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Civil Code and Related Subjects: Conventional Obligations

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Moreover, one justice was doubtful that so large an estate could have been properly settled in any case without an administration.

In opposition to the final account of the administatrix of the estate of deceased, in *Succession of Siren*,[33] his daughter by a previous marriage, the curatrix of his interdicted widow, maintained that a debt was owed. The deceased had bought and mortgaged certain property preceding his second marriage and this indebtedness had been paid during the second community. The court held that the community owed the separate estate this amount and the widow should receive a credit of one-half of it. The lower court had recognized the widow as a creditor to be paid from the mass of the estate, which would have reduced the share of the community due to the widow.

CONVENTIONAL OBLIGATIONS

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There was presented to the court in *Amato v. Latter & Blum, Inc.*[1] the novel question of whether a real estate agent who withholds from the owner of listed property an offer to buy it and thereby induces him to sell at a lower figure to another buyer violates a legal duty owed to the prospective purchaser. The latter brought suit for damages based on the difference between the offer submitted and the price put on the property by the party who bought it. The trial court upheld an exception of no cause of action and dismissed the action. The Supreme Court reversed. It found that the broker owed the prospective purchaser a duty to communicate the offer to the owner. This was based on the proposition that R.S. 37:1432-54 regulating the business of real estate brokerage and requiring real estate brokers to give a bond, constitute a legislative recognition that real estate brokerage is a business affected with a public interest. Justice Hamiter dissented, finding no basis in the legislation for the existence of a duty in the agent to the prospective purchaser.[2] Beyond the question of statutory construction it is interesting to speculate whether relief might have been granted on

33. 226 La. 687, 77 So.2d 5 (1954).

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1. 227 La. 537, 79 So.2d 873 (1955).

2. For a detailed discussion of this case, see Note, 16 LOUISIANA LAW REVIEW 447 (1956).

the theory that the broker had injured the plaintiff by causing him to rely on the belief that his offer would be presented to the owner. Does a real estate broker, by receiving an offer for listed property, impliedly promise to present it to the owner? Would such a promise have a lawful cause? Should it be said that the broker had reason to believe that if he refused to receive the offer the plaintiff would go directly to the owner?

On the basis of a careful analysis of the facts, the court, in *Louisiana State Board of Education v. Lindsay*,[3] failed to find an offer and acceptance resulting from negotiations between the Board of Education and a landowner looking toward the purchase by the former of a tract of land. It adverted to the rule that an oral acceptance is ineffective and to the provisions of article 1805 of the Civil Code under which an acceptance must conform with the terms of the offer. The case should serve as a reminder to prospective purchasers of real estate that careless and indefinite dealings create particular risks in cases of this kind. The court was specific in commenting that not only must an offer to buy or sell immovable property be in writing but that the acceptance must also be in writing. This positive expression of the court may assist in cutting off the dubious roots of an earlier opinion which seemed to find an acceptance in the purchaser's recordation of an offer to sell real estate.[4]

Another problem of offer and acceptance was before the court in *Mackey v. Scarborough*.[5] It was found that the plaintiff, suing to enforce an alleged contract to convey land by way of a compromise, had failed to accept the offer made prior to the offeror's death.

Generally speaking, contracting parties are free to close their contract when it suits them to do so. They may, for example, verbally agree on all the terms of a proposed contract with the understanding that they will not be bound until a writing embodying their agreement is signed. On the other hand, they may enter into a verbal contract with the understanding that they are then bound but with the further understanding that they will later reduce the contract to writing for purposes of evidence and to avoid future dispute. If then the contemplated writing is

3. 227 La. 553, 79 So.2d 879 (1955).
4. See Cerami v. Haas, 195 La. 1048, 197 So. 752 (1940); *cf.* Haas v. Cerami, 201 La. 612, 10 So.2d 61 (1942).
5. 226 La. 106, 75 So.2d 24 (1954).

