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Civil Code and Related Subjects: Particular Contracts

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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

*J. Denson Smith**

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).

did not discuss the point but it has been much discussed in France. The latest holding of the *Cour de Cassation* recognizes the possibility of a recovery of damages.³ The theory is that under such an agreement each party is contractually bound to appoint an expert and must respond in damages if he fails to do so, notwithstanding that enforcement in nature will not be decreed nor appointment by the court substituted.

The rule in France is that the sale of standing timber is the sale of a movable. Prior to 1904 this was the rule in Louisiana. In that year the Legislature adopted an act providing that standing timber is an immovable and "subject to all the laws of the State on the subject of immovables."⁴ Among the provisions of the Civil Code relating to immovables are a number of articles which adjust the rights of the parties where, in the sale of an immovable, there is a shortage or an overplus in the measurement called for by the act of sale. One of these articles fixes a prescriptive period of one year on the action for a supplement or diminution of the price dating from the day of the contract.⁵ In *Martin Timber Co. v. Jean Lumber Co.*,⁶ this article was applied to a sale of 1,470,496 feet of pine timber "marked with blue paint at the ground level growing and situated upon the following described property." The court pointed out that the effect of the 1904 act is to subject sales of standing timber to the articles of the Civil Code dealing with delivery of immovables and accordingly it found that the action was barred by prescription. The plaintiff, alleging a deficiency of 103,393 feet, was claiming the return of a proportionate part of the purchase price. Contrary to his insistence that he had purchased simply a specified number of feet of pine timber, the court's view was that the contract showed that the vendor sold certain standing timber, located on certain described land for a lump price. The language of the contract, however, as reflected in the opinion, seems to bear out the plaintiff's contention. Here was not a sale of all merchantable pine timber on the described property but that particular timber "marked with blue paint." There seems to be no clear analogy between such a transaction and the sale of a certain and limited body for a fixed price, or a sale *per aver-*

3. *Chabreiron v. Mouton*, *Cour de Cassation* (Ch. civ., sect. civ.) April 25, 1952, [1952] *Dalloz Jurisprudence* 635.

4. La. Acts 1904, No. 188, p. 420; LA. R.S. 9:1103 (1950).

5. LA. CIVIL CODE art. 2498 (1870).

6. 227 La. 894, 80 So.2d 855 (1955).

sionem as the court suggested might have been the true nature of the transaction. In addition, the question before the court was one of prescription and since there is no way to determine the exact quantity of timber sold until cut and measured, the propriety of applying a prescriptive period dating from the date of the sale as in sales of real estate is not manifest. All of which suggests that it is questionable legislating to enact a statute, of the kind here involved, as sweeping in its terms.

The cloudy concept of default has again obscured the way of justice — unnecessarily, the writer continues to believe.⁷ In *Shell Oil Co. v. Hogan*,⁸ a contract to sell certain commercial property, duly recorded, provided that the act of sale was to be passed on March 4, 1954, "or on such other date as might be mutually agreed upon by the parties." The contract to sell also imposed certain obligations on the seller. These obligations the seller proceeded to violate immediately. March 4th came and went without action. Ten days later the seller sold the property to another. A month later the purchaser, Shell Oil Company, sued for specific performance. It argued, apparently, that it did not have to put defendant in default by offering to perform on March 4th inasmuch as the defendant had actively breached the contract by violating the obligations imposed upon him. The court, conceding this to be true, said that plaintiff, by seeking specific performance and waiving the breaches, had elected to treat the contract as unbroken, hence its failure to offer to perform on March 4th deprived it of the right to specific performance. According to the Code the remedies for non-performance are specific enforcement or dissolution with or without damages.⁹ When a defendant opposes a suit for specific performance, as here, he is actually claiming dissolution. The Code provides in article 2047 that when dissolution is demanded the court may allow "the party in default" further time for performance. Consequently, even assuming that the Shell Company was in default, the court had the power to allow it further time for performance. And this is as it should be. A mere failure to perform after demand made should not terminate the other party's duty unless

7. See *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Sale*, 13 LOUISIANA LAW REVIEW 236 (1953); *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Sale*, 11 LOUISIANA LAW REVIEW 166 (1950); *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Sale*, 8 LOUISIANA LAW REVIEW 230 (1948).

