

Louisiana Law Review

Volume 15 | Number 4

June 1955

French Civil Law - Sales - Earnest Money

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Repository Citation

William C. Hollier, *French Civil Law - Sales - Earnest Money*, 15 La. L. Rev. (1955)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol15/iss4/21>

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Louisiana law to an English court.²⁰ Thus, on the basis of *Hess v. Pawloski* and the more general considerations involved in *International Shoe Co. v. Washington*, the court's conclusion that service of process on the Secretary of State in cases like this one does not offend due process of law seems reasonable.²¹

While there may be some disagreement as to whether or not *Pennoyer v. Neff* has been abandoned,²² it is certain that service of process on the defendant within the state as a requirement of due process no longer carries the same meaning that it did when first announced. An expansion of state jurisdiction has been recognized in the decisions, especially where the defendant has been a foreign corporation. The *International Shoe* case increased this tendency.²³ The instant case sanctions the statutory agent device of the *Hess* decision in an application of the *International Shoe* doctrine.

John S. White, Jr.

FRENCH CIVIL LAW—SALES—EARNEST MONEY

Plaintiff deposited 200,000 francs with defendant during the course of their negotiations for the sale of defendant's immovable property. Upon failure to agree on the terms of the contract, although a price of 1,000,000 francs had been agreed upon, defendant retained the deposit on the grounds that it constituted earnest money within the meaning of *Code Civil* article 1590.¹ Plaintiff instituted suit to recover the deposit. He contended that article 1590 was inapplicable, because the payment had been made to secure preference over another prospective buyer and

20. The burden of proving a difference between the law of England and any foreign law is upon the party who asserts its existence. 13 HALSBURY, LAWS OF ENGLAND 614, § 685 (2d ed. 1934); see, e.g., *Smith v. Gould*, *The Prince George*, [1842] 4 Moo. P.C.C. 21.

21. The defenses based on the interstate and foreign commerce clause, and the admiralty clause of the Federal Constitution were rejected summarily on authority of *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Sherlock v. Alling*, 93 U.S. 99 (1876); *Pueblo v. H. E. Moss & Co.*, 159 F.2d 842 (2d Cir. 1947).

22. 23 U.S.L. WEEK 1101 (Jan. 11, 1955), announced the case with the following headline, "Pennoyer v. Neff Overruled, Federal District Court Holds."

23. See Note, *The Growth of the International Shoe Doctrine*, 16 U. OF CHI. L. REV. 523 (1949).

1. Art. 2463, LA. CIVIL CODE of 1870 is identical. It states: "But if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise; to wit: he who has given the earnest, by forfeiting it; and he who has received it, by returning the double."

hence should be treated as a payment on the price, to be returned in the event the sale was not perfected. From an adverse judgment, defendant appealed. *Held*, affirmed. Although article 1590 is applicable to preliminary negotiations, the payment was not earnest money because the parties did not intend to treat the payment as a forfeit. *Dumont v. Artztein*, Cour d'appel de Nancy, March 17, 1954 (Gazette du Palais 1954.1.311).

Although Louisiana and France have identical code articles dealing with earnest money, the application of these articles under both systems is quite different. Article 2463 of the Louisiana Civil Code provides that "if the *promise to sell* has been made with the giving of earnest, each of the contracting parties is at liberty to recede from his promise." (Emphasis added.) Although until 1910 article 2462 stated simply that "a promise to sell . . . amounts to a sale,"² the courts consistently held that a contract to sell did not transfer title and that the assimilation of a promise to sell to a sale meant only that the parties to a contract to sell are entitled to specific performance.³ Therefore, the statement is found in cases involving immovable property that article 2463, dealing with earnest money, is applicable only to contracts to sell.⁴ This is probably due to the fact that a sale of an immovable is not perfected in Louisiana until execution of an act translative of title.⁵ Thus, when an act translative of title is executed the executory contract to sell becomes a perfected sale and forfeiture of a deposit in the event of non-execution of the contract is no longer possible. However, in transactions involving movables, the sale is perfect as soon as there exists an agreement on the object and the price, although the price has not been paid, nor delivery made.⁶ Thus, if the rule found in cases involving immovables, that earnest money is applicable only to contracts to sell, is applied to agreements concerning movables, a deposit accompanying an agreement for the sale of a particular movable at an agreed price could not constitute earnest money, because the

2. In 1910, article 2462 was amended to read as follows: "A promise to sell . . . so far amounts to a sale, as to give either party the right to enforce specific performance of same." La. Acts 1910, No. 249, p. 417.