viewed by them merely as a memorial of their verbal contract, the fact that they fail to have it drawn up and signed will have no effect. When they do not intend to be bound until the writing is signed, a failure to reduce the agreement to writing will prevent the formation of a contract. This latter rule was applied, properly it appears, in the case of *Breaux Brothers Construction Co. v. Associated Contractors, Inc.*[6] However, the court in so ruling quoted from an earlier case[7] indicating that it is only when the agreement to reduce to writing is made subsequent to the verbal contract that the failure to execute the writing will have no effect. This is believed to be too narrow a statement of the principle. Even when the agreement to reduce to writing is part and parcel of the whole understanding it need not prevent the formation of a complete verbal contract unless the parties so intend. To get at this intention the whole facts may be considered, not merely the point of time when the agreement to reduce to writing is made.

The case of *Dane & Northrop v. Rittiner*[8] presented the question of whether the payment of a specified sum constituted the final act necessary to the acceptance of an offer covering the financing of a housing project, or whether the written proposal of the plaintiff to which the defendant affixed his signature by way of acceptance constituted a completed contract and resulted in the imposition of a duty on the defendant to make the stipulated payment. The court took the former view. Justice McCaleb, in dissenting, took the latter. The stated sum was not paid and the suit was to recover it. The written proposal was undoubtedly susceptible of the construction placed upon it by the majority of the court, but at the same time it might have lent itself as readily to the contrary construction. Although approval of any loans under the commitment was clearly conditioned on the deposit of the specified sum in cash, the written proposal offering the commitment might well have been held subject to merely the defendant's signature of acceptance. The defendant offered parol evidence to show that the written acceptance was conditioned on the defendant's securing necessary interim financing. There is a possibility the court may have been satisfied of this but it was found unnecessary to pass on the admissibility

6. 226 La. 720, 77 So.2d 17 (1954).
7. Fredericks v. Fasnacht, 30 La. Ann. 117 (1878).
8. 226 La. 1074, 78 So.2d 178 (1955).

of the proffered evidence in view of the holding that the deposit was necessary to complete the acceptance. In passing, it may be observed that parol evidence that a writing purporting to contain the terms of a contract was delivered or signed conditionally should always be admissible. There is no need to exclude such evidence until it has been determined that a contract has been made. A written document cannot prove its own character.[9]

In *Smith v. LeSueur & Co.*[10] the court reaffirmed its position that misrepresentation concerning the rentals that may be collected legally on property offered for sale for investment purposes will justify a judgment annulling a contract for the purchase of the property.

A contract for the installation of a heating system was dissolved in *Ilgenfritz v. Radalec, Inc.*[11] and the owner was given judgment for the amounts paid plus the cost of removing the system and restoring his home to its former condition. The court approved the trial court's finding that the non-performance was complete and entire. This case should make it clear that where there is a total failure of performance and not a partial default only, the owner is not restricted to a reduction in the price in an amount required to correct the defects.[12]

In *Roland v. American Casualty Co.*[13] the court applied the rule that when a contractor is prevented by the owner from fulfilling his contract he is entitled to the profit he would have made. This is determined by deducting from the contract price what it would have cost the contractor to complete the work. The result is to put the contractor in as good a position as he would have been in if the contract had been carried out as originally contemplated.

In *Walker v. Iannazzo*[14] the plaintiff was suing on an alleged agreement under which he was to receive $75 per week plus one-third of the net profit on the sale of two buildings, the construction of which plaintiff was to supervise. The $75 per week having been paid, plaintiff was claiming the one-third of the net profit. He claimed this supposedly on the basis of the alleged

9. See 3 CORBIN, CONTRACTS § 577, especially illustration (6) (1951).
10. 227 La. 413, 79 So.2d 501 (1955).
11. 226 La. 59, 74 So.2d 903 (1954).
12. *Cf.* Mangin v. Jorgens, 24 So.2d 384 (La. App. 1946).
13. 227 La. 727, 80 So.2d 387 (1955).
14. 226 La. 856, 77 So.2d 513 (1955).

