

Louisiana Law Review

Volume 20 | Number 2

The Work of the Louisiana Supreme Court for the

1958-1959 Term

February 1960

Civil Code and Related Subjects: Particular Contracts

J. Denson Smith

Repository Citation

J. Denson Smith, *Civil Code and Related Subjects: Particular Contracts*, 20 La. L. Rev. (1960)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol20/iss2/7>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

In *Orr v. Walker*⁵ the court correctly held that a contract may be avoided because of fraud practiced by the other party although no pecuniary loss is involved. Article 1847 of the Civil Code, relied upon as authority, is clear to the point.

In *Loew's, Inc. v. Don George, Inc.*,⁶ the court concluded that a demand for triple damages under the state and federal anti-trust laws was not contractual or quasi-contractual in nature but sounded in tort and was subject to a prescription period of one year.

PARTICULAR CONTRACTS

*J. Denson Smith**

SALES

The degree of care required in the formulation of legislation is a matter of common knowledge. Even greater care is required to translate accurately legislative provisions from their original language into another. That the person or persons who translated the Louisiana Civil Code from French into English were wanting in this respect is also a matter of common knowledge. Some expressions of the court in *Zemurray v. Boe*¹ seem questionable, perhaps for this reason. Creole, a land developer, paid \$500 for a two-year option to purchase certain acreage from the plaintiff. The exercise of the option was subjected to the condition that on or before a stated date Creole pay or buy a note of a third party held by the plaintiff. This Creole failed to do, hence the present suit to cancel the option notwithstanding that the note was paid in full prior to the expiration of the option period. After a painstaking review of the complicated evidence, the majority of the court found no basis for holding the plaintiff estopped to claim that the option had terminated for failure of the condition. A dissent took the contrary view. Although the ultimate disposition of the case turned on the matter of estoppel, in rejecting a contention that the option was not forfeited since Creole had not been put in default, a prerequisite to an action in resolution, the majority opinion took the position that the purchase or payment of the mentioned note within the stated period

5. 236 La. 740, 109 So.2d 77 (1959).

6. 237 La. 132, 110 So.2d 553 (1959).

*Professor of Law, Louisiana State University.

1. 235 La. 623, 105 So.2d 243 (1958).

was a suspensive condition which prevented the "initiation" of any obligation on the part of plaintiff under the option. Therefore, it was explained, since the payment could not be counted as resolutive in nature, a putting in default was not required as a prerequisite to cancellation of the option. Although the conclusion is sound, the stated effect of a suspensive condition seems incorrect. Article 2021 of the Civil Code, quoted by the court, lends color to its position, but the true meaning of the provision appears to have been distorted in its translation from the French. The English version reads in part: "If the obligation is not to take effect until the event happen, it is a suspensive condition." A more exact rendition of the French would be: "The obligation is conditional when it is made to depend on a future and uncertain event, either by suspending it until the arrival of the event. . . ."² The French version seems to make it clear that the obligation exists but is merely suspended pending the happening of the event,³ whereas the English suggests that there is no obligation until the event happens. This latter view was taken by the court. Pretermitted, however, a comparison of the English and French versions, a more accurate as well as positive provision to the contrary is found in Article 2028. It recognizes specifically that the obligee has a right of which the obligor cannot deprive him, although its exercise is suspended. In the law of contract the proper use of the term "condition" is in reference to an event on which the *performance* but not the *existence* of a duty depends, in which event it is a suspensive condition or condition precedent. For example, a promise to sell one's house if the promisor is transferred to Mamou given in return for a promise to buy it in such event, gives rise to a binding bilateral contract. Neither party is privileged to withdraw pending the occurrence of the condition; the rights under the contract are transmissible and date from the date of the contract;⁴ they may be preserved by recordation; they may be alienated or mortgaged;⁵ and their possessor may take conservatory meas-

2. CODE CIVIL art. 1168: "*L'obligation est conditionnelle lorsqu'on la fait dépendre d'un événement futur et incertain, soit en la suspendant jusqu'à ce que l'événement arrive. . . .*"

3. Unhappily, however, there is no agreement to this effect among the French. Even as sound a scholar as Planiol takes a contrary view and is then put to it to explain transmissibility prior to the happening of the condition, and retroactivity. See 2 PLANIOL, CIVIL LAW TREATISE [AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE] Nos. 381, 382 (1959). But Colin and Capitant support the view with ample citation of authority. See 2 COLIN, CAPITANT ET DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL No. 653 (12th ed. 1953).

4. LA. CIVIL CODE art. 2041 (1870).

5. *Id.* art. 3301.

ures.⁶ Yet they are conditional and not absolute or unconditional rights. This means that the duty to proceed with performance is suspended pending the occurrence of the condition and there can be no breach in the meantime although, by preventing fulfillment of the condition, a party may render his duty absolute.⁷ Applied to the instant facts, when Zemurray in return for \$500 gave Creole the right