Louisiana Law Review

Volume 14 | Number 1
The Work of the Louisiana Supreme Court for the 1952-1953 Term
December 1953

Civil Code and Related Subjects: Sales

J. Denson Smith

posed serious financial burdens on any future traffic improvement projects.

As on previous occasions the Supreme Court refused to take into consideration "mere possibilities" in fixing the market value of expropriated land.[60] In *Plaquemines Parish School Board v. Miller*,[61] a case in which the issue was a "matter solely of the value of the lands" it was stated again that "it will not do for the owner to say that at some indefinite time it is foreseeable that his property, because it adjoins a growing town, will have an added value as a subdivision project."[62]

SALES

*J. Denson Smith**

The cases falling under this heading that were decided by the court during the last term included a few of more than passing jurisprudential interest. High on this list was a group of fifteen suits consolidated for trial, *Breaux v. Laird*.[1] The court reversed the judgment of the trial court sustaining an exception of no right or cause of action and held that the purchaser of a defective home from a subdivision developer was entitled to sue the surety on the contractor's bond. The decision was bottomed on Article 2011 of the Civil Code. This article provides for the transmission of rights resulting from a contract relative to immovable property in favor of the transferee of the property. No exactly similar application of this article has

60. See Louisiana Highway Commission v. Guidry, 176 La. 389, 403, 146 So. 1, 5 (1933); Louisiana Ry. & Nav. Co. v. Sarpy, 125 La. 388, 51 So. 433 (1910).

61. 222 La. 584, 63 So. 2d 6 (1953).

62. 222 La. 584, 589, 63 So. 2d 6, 8 (1953). See also Louisiana Highway Commission v. Guidry, 176 La. 389, 146 So. 1 (1933). The instant case shows just as the *American Tel. & Tel. Co.* case a paucity of evidence relating to the value of land, as pointed out by Justice LeBlanc. In Texas Pipe Line Co. v. Johnson, 223 La. 380, 65 So. 2d 884, 886 (1953), Justice Hamiter correctly refused a motion by defendant-appellant to remand the cause for the reception of additional evidence, and cited language from Kinnebrew v. Louisiana Ice Co., 216 La. 472, 501, 43 So. 2d 798, 808 (1949), that our Supreme Court is "not disposed to permit litigants to try their cases piecemeal and continue protracted litigation as to facts that could have been established on the original trial," just as he had done once before in Young v. Mulroy, 216 La. 961, 971, 45 So. 2d 357, 360 (1950).

* Professor of Law, Louisiana State University.

1. 223 La. 446-465, 65 So. 2d 907-913 (1953).

been found.[2] It was not taken from the Code Napoléon but seems to have been based on the writings of Toullier.[3] He asserted that the right of an owner against a builder who contracts to erect a structure on the former's property passes tacitly to the transferee of the property as an accessory. Support for this proposition was found by Toullier in the Roman law and in other provisions of the Code Civil, particularly Article 1122 which provides, in effect, that one is considered as having stipulated for himself and for his heirs and assigns unless the contrary is expressed or results from the nature of the agreement. The result may be considered as a tacit assignment. Assuming a bilateral contract between former owner and contractor for the services to be performed, obligating the owner to pay for them, one may wonder whether the tacit assignment of the right carries with it a tacit assumption of the duty? Toullier did not go into this. He did recognize, as does our code,[4] that a real obligation leaves the acquirer free to surrender the property and does not become a personal obligation "unless he has made it such by his own act." Perhaps claiming the benefits of the contract might be interpreted as such an act. Further development of this aspect of the principle of Article 2011, and related provisions, will come in time. It may be observed in passing that the right of the acquirer is not a real right. It is simply a personal right against the contractor. Nor is the obligation of the contractor a real obligation. It, again, is personal. Of course, the right of the owner is heritable, and is also assignable. Article 2011 provides a tacit assignment in favor of a transferee under particular title. The instant decision is consistent with the source of its authority.

An interesting and important question concerning the recovery of damages for breach of a contract to purchase 500 tons of steel caused a division of the court in *Friedman Iron & Supply Co. v. J. B. Beaird Co.*[5] At the time defendant repudiated the contract and throughout the delivery period the market price was below the contract price; but at the time of the trial, more than a year later, the market price was above the contract price. The suit was originally filed as one for specific perfor-

2. But see Simoneaux v. Lebermuth & Israel Planting Co., 155 La. 689, 99 So. 531 (1924); Canal & Carrollton Railway Co. v. Orleans Railway Co., 44 La. Ann. 54, 10 So. 389 (1892).

3. 3 Toullier, Le Droit Civil Français nos 421-424 (1833).