8. 228 L.R. 37, 81 So.2d 761 (1955).

9. LA. CIVIL CODE arts. 2046, 2047 (1870).

the default is so material that justice demands such result. Furthermore, a party is supposedly not in default by failing to perform on time. After mature deliberation it was so held in *Erwin v. Fenwick*.¹⁰ Presumably that holding is still the law, at least if time is not of the essence. In some earlier cases involving similar holdings the court seemed to stress this latter qualification and rely on it.¹¹ But nothing was said to this effect in the instant case. It does seem clear that the parties must not have considered time as being of vital importance inasmuch as the act of sale was to be passed on "March 4th, 1954, or on such other date as might be mutually agreed upon by the parties." Indeed, time is seldom of the essence in contracts for the sale of real estate and, more particularly, with reference to the obligation of the buyer. If time is so vital that holding a party to his duty after the day fixed for performance has passed would impose on him a hardship that could not be compensated by an award of moratory damages he should be held discharged. But since the Shell Company's obligation was merely one to pay money, and in view of the unjustifiable conduct of the defendant, further time might well have been allowed if the court had felt free to dispose of the case on such basis. It may be that in view of the decisions rendered in recent years, which the court followed, these views should no longer be expressed. But the eyes of hope are restless. Perhaps someday a putting in default, if required at all, will be considered necessary only when delay damages are being claimed. Then we will go back to the function of this requirement as it was apparently understood by the draftsmen of the French Civil Code.¹² And then the effect of a breach by one party on the duty of the other party will be considered, as it should be, on the merits.

It is an established principle that a person who has contracted to purchase real property will not be compelled to accept a title that will expose him to litigation. This principle was applied and the purchaser was given judgment for a return of the purchase price plus costs, expenses, and attorney's fees, as provided in the contract to sell, in *Oatis v. Delcuze*.¹³ The objections to the

10. 6 Mart. (N.S.) 229 (La. 1827).

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

12. 8 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 232 (1836).

13. 226 La. 751, 77 So.2d 28 (1954).

title emanated from the fact that the property did not conform with the applicable zoning regulations.

The case of *Southwest Steel Corp. v. Jumonville*¹⁴ involved merely a question of whether the defendant, sued on certain promissory notes given for the purchase price of three infantry landing craft, had received a clear title thereto. The court found that he had, on ample evidence.

An action in redhibition brought by a dealer against a manufacturer with respect to two air conditioning units was before the court in *Radalec, Inc. v. Automatic Firing Corporation*.¹⁵ The dealer was compelled to remove the units after they had been installed on the premises of a purchaser. The manufacturer offered several defenses, none of which was found valid.¹⁶

To succeed in a suit based on lesion beyond moiety the burden is on the party claiming lesion to establish, by strong and convincing proof, that the price paid was less than one-half of the value of the property at the time of the sale. The court's opinion in *Foos v. Creaghan*¹⁷ clearly shows that the plaintiff failed to shoulder this burden, as the court found.

In a carefully reasoned opinion, the court refused, in *Pierce v. Roussel*,¹⁸ to set aside a sale of land for alleged fraud on the part of the buyer or lesion beyond moiety. Proof of the fraud was wholly lacking and the court understandably concluded that the market value of property cannot be fixed by an estimate concerning the value of recoverable oil lying beneath it. It concluded that there was no proof that the price was lesionary.

What may be considered an extension of the public records doctrine is to be found in the case of *Smith v. Taylor*.¹⁹ It was there held that an abstractor who discovered an error in the section number in a sheriff's deed would be protected in his acquisition of the property from the former owner under a correct description. In an earlier case²⁰ the court had held that where a

14. 228 La. 240, 81 So.2d 875 (1955).

15. 228 La. 116, 81 So.2d 830 (1955).

16. A note on the *Radalec* case will appear in a later issue of the *Louisiana Law Review*.

17. 226 La. 619, 76 So.2d 907 (1954).

18. 227 La. 438, 79 So.2d 567 (1955).

19. 226 La. 235, 75 So.2d 850 (1954).

