inimical to the best interest of the public, which, at least up to a point, will profit from an absence of restrictions on competition. Certainly would this be true with reference to professional people like dentists. On the other hand, an employer or vendee is entitled to some protection against the possibility of subsequent competition by those whom he employs or from whom he buys, and as long as the restraint imposed is reasonably necessary to give the needed protection, and no more, the courts should uphold such agreements in the absence of legislation requiring the contrary. Where the restraint is unreasonable, agreements of noncompetition are unenforceable. In the instant case the obligation of a branch manager not to entice or disturb his employer's dealers or other employees for a period of two years following the termination of his employment, was reasonable in substance and in duration. It was adjudged enforceable. Let us hope that the present opinion will tend to divorce cases of this kind from the potestative condition confusion.

A considerable portion of the time that the court was called upon to give to problems involving the law relating to conventional obligations was taken up by matters of no real jurisprudential consequence. It had to consider whether a cost-plus contractor was entitled to the balance he claimed under a building contract;[11] whether an employee was compelled to leave his employment because of the wrongful conduct of his employer so that he would be entitled to his unpaid salary for the remainder of

9. 60 So. 2d 83 (La. 1952).
10. 166 La. 1014, 118 So. 117 (1928).
11. Lagasse v. Allen, 219 La. 745, 54 So. 2d 6 (1951).

the contract period under Louisiana Civil Code Article 2749;[12] it had to repeat again that parol evidence is not admissible to prove that what purports to be a sale for cash in hand paid is in fact a donation;[13] it was called upon to enforce a contract written so as to preserve a landowner's claim of prescription liberandi causa against the contention that the right had been lost through the signing of a unitization contract;[14] it had to deal with the troublesome problem of property valuation in disposing of a claim of lesion beyond moiety;[15] it affirmed the dismissal of a suit for demurrage charges and taxes, finding that the defendant who loaded certain railroad cars did not have dominion over them;[16] it applied the parol evidence rule in an action for specific performance of an agreement to convey an interest in a plantation so as to exclude any evidence beyond a writing binding, apparently, on the plaintiff;[17] it found that a teacher had not accepted a tendered appointment so as to make available under the Teacher Tenure Act the writ of mandamus for securing reinstatement;[18] and it had to consider whether a plaintiff had proved an alleged three-year contract for the removal of dirt.[19]

One thing should be noted concerning the opinion in the last-mentioned case. Counsel for plaintiff urged upon the court Section 90 of the American Law Institute's Restatement of Contracts, which embodies a principle commonly known as the doctrine of promissory estoppel. In response, the court replied that the cited theory is unknown to our law. Some of the cases from common law jurisdictions demonstrate misapplications of Section 90 sufficiently flagrant to have given the draftsman of that section cause to doubt the wisdom of its inclusion or the choice of language it contains. It is heartening that our court is not willing to succumb to its wiles.

The influence upon us of the common law doctrine of consideration is observable in an opinion of the court dealing with the right of an attorney to recover on a claim for professional services rendered after he had secured the certification of a check sent

12. Carlson v. Ewing, 219 La. 961, 54 So. 2d 414 (1951).
13. Lewis v. Clay, 60 So. 2d 78 (La. 1952).
14. Placid Oil Co. v. George, 221 La. 200, 59 So. 2d 120 (1952).
15. Lakeside Dairies, Inc. v. Gregersen, 221 La. 503, 59 So. 2d 701 (1952).
16. Texas & P. Ry. v. Great Nat. Oil Corp. of La., 221 La. 378, 59 So. 2d 426 (1952).
17. Stack v. De Soto Properties, Inc., 221 La. 384, 59 So. 2d 428 (1952).
18. State ex rel. Eberle v. Orleans Parish School Board, 221 La. 243, 59 So. 2d 177 (1952).
19. Ducote v. Oden, 221 La. 228, 59 So. 2d 130 (1952).

to him in full settlement of his fee.[20] To a common law court, the problem would involve the doctrine of consideration, and its resolution would turn on whether or not the amount due was in dispute. On finding that a dispute did exist the common law court would take the view that the creditor's acceptance of the amount tendered was supported by consideration and therefore an accord and satisfaction had occurred. Our court, not without precedent in our law, however, handled the problem in the same way.

Actually, with us facts of the kind in question raise a problem of remission. A gratuitous remission is perfectly valid under our code. To find a remission of the remainder when part payment is made there should be found an intention to remit or the creditor should be held estopped by his acceptance of the amount paid to deny the existence of such intention. The facts show that the attorney's fee was to be based on the value of certain stock. No dispute at all had developed before the client sent the check in question, the amount of which was figured on an arbitrary value fixed by himself. The attorney kept the check but claimed with strong support in the facts that the value used by the client was not the true value of the stock. By the letter he wrote to his client upon receiving the check, the attorney definitely negated any intention to remit. There was thus no actual intention to remit; and it is by no means clear that we should permit a debtor to claim an estoppel against a creditor who accepts a payment admittedly due, for it will be remembered that the law requires a debtor to perform his own obligations in good faith.

CORPORATIONS

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CORPORATIONS—RECEIVERSHIPS TO PROTECT MINORITY INTERESTS

Louisiana's general receivership statute provides for the judicial appointment of receivers at the instance of minority shareholders whose interests are "in imminent danger" from gross mismanagement, persistent ultra vires action or wasting of the corporate assets.[1] The corporate receivership, however, is an expensive and rather drastic remedy, and it may not be resorted

20. Henriques v. Vaccaro, 220 La. 216, 56 So. 2d 236 (1951).

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1. La. R.S. 1950, 12:752(2), (11).