4. Art. 2019, La. Civil Code of 1870.

5. 222 La. 627, 63 So. 2d 144 (1952).

mance or damages in the alternative. Plaintiff alleged in its petition that it had segregated and stockpiled the steel for defendant and it was awaiting shipment but that tender and delivery had been refused. The demand for specific performance was dismissed on an exception of no cause of action and was abandoned by the plaintiff. The court's original holding was that inasmuch as the plaintiff still held the steel, the market value of which, at the time of the trial, was above the contract price, plaintiff had failed to prove that the breach had resulted in any loss. On rehearing the original decree was reversed and set aside, and judgment rendered for the difference between the contract and market prices at the time delivery was refused. Justices Hamiter and Hawthorne dissented.

The court applied the usual rule that in the event of a breach by a buyer the seller is entitled to recover the difference between the market price and the contract price at the time of the breach. The court considered the date plaintiff received the cancellation notice as the time of the breach. Actually the cancellation notice constituted an anticipatory repudiation since it was received before any delivery was due. Deliveries were to be made on certain specified dates during the next three months. The accepted rule elsewhere would measure the recovery as of the time and place of delivery notwithstanding an anticipatory repudiation. But there was apparently no showing of market prices on the delivery dates. Pretermitting this angle, since it appears that a seller cannot recover for a loss resulting from a decline in the market price subsequent to the time for performance, that is, since, if he holds the goods and the price goes down the resulting loss is not chargeable to the buyer, it also seems logical to conclude that if he holds the goods and the price goes up the resulting profit should not inure to the benefit of the buyer. A detailed consideration of this problem will appear in the next issue of this REVIEW.

The significant case of *LeBlanc v. Louisiana Coca-Cola Bottling Co.*[6] has been examined at length in this REVIEW.[7] Believing that the warranty there found was considered by the court as contractual in nature, the writer shares the doubt voiced in the casenote concerning the legal propriety of extending a direct

6. 221 La. 919, 60 So. 2d 873 (1952).
7. Note, 13 LOUISIANA LAW REVIEW 624 (1953).

warranty of wholesomeness by a manufacturer of a bottled beverage to a non-purchasing consumer. Such an objection would fall, of course, if the warranty was recognized as being merely a warranty imposed by law as a matter of public policy irrespective of agreement.

Buyers should get a degree of comfort from the court's realistic disposition of a redhibitory action aimed at the rescission of a sale of a new automobile by defendant to plaintiff.[8] It affirmed that a purchaser of an automobile is entitled to get a vehicle that will meet his needs and recognized that one that will not run or runs intermittently or imperfectly and that requires the frequent attention of a mechanic to keep it going is an abomination to the owner that the law does not require him to endure. The decision makes it clear also that the purchaser may continue using the car, while the seller is engaged in trying to remedy the defects. A period of nine months during which the car had been driven 9600 miles was here involved. But all of this time the seller was continuously assuring the owner that the defects would be remedied. Although a purchaser may well foresee that adjustments may have to be made before the new car he buys may operate properly and should be required to submit to them, the risk of serious maladjustments that cannot be or are not readily corrected should not be placed on him. As the court said previously, "An automobile vendee does not contract to hire an expert automobile mechanic to drive him."[9]

The case of *J. E. Beaird Co. v. Burris Bros.*[10] came back to the court following a prior remand to determine the amount defendant was entitled to by way of a reduction in the purchase price of a sweet potato dehydrator.[11] In the prior opinion there was evidence of a claimed guarantee of capacity. The court seemed to feel that the guarantee had been proved but apparently felt that any such finding was unnecessary. Relying on the articles of the code dealing with redhibition, it was decided that the defendant was entitled to a reduction in the purchase price. The case was remanded for a determination of the amount to be allowed. The lower court seemingly based its award on alleged losses incurred by the defendant in its opera-

8. Reech v. Coco, 223 La. 346, 65 So. 2d 790 (1953).
9. Jackson v. Breard Motor Co., 167 La. 857, 120 So. 478 (1929).
10. 222 La. 579, 63 So. 2d 4 (1953).
11. See prior opinion in 216 La. 655, 44 So. 2d 693 (1950).

tion of the machine over a period of some two or three years. On the instant appeal the court denied that losses sustained through the operation of the machine offered a criterion for determining the reduction. Yet it allowed defendant some $600 more than the difference between what he paid for the machine and the price obtained by him on its resale. The underlying theory does not appear in the opinion. Presumably damages were being allowed for breach of contract, that is, breach of the claimed guarantee. The opinion speaks of a guarantee yet purports to allow only a reduction in the purchase price as provided in the prior remand. Surely a reduction in the purchase price alone could not exceed the difference between what the buyer paid for the machine and what he got for it on resale. And for redhibitory defects, unaccompanied by knowledge thereof and neglect to declare them, damages are not recoverable. Perhaps the theory of presumptive knowledge was being applied but this seems doubtful. At any rate, the buyer came off pretty well. He used the machine, such as it was, for three years. He then recovered in full everything it cost him, plus something over $600. Justice Hamiter dissented.