20. *Quatre Parish Co. v. Beauregard Parish School Board*, 220 La. 592, 57 So.2d 197 (1952).

deed actually describes a tract of land different from that intended to be conveyed, its registry cannot be regarded as furnishing notice to third persons. If it should have been believed that a third person who had actual knowledge of the error in the description could not benefit by the rule the court has now given its answer to the contrary. It is, of course, hornbook law that such a purchaser can effectively buy despite his knowledge of a prior unrecorded deed and the situation before the court may be considered analogous, since in consequence of the error there was no deed of record transferring the particular property. The case was also decided, however, on a second ground, *viz.*, that the judgment under which the seizure and sale occurred was null and void because the obligation sued on had not matured prior to the time citation was waived and judgment confessed.

In *Stevens v. Stevens*²¹ the court affirmed a district court judgment annulling, at the suit of the tutrix of certain minor heirs, a transfer made by their grandmother to her son for a price less than one-fourth the value of the property. In its approval of the district court's finding as to the value of the property, the court remarked that the district judge might properly have taken into consideration the value of the land for mineral purposes. This observation should not now be open to question. The court also held that the plaintiffs did not have to deposit in the registry of the court the price found to have been paid by the son since they had not received it.

A consolidation of two suits having the same purpose as the suit in the *Stevens* case came before the court as *Dietz v. Dietz*.²² The opinion contains an excellent discussion of the problem of proof to support the claim that a purported sale by an ancestor to his child of immovable property is a pure simulation or a donation in disguise. After questioning the statement in two earlier cases that suits of this nature are not favored,²³ a statement with little to support it, and less to commend it, the court held that the plaintiffs had the burden of proving by preponderating or convincing evidence that the sales were without consideration. On the strength of article 2480 of the Civil Code, the court held squarely that the burden of proving the reality of one of the sales

21. 227 La. 761, 80 So.2d 399 (1955).

22. 227 La. 801, 80 So.2d 414 (1955).

23. *Blackman v. Brown*, 155 La. 959, 962, 99 So. 711, 713 (1924); *Moore v. Wartelle*, 39 La. Ann. 1067, 1070, 3 So. 384, 386 (1887).

had shifted to the transferee. As to the other, although the court's language is less specific, and although it found the evidence adduced by the plaintiff too scant to shift the burden, the court, in remanding the case, nevertheless made it clear that unless the transferee produced the notary and witnesses to the act of sale since they were all available, a finding of simulation should be made. Apparently, therefore, it appears that when, in a case of this kind, the plaintiff produces evidence that casts suspicion on the verity of the transaction, the defendant will be required to produce evidence supporting the transfer that is readily available to him.

A transfer by parents to a daughter was sustained in *Warden v. Porter*²⁴ against the claim of other forced heirs that it was a simulation or a donation in disguise. The court approved the use of parol evidence to show that the transfer was actually a *dation en paiement* and held that delivery of the property took place with delivery of the authentic act of transfer. The prior jurisprudence clearly sustains the view that where an act of sale is under attack by third parties, as a simulation or disguised donation, parol evidence is admissible to show the true cause. The Code is specific that delivery of an immovable accompanies the public act although there have been some unnecessary expressions to the contrary.²⁵

In *Dare v. Myrick*²⁶ a widow and ten children sued to have a sale by the deceased husband and father to his brother declared a pure simulation. Although the facts were strongly suggestive of a fraudulent scheme between the defendant and his deceased brother to put the property beyond the reach of his divorced wife, the plaintiffs were unable to overcome the proof of reality evidenced by the deed to the defendant and a cancelled check of the defendant in the amount of the price. The court properly questioned plaintiffs' reliance on article 2444 of the Civil Code but found that they had failed to prove that no price had been paid for the property.

A finding by the trial court that a sale of a house and lot to the daughter and son-in-law of the vendors was a fraudulent simulation was affirmed in *Harper v. Rosenblath*.²⁷ The evi-

24. 228 La. 27, 81 So.2d 707 (1955).

25. See *Queyrouze & Bois v. Thibodeaux*, 30 La. Ann. 1114 (1878).

26. 226 La. 732, 77 So.2d 21 (1954).