3. *Capo v. Bugdahl*, 117 La. 992, 42 So. 478 (1906); *Girault v. Feucht*, 117 La. 276, 41 So. 572 (1906); *Peck v. Bemiss*, 10 La. Ann. 160 (1855); *McDonald v. Aubert*, 17 La. 448 (1841).

4. *McCain v. Hicks*, 150 La. 43, 90 So. 506 (1921); *Smith v. Hussey*, 119 La. 32, 43 So. 902 (1907); *Capo v. Bugdahl*, 117 La. 992, 42 So. 478 (1906).

5. Art. 2275, LA. CIVIL CODE of 1870. See also *Hebert, The Function of Earnest Money in the Civil Law of Sales*, 11 LOYOLA L.J. 121, 137 (1930) and cases cited therein.

6. Art. 2456, LA. CIVIL CODE of 1870.

agreement was a perfected sale. This would tend toward restricting the application of earnest money to transactions involving immovable property. However, there are no decisions adopting the view that, with respect to movables, earnest money is applicable only to contracts to sell. Even after it is found that the nature of the contract permits the application of article 2463, there is the additional problem of determining whether a deposit accompanying that contract constitutes earnest money. Louisiana courts presume that all such deposits are intended as forfeits,⁷ except where there is positive proof to the contrary.⁸ For instance, deposits have been held to be earnest money, even though the agreement stated that the payment had been made "on account of the purchase"⁹ or "to bind my purchase."¹⁰ Similarly, a payment of "10 per cent. of the purchase price" included in an offer to purchase immovable property was held to be earnest money.¹¹

In France, the well-settled view is that article 1590, dealing with earnest money, is applicable to unexecuted sales as well as promises to sell.¹² This is a consequence of the provision in arti-

7. *Livingston v. Southport Mill*, 173 La. 120, 136 So. 289 (1931); *Buckman v. Stafford, Derbes & Roy*, 167 La. 540, 119 So. 701 (1929); *Capo v. Bugdahl*, 117 La. 992, 42 So. 478 (1906); *Yates v. Battelford*, 19 La. App. 374, 139 So. 37 (1932). For a short time, the court departed from this position in the cases of *Nosacka v. McKenzie*, 127 La. 1063, 54 So. 351 (1911) and *Provenzano v. Glaesser*, 122 La. 378, 385, 47 So. 688, 690 (1908), in which the court held that the words "ten per cent . . . on account of the purchase price" indicated that the parties did not intend that the deposit be considered as earnest money. But this view was expressly overruled in the case of *Maloney v. Aschaffenburg*, 143 La. 509, 78 So. 761 (1918). See also *Hebert, The Function of Earnest Money in the Civil Law of Sales*, 11 *LOYOLA L.J.* 121, 138-141 (1930).

8. If the agreement contains language clearly indicating that forfeiture was not intended, the deposit is treated as a payment on the price, entitling the parties to specific performance. *Moresi v. Burleigh*, 170 La. 270, 273, 127 So. 624, 625 (1930) (agreement stated: "it is agreed that the amount given . . . is not earnest money, but shall form part of the price. . ."); *Wright v. Derbes*, 168 La. 335, 122 So. 57 (1929) (promissory note given in lieu of second mortgage with understanding that as soon as mortgage was executed, notes would be returned); *Jacobs v. Freyhan*, 156 La. 585, 587, 100 So. 726, 727 (1924) (agreement stated that the deposit "is not to be considered as earnest money, the parties hereto reserving the right to demand specific performance.").

9. *Legier v. Braughn*, 123 La. 463, 465, 49 So. 22 (1909).

10. *Smith v. Hussey*, 119 La. 32, 33, 43 So. 902, 903 (1907).

11. *Maloney v. Aschaffenburg*, 143 La. 509, 511, 78 So. 761 (1918).

12. Although CODE CIVIL art. 1590 speaks only of promises to sell, its rule concerning *arrhes*, or earnest money, is equally applicable to unexecuted sales, because of the assimilation made in article 1589 of a promise to sell to a sale. 5 *AUBRY ET RAU, DROIT CIVIL FRANÇAIS* n° 349, n. 36 (5th ed. 1907); 2 *BAUDRY-LACANTINIERE, PRÉCIS DE DROIT CIVIL* n° 744 (13th ed. 1925); 2 *COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* nos 831, 834 (10th ed. 1953); 2 *PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* n° 2434, n. 2 (3d ed. 1949). *Contra*, 6 *MARCADE, EXPLICATION DU CODE CIVIL* 172, 173 (1875); 1 *POTHIER, TREATISE ON CONTRACTS* 479 (Cushing's transl. 1839).