The one year prescriptive period for instituting the redhibitory action runs from the discovery of the vice when the seller knows of the vice and neglects to declare it. Such knowledge is imputed to the artisan, craftsman, builder or manufacturer. The court refused to apply this rule against the vendor of a building and dismissed the suit against him in *Sterbcow v. Peres*.[12] It found that the actual construction was by an independent contractor. Nor did the court believe the evidence disclosed actual knowledge.

In *Bayou Rapides Lumber Co. v. Davies*[13] the court followed an earlier case holding that in an action of redhibition a reduction in the purchase price may be decreed even if rescission may not be granted because the thing sold has been disposed of by the purchaser. The thing sold was a house and its insufficient foundations were held not discoverable on simple inspection by an ordinary layman.

In *Bishop v. Copeland*[14] the court affirmed the established rule that the law of registry is not applicable to a claim vested

12. 222 La. 850, 64 So. 2d 195 (1953).
13. 221 La. 1099, 61 So. 2d 885 (1952).
14. 222 La. 284, 62 So. 2d 486 (1953).

by operation of law, such as that of heirs to an inheritance from their half-sister. It also refused to find the heirs estopped to assert their ownership on the ground that they had permitted their father to be sent into possession of the whole. They had neither aided nor assisted in bringing about the error by an affirmative act or omission under circumstances prompting action. It was also held that the purchaser, who succeeded to a one-fourth interest in the land, was not entitled to a judgment in warranty until after a partition and accounting had made his damage determinable. The decision finds ample support in the law and the facts.

A sale by a deceased father to one of three daughters was sustained in *Taylor v. Brown*[15] against the claim by the other two that the transfer was in reality a donation in disguise in that the price paid was less than one-fourth the value of the property. The court found the stated price legally adequate and avoided passing on the trial court's action in admitting parol evidence by the defendant to show additional consideration in the form of services rendered. In passing, it observed that the question of the admissibility of parol evidence "tending to enlarge the recitals of an authentic act is not free from doubt." This is certainly true of Louisiana jurisprudence although the rule in France seems to be very well understood as prohibiting any oral evidence against or beyond any written instrument. The rule stemmed from the belief that a writing is a more reliable form of proof than oral testimony. With respect to the cause of a contract this rule prohibits the use of parol evidence to show the true cause unless the stated cause is disproved by legally admissible evidence.[16]

In *Fisher v. Bullington*[17] the court protected an Illinois conditional vendor of an automobile who consented to its removal to Arkansas but not to Louisiana where it was resold and bought by the defendant. The decision accords with the principle of prior cases denying validity to out-of-state conditional sales only where the property is removed to Louisiana with the seller's knowledge and consent.

A conflict of testimony was resolved against a buyer of hotel furnishings and a recovery of damages to cover expenses in-

15. 66 So. 2d 578 (La. 1953).
16. See, generally, Rubin, Parol Evidence to Vary a Recital of Consideration, 3 LOUISIANA LAW REVIEW 427 (1941).
17. 223 La. 368, 65 So. 2d 880 (1953).

curred in having to disinfect upholstered furniture and bedding was rejected in *Villegas v. Latter*.[18]

On its third presentation to the court, the litigation of *Cerami v. Haas*,[19] involving a contract to sell real estate, was dismissed as res adjudicata under Louisiana Civil Code Article 2286.

SECURITY DEVICES

*Joseph Dainow**

MATERIALMAN'S LIEN (UNDER BUILDING CONTRACT LAW)

In appropriate cases, the statutory delay within which a claim must be filed, in order to establish a laborer's or materialman's lien on the property, is sixty days after the last delivery of all material or the last performance of all labor on the property. This has been interpreted to mean sixty days after the completion of the structure regardless of the last date of services or deliveries by the particular claimant.[1] Since there is no room for ambiguity in the counting of the days, the issue on which disputes center is the starting point for the running of this time. Generally, a building is considered as completed when it is ready for actual occupancy, even though minor repairs and adjustments have to be made at a later date.[2] In the case of *Trouard v. Calcasieu Building Materials, Inc.*,[3] the supplier of materials filed his claim about seven months after the end of construction and actual occupancy of the building. However, he contended that the house was not finished because certain things required for either F.H.A. or V.A. approval had not yet been done. The only issue was whether the claim had been timely filed, and the court held that it had not, stating that the stipulations of a lending agency for requirements which were not part of the building specifications did not constitute any criterion in determining whether or not a building is a completed structure within the meaning of the building contract statute.

18. 66 So. 2d 339 (La. 1953).
19. 222 La. 899, 64 So. 2d 212 (1953).
* Professor of Law, Louisiana State University.
1. National Homestead Ass'n v. Graham, 176 La. 1062, 147 So. 348 (1933).
2. Hortman-Salmen Co. v. White, 168 La. 1067, 123 So. 715 (1929).
3. 222 La. 1, 62 So. 2d 81 (1952).