27. 227 La. 507, 79 So.2d 863 (1955).

dence of a fraudulent attempt to put the property beyond the reach of the creditors of the transferors was convincing and the vendee failed to overcome the presumption of fraud resulting from continued possession in the vendors.²⁸ Fraud in cases of this kind is difficult to prove but the case demonstrates that where the facts are strong enough the court will not hesitate to find it.

The case of *General Finance Co. v. Riverside Warehouse, Inc.*²⁹ involved an interpretation of the responsibility of a warehouseman under La. R.S. 54:20 where a quantity of cartons for which receipts were issued contained, instead of shrimp, cans of water. The receipt was held to comply with the requirements of the provision with the result that the warehouseman was absolved of responsibility.

The case of *New York Fire Insurance Co. v. Kansas Milling Co.*³⁰ involved a gratuitous loan for use. A valuable ox loaned to the defendant for exhibition purposes died as a result of injuries received when the trailer in which it was being towed became unhitched from the towing truck. The court held that the burden of showing freedom from any fault was on the borrower. It also found that this burden had not been satisfied. The obligation of the borrower is to preserve the thing as a *bon père de famille* in the best possible order and to return it as agreed. If he fails to return it he may be absolved only if he shows that the failure was through no fault of his. No such showing was made in the instant case.

LEASE

An interesting problem of first impression was before the Supreme Court in *Bloom v. Southern Amusement Co.*³¹ Plaintiff-lessor was seeking damages because of defendant's alleged failure to comply with a provision in the contract of lease requiring the lessee to "keep the theatre modernized . . . and up to date fixtures therein at all times." At the time suit was filed the lease had three years yet to run but the plaintiff did not ask for its dissolution. After a comprehensive review of conflicting opinions expressed by French commentators the court concluded that the action for damages, without a prayer for dissolution, was pre-

28. LA. CIVIL CODE art. 2480 (1870).

29. 227 La. 270, 79 So.2d 305 (1955).

30. 227 La. 976, 81 So.2d 15 (1955).

31. 228 La. 44, 81 So.2d 763 (1955).

mature. The court seemed to have been guided by practical considerations involving difficulties in adjusting the rights of the parties without a dissolution of the lease in the event the lessee, by an award of damages against him, should be compelled to pay for the repairs he had bound himself to make. The opinion indicated that a suit for dissolution with damages would lie under such circumstances through a proper application of article 2711. It is believed that the same conclusion is given direct support by article 2729 of the Code which renders applicable article 2046. Ordinarily, a lessor may not obtain a dissolution of the lease and rent accruing thereafter. But article 2711 specifically obligates the lessee to pay rent until the thing is again leased when the dissolution of the lease is obtained on the ground that he has made another use of the thing leased. Consequently, if article 2711 applies to facts such as those before the court, the lessor would be entitled to dissolution, damages, and a recovery of rent until the premises are again leased.

In *Wall v. Green*³² the plaintiff-lessor, seeking eviction and judgment for unmaturing rent, secured the former, the court having found that the lessee had failed to pay his rent when due and had neglected to keep the premises insured for the benefit of the lessor. The defendant had excepted on the ground of improper cumulation. The judgment of the lower court reserved to plaintiff the right to sue under a cancellation clause for the unmaturing rent. In view of the fact that the lessee was evicted and possession delivered to the plaintiff by the judgment, there is a serious question as to whether plaintiff should be entitled to recover rent unmaturing at the time possession was surrendered.³³ Perhaps the lower court, on the basis of defendant's exceptions, should simply have compelled the lessor to make election between recovery of possession or a judgment for rent to the end of the lease. He should not be entitled to both. The Supreme Court did not find it necessary to pass on this point.

In *Moore v. Lelong*³⁴ a lessee of land for the purpose of cultivation claimed damages under R.S. 9:3203 for an alleged wrongful dispossession by the landlord. His suit failed for lack of adequate proof except as to the conversion of 305 bales of hay by the landlord.

32. 228 La. 59, 81 So.2d 769 (1955).

33. *Henry Rose Merc. & Mfg. Co. v. Stearns*, 154 La. 946, 98 So. 429 (1923); *Sigur v. Lloyd*, 1 La. Ann. 421 (1846).

34. 226 La. 962, 77 So.2d 729 (1955).