Louisiana Law Review

Volume 19 | Number 2
The Work of the Louisiana Supreme Court for the 1957-1958 Term
February 1959

Civil Code and Related Subjects: Particular Contracts

J. Denson Smith

on the basis of the sub-contract entitled to the benefits provided by the prime contract as well as bound by its provisions otherwise. The court's disposition of the case accorded with the agreement between the parties and also satisfied the ends of justice. Both plaintiff and defendant seem to have profited by the generosity of the Corps of Engineers in making an adjustment because of a called work suspension.

In *Pechon v. National Corporation Service, Inc.*,[18] an employment contract was found to be for an indefinite time and therefore terminable at will.

PARTICULAR CONTRACTS

SALE

*J. Denson Smith**

The case of *Wells v. Joseph*[1] raises a serious question affecting the public records doctrine. The decision held that an unrecorded tax redemption was effective against a purchaser from the heirs of the tax adjudicatee in his suit to quiet title. Although the redemption had not been recorded, there were of record a judgment sending the heir of the tax debtor into possession of the property and other subsequently recorded instruments. From this the court reasoned that having been put on inquiry as to the title since the public records revealed that there were other claimants to the property, and that a lawsuit to establish ownership would be necessary, the purchaser must be considered as having bought at his peril and risk. In view of the fact that the case is being noted elsewhere in this issue, no extensive comment will be here made. Granting that the instruments of record may have put the plaintiff on inquiry, an investigation of the title could have led at most to the discovery of the unrecorded redemption. But this leaves unanswered the question of whether the unrecorded redemption could be held effective against the plaintiff without doing violence to established principles of registry. The public records doctrine holds that all unrecorded sales, contracts, and judgments affecting immovable property are utterly null and void as to third parties even when they know of their ex-

18. 234 La. 397, 100 So.2d 213 (1958).

*Professor of Law, Louisiana State University.

1. 234 La. 780, 101 So.2d 667 (1958).

istence. Is knowledge now to take the place of registry as long as the records suggest the possible existence of an unrecorded act? Or is the ruling to be restricted to the proposition that a purchaser from a tax adjudicatee does not acquire title to the property if there has been a redemption and if there is of record discoverable evidence suggesting the possibility?

Another significant case decided during the last term was *Miller v. Miller*.[2] Its holding, over the dissent of Justice Simon, that if a husband in making a *dation en paiement* to his wife to replace her separate funds used by him, reserves a power of redemption, the transaction is a nullity, is an addition to the jurisprudence. The court, reversing on rehearing its original opinion, reasoned that, since the husband has only limited powers of contract with his wife, they must be strictly construed; consequently, in view of the fact that the Code does not specifically authorize the reservation of a power of redemption in a *dation en paiement* by husband to wife, he has no such power. Considering the settled policy favoring the replacing by the husband of his wife's separate property, crystallized by the Code itself in the provision recognizing that the husband may prefer the wife over his other creditors, the writer does not find this reason appealing. The fact that the husband cannot reserve a power of redemption will have the necessary effect of discouraging the replacing by him of his wife's separate property through the transfer to her of his own, which goes counter to the established policy of the law.

It has long been established that where the vendor in a sale with the right of redemption remains in possession of the property, the transaction will be considered as between the parties, in the absence of evidence to the contrary, as a pignorative contract instead of a sale. In the case of *Coddou v. Gros*[3] the court found sufficient evidence to the contrary in the close family relationship between the parties and the fact that the sale in question was actually a *dation en paiement* to discharge an indebtedness already secured by a special mortgage on the property. The court's observation that the continued physical possession of the vendor affected in no way the rights of the parties because in a sale and a *dation en paiement* as well, delivery accompanies the public act transferring the property, is open to serious question. Under the rule of *Marbury v. Colbert*[4] the continued possession

2. 234 La. 883, 102 So.2d 52 (1958).
3. 235 La. 25, 102 So.2d 480 (1958).
4. 105 La. 467, 29 So. 871 (1901).

of the vendor is the controlling factor because it tends to negate the existence of an intention to divest the vendor of ownership. It is true that delivery of an immovable always accompanies the public act by which the property is transferred and that this rule is applicable to a *dation en paiement*. But this is a constructive delivery only which will take place although actual possession may not be surrendered. When the Code provides that delivery is essential to the perfection of a *dation en paiement* the reference seems clearly to be to the delivery to be effected by the act of transfer and not to the surrender of possession. It is then that the "payment" is completed and there is then left no suit to enforce the seller's obligation to deliver. This same theory finds expression in the rules relating to the accord and satisfaction of the common law. The accord, or contract itself, does not operate to discharge the existing indebtedness. To have this effect it must be performed, *i.e.*, the thing to be given in satisfaction must be delivered. Otherwise, the creditor would not be any better off. Instead of having an action on the indebtedness he would have an action on the contract of accord; he would be giving up one cause of action for another, and such an intention is not to be presumed. For this reason the old claim is not discharged until the accord is satisfied by performance; there must be an accord *and* satisfaction. For the same reason, our Code provides that the giving in payment is completed only by the delivery. In the case of an immovable this delivery takes place with the delivery of the public act. Consequently, when this is done the transaction is complete, the agreed performance has been rendered, and the old debt is then discharged by the giving in payment. The *dation en paiement* differs from the ordinary contract of sale in that, to follow the original theory of the Code, in the latter case the sale is considered to be perfect and the property is acquired of right by the purchaser as soon as there exists a concurrence of thing, price, and consent, although the thing has not yet been delivered nor the price paid. If the seller fails to deliver, the buyer may sue to recover the thing on the basis of his ownership. But a payment involves delivery, hence the requirement that the *dation en paiement* is completed only by delivery of the thing given in payment.