agreement, and in the alternative he asked recovery of the sum in quantum meruit. The court rejected his claim founded on the agreement for lack of evidence and also rejected his alternative claim for recovery in quantum meruit for lack of proof. If a contractor has completed his performance he is entitled to recover the agreed compensation, or if he is unable to prove that a compensation was agreed upon, he is entitled to recover, as by way of restitution, the value of his services. Perhaps, where after performance the defendant breaks his contract to pay, the plaintiff might get a judgment either for the contract price or the value of the services rendered,[15] but it is doubtful that where a plaintiff's services have created a contractual money debt a court would create a non-contractual money debt in a different amount. At any rate, the proof must support the claim and here it did not.

In *Sheeks v. McCain-Richards, Inc.*[16] the court was confronted with a complicated problem involving an award of damages for breach of contract and the establishment of certain claims of the defendant by way of compensation or set-off for sums paid or advanced to the defendant. A comment by the court that a novation occurred through the giving of a note to cover an existing indebtedness and an additional advance is open to question.[17] However, no holding on the point appears to have been necessary. Otherwise the opinion raises no issue.

A case clearly calling for the application of the principle that where a party prevents the fulfillment of a condition on which he is to be bound the condition will be considered as fulfilled was *Garig Transfer, Inc. v. Harris.*[18] This principle is found in article 2040 of the Civil Code. The language of the article is confused but this comes from its poor translation from the French. The court's recognition of the true meaning of the provisions was clear and succinct. So, too, was its discussion of the right to recover for profits lost. Exact proof should not be required but at the same time an award cannot be based on mere speculation. Nonsuiting the claim for damages was a fair disposition of it.

15. See 5 CORBIN, CONTRACTS § 1110 (1951).
16. 226 La. 578, 76 So.2d 892 (1954).
17. See Reconstruction Finance Corp. v. Thomson, 186 La. 1, 171 So. 553 (1936); Lee Tire & Rubber Co. v. Frederick-Planche Motor Co., 180 So. 143 (La. App. 1938).
18. 226 La. 117, 75 So.2d 28 (1954).

Article 2239 of the Civil Code permits forced heirs to introduce parol evidence in an effort to annul as simulated the contracts of those from whom they inherit. In *Miller v. Miller*[19] the court rejected as inadmissible hearsay an affidavit of the ancestor to the effect that a mortgage granted to his second wife's brother to secure an advance of $5000 was simulated. It pointed out that article 2239 does not permit the substitution of hearsay as legal proof.

In *Vath v. Gay*[20] the court applied Civil Code article 2277, requiring proof by at least one credible witness and other corroborating circumstances of a contract for the payment of money in excess of $500, and affirmed the lower court's judgment rejecting both the principal and reconventional demands for lack of sufficient evidence.

A problem of contract interpretation was presented to the court in *Pothier v. Barber Laboratories, Inc.*[21] The opinion was well and convincingly reasoned and in accordance with article 1955 of the Civil Code.

PARTICULAR CONTRACTS

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SALE

In the case of *Lake v. Lejeune*,[1] the Supreme Court applied the rule that authority to an agent to sell real estate must be specific and in writing and concluded that an attorney at law, as such, has no authority to contract for the sale of his client's real estate. The case also involved a holding that where the parties to an agreement for the sale of property stipulate that the price shall be fixed by experts to be appointed by them, either has it in his power to prevent the perfection of the sale by refusing to make the appointment. No mention was made of the possibility of recovering damages based on the failure to appoint. In an earlier and factually weaker case, the right of the plaintiff to sue for damages was reserved.[2] The opinion in the instant case

19. 226 La. 273, 76 So.2d 3 (1954).
20. 226 La. 873, 77 So.2d 519 (1955).
21. 227 La. 357, 79 So.2d 481 (1955).
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1. 226 La. 48, 74 So.2d 899 (1954).
2. Louis Werner Sawmill Co. v. O'Shee, 111 La. 817, 35 So. 919 (1904).