cle 1589 that "*la promesse de vente vaut vente*,"¹³ which is considered by the modern commentators as a complete assimilation of a promise to sell to a sale.¹⁴ The instant case states that, in France, earnest money is also applicable to preliminary negotiations. The difference between Louisiana and French law on the subject of earnest money extends even further. In France, despite the presumption that a deposit is intended as a forfeit,¹⁵ the question of whether the deposit constitutes earnest money essentially depends upon the intentions of the parties as evidenced by the surrounding circumstances.¹⁶ Thus, depending upon the intentions of the parties, a deposit accompanying negotiations, a promise to sell, or a contract of sale may constitute (1) a forfeit under article 1590 in which case the parties will have the privilege of withdrawal or (2) proof of the contract, or (3) a partial payment on the price.¹⁷ In finding the intentions of the parties, the French courts rely on the circumstances surrounding the transaction. Thus, in the instant case, although there was no written evidence of the parties' intentions, the court found that the substantial amount of the deposit¹⁸ and the previous offer by the other prospective buyer indicated that the parties did not consider the payment as a forfeit, but as a payment on the price. The more flexible French system does not impart the degree of certainty in the law of immovable property which the Louisiana jurisprudence has produced. On the other hand, the Louisiana approach of viewing all deposits accompanying contracts to sell

13. CODE CIVIL art. 1589.

14. See note 12 *supra*.

15. 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 209, n. 3 (1932).

16. 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL n° 745 (13th ed. 1925); 6 MARCADÉ, EXPLICATION DU CODE CIVIL 181 (1875); 2 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 2434 (3d ed. 1949). In discussing whether article 1590 was a rigid rule to be applied in all cases, Marcadé stated: "[I]t is a question of intention of the parties . . . a question of fact that the judge ought to decide in each case, by the custom of the locality, by the importance of the earnest money compared to the price of the thing, by the habits of the parties It is by this means and as a question of fact, that he will determine whether the sum remitted has been intended as forfeit, or by indication to the contrary, as proof of the contract, or as a payment on the price" (Author's translation.)

17. 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS n° 209 (1932).

18. Although the distinction between earnest money and a payment on the price depends upon the intentions of the parties, a substantial deposit is a factor which is generally considered when determining whether the payment was on the price or earnest money. 17 BAUDRY-LACANTINERIE ET SAIGNET, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL n° 85 (2d ed. 1900); 6 MARCADÉ, EXPLICATION DU CODE CIVIL 181 (1875); 2 PLANIOL ET RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 2434 (3d ed. 1949).

as forfeits may lead to results not envisaged by the parties. Although French courts apply earnest money to unexecuted sales and Louisiana has restricted its application to contracts to sell, the results reached under both systems are for all practical purposes identical. Under neither system would a deposit constitute earnest money after the sale has been executed by delivery. In France, earnest money is applicable to perfected sales of both movables and immovables, although a sale may be perfected before delivery has been made or the price paid.¹⁹ In Louisiana, however, a sale of an immovable is not perfected until an act translative of title is executed,²⁰ at which time delivery takes place.²¹ In France, delivery of an immovable is accomplished by delivery of the title papers.²² Therefore, earnest money applies in France until delivery, although the sale may have been perfected before, and it applies in Louisiana until delivery although the sale will not be perfected before. The question of the application of earnest money to contracts involving movable property should not depend on whether the transaction constitutes a sale or a contract to sell, but on whether the contract has been executed by delivery. A forfeit is given as an alternative to performance, and when performance is rendered, the election is made. Therefore, when the transaction has been completed by delivery, there is no basis for the court to conclude that a payment was intended as a forfeit.

William C. Hollier

INSURANCE—AUTOMOBILE LIABILITY POLICY—INTERPRETATION
OF TERM "EACH ACCIDENT"

Defendant's negligently driven truck collided with a freight train and damaged sixteen boxcars belonging to fourteen separate owners. The railroad company, on its own behalf and presumably acting under assignments in its favor, brought suit against the defendant. Defendant's automobile liability insurance policy limited the insurer's liability for bodily injury to each person to \$100,000, to \$300,000 for each occurrence, and for prop-

19. See note 12 *supra*.

20. See note 5 *supra*.

21. Art. 2479, LA. CIVIL CODE of 1870; Succession of Curtis, 156 La. 243, 100 So. 412 (1924); Brown v. Brown, 30 La. Ann. 966 (1878); Laurans v. Garnier, 10 Rob. 425 (La. 1845); Lallande v. Lee, 9 Rob. 514 (La. 1845); Greco v. Milano, 13 Orl. App. 134 (La. App. 1916).

22. CODE CIVIL art. 1605.