Of course, our jurisprudence has departed from the original theory of the Code in sales of immovables; concurrence of thing, price, and consent is not now enough. A written contract for the sale and purchase of an immovable will not occasion a transfer

of ownership between the parties. There must be an act translative of ownership, so that now when this act is delivered the sale is perfected and ownership passes. Delivery is now required, therefore, in order to perfect the ordinary sale of an immovable. Consequently it no longer differs from the *dation en paiement* in this respect. The distinction still holds, however, with respect to movables. An ordinary sale of a movable will be perfected by concurrence of thing, price, and consent, but a *dation en paiement* will not. This is because delivery of a movable is effected by a physical surrender of possession, not delivery of an act. In consequence, whereas perfection of the sale and delivery take place at the same time in the case of an immovable, they are separate and distinct in the case of a movable. Delivery of a movable denotes, therefore, surrender of possession, but in the case of an immovable it means merely the handing over of an act translative of the property. Hence it is that delivery may be made of an immovable without a surrender of possession of the property. But since a retention of possession of an immovable tends to contradict the delivery of an act of sale thereof, the rule is that if the vendor in a sale with right of redemption continues in actual possession of the property the transaction will be considered in the absence of evidence to the contrary as merely a security contract. This rule might well be applied, therefore, in a *dation en paiement* with a right of redemption. The fact that delivery of the act will perfect the payment should not detract from the effect to be given to the vendor's remaining in actual possession of the thing given.

In *Moore v. Sucher*[5] the court made what appears to be a questionable application of Article 1526 of the Civil Code. The case involved a donation of property worth $14,750.00 subject to a charge amounting to $7,584.19. The court found that the transfer constituted an onerous donation but held that, since the *charge imposed* exceeded *one-half the value of the object*, the rules peculiar to donations were not applicable. Article 1526 provides, however, that the rules peculiar to donations do not apply except when the *value of the object given exceeds by one-half that of the charges imposed.* That is, the value of the object given must exceed by one-half *the value* of the charges. Since the value of the object given was $14,750.00 and the value of the charges imposed was $7,584.19, the former exceeded the latter by more than one-half, *i.e.*, it was more than one and one-half

5. 234 La. 1068, 102 So.2d 459 (1958).

times the value of the latter, and the rules peculiar to donations were applicable. Under the court's interpretation the provision is read to say that the rules peculiar to donations do not apply except when the value of the object given is *double* that of the charges imposed. This is not, however, the first time this construction has been given to Article 1526.[6] Indeed, it has been construed also as providing that the rules peculiar to donations will apply if the value of the thing given exceeds one-half (not by one-half) the value of the charges.[7] However, the result reached through treating the transfer as onerous would have been the same if the rules peculiar to donations had been applied.

The case of *Domino v. Domino*[8] throws additional light on how to fix the value of property in an action of lesion beyond moiety. The trial court had added the valuations of plaintiff's witnesses and those of defendant's witnesses and then had taken an average of the whole sum, basing its procedure on two earlier cases. The opinion of Judge Hawthorne pointed out that such a method cannot be employed in all cases and was not appropriate to the case under consideration since the valuations placed on the property by defendant's witnesses were not entitled to consideration and since some of those of plaintiff's witnesses were obviously excessive. An average was taken by the court only after these exclusions and reductions. This seems to constitute a very sensible way of arriving at the true value of the property at the time of the sale.

The case of *Minton v. Talbert*[9] involved an effort to have a sale by a mother to her daughter declared a disguised donation and null because it divested the donor of her property without reserving enough for her subsistence, in violation of Article 1497 of the Louisiana Civil Code. The claim was properly rejected for lack of evidence sufficient to support it.

Because terrazzo flooring in a house purchased by plaintiff from defendant began to crack badly shortly after the sale, plaintiff in *Leob v. Staples*[10] sued for rescission of the sale or damages to cover the cost of remedying the defects and for a diminution of the price. Plaintiff acquiesced in the rejection of his prayer for rescission but answered the appeal from a judgment award-

6. Castleman v. Smith, 148 La. 233, 86 So. 778 (1920).
7. Succ. of Spann, 169 La. 412, 125 So. 289 (1929).
8. 233 La. 1014, 99 So.2d 328 (1958).
9. 234 La. 552, 100 So.2d 504 (1958).
10. 234 La. 642, 101 So.2d 1 (1958).

ing damages measured only by the cost of remedying the defects. An increase was granted to cover diminution of the value of the house. The contention of defendant that the plaintiff was not entitled to damages plus diminution of the price was answered by the court in a per curiam saying that the entire award was actually for diminution of the price in lieu of rescission. This is in accord with settled jurisprudence to the effect that in fixing the amount due the aggrieved purchaser in such cases the cost of remedying the defects is taken into consideration. Where, as in the instant case, the defects cannot be completely overcome by any possible remedial work, an additional amount may be required to make up the difference between what the purchaser got and what he paid for.

In *Thompson v. Walker*,[11] on rehearing,[12] the court rejected defendant's plea of peremption of a tax title on finding that the adjudicatee had bought the property when sold for taxes merely to protect its interest as mortgagee of an interest in the property and actually for the benefit of the debtors. This it had judicially acknowledged ten years later by foreclosing on its mortgage. Defendant, the purchaser at the foreclosure, was held bound by this judicial admission and estopped to question the ownership of the seized debtors in the property or to claim that he had acquired the interest of the plaintiff which had not passed to the mortgagee-adjudicatee.

The rapid growth and development of many sections of the state and the resulting public improvements gave rise during the past term to a number of cases dealing with the right of eminent domain. The central problem in all of them embraced the factors to be considered in fixing the true value of the property taken before the contemplated improvements under Civil Code Article 2633. The over-all design in the determination of true value is substantially to place the owner in as good a position as he would have enjoyed if the property had not been taken.[13] True value is that market value or price which would be agreed upon at a voluntary sale between a willing seller and a willing buyer.[14] It

11. 235 La. 132, 103 So.2d 65 (1958).
12. See 104 So.2d 721 (La. 1958) for original opinion.
13. State Department of Highways v. Ragusa, 234 La. 51, 99 So.2d 20 (1958); Koerber v. New Orleans, 234 La. 433, 100 So.2d 461 (1958); State v. Mortallaro, 234 La. 741, 101 So.2d 450 (1958).
14. State Department of Highways v. Ragusa, 234 La. 51, 99 So.2d 20 (1958); State v. Sauls, 234 La. 241, 99 So.2d 97 (1958); Koerber v. New Orleans, 234 La. 433, 100 So.2d 461 (1958); State v. Dent, 234 La. 659, 101 So.2d 193 (1958); State v. Mortallaro, 234 La. 741, 101 So.2d 450 (1958).

may include in addition to the physical value of the property taken at the time of the taking the diminution of value of the remainder, often referred to as severance damages.[15] Sales of comparable property have great weight.[16] Factors such as rental income and the value of an existing business are important. Location, zoning, assembly or platting value, topography, and adaptability may be considered in establishing the most profitable use to which the property can be put in view of the possibilities in the not too distant future.[17] Although losses common to all affected owners such as result from redirecting or diverting traffic, changes in situation with respect to parking on public thoroughfares, or narrowing streets should not be considered, yet elements of loss not common to all owners occasioned by the peculiar location of particular property and the manner in which its use is affected may be included.[18] Finally, purely consequential damages such as those flowing from loss of value of stocks of goods or fixtures are not includable.[19] In sum, the cases demonstrate a consistency of application of the controlling principles.

LEASE

*J. Denson Smith**

In *Calhoun v. Gulf Refining Co.*[1] the court was confronted with the argument that a person who buys property subject to a recorded lease thereby assumes the obligations of the lessor under the lease and that since a lessor holding a one-fourth mineral interest had agreed that any additional interest he acquired would vest in the lessee, therefore an additional interest acquired by the person to whom he sold the property vested in the lessee. This contention was rejected. The court pointed out that the obligation in question was personal to the vendor and did not pass with a sale of the property and added that a lease creates a *jus*

15. Gravity Drainage District No. 1 of Rapides Parish v. Key, 234 La. 201, 99 So.2d 82 (1958); Texas Gas Transmission Corp. v. Broussard, 234 La. 751, 101 So.2d 657 (1958); State v. Sullivan, 235 La. 324, 103 So.2d 458 (1958).

16. State v. Sauls, 234 La. 241, 99 So.2d 97 (1958); State v. Dent, 234 La. 659, 101 So.2d 193 (1958); State v. Sullivan, 235 La. 324, 103 So.2d 458 (1958).

17. State v. Sauls, 234 La. 241, 99 So.2d 97 (1958); Koerber v. New Orleans, 234 La. 433, 100 So.2d 461 (1958); State v. Dent, 234 La. 659, 101 So.2d 193 (1958).

18. Cerniglia v. New Orleans, 234 La. 730, 101 So.2d 218 (1958).

19. State v. Sauls, 234 La. 241, 99 So.2d 97 (1958).

*Professor of Law, Louisiana State University.

1. 235 La. 494, 104 So.2d 547 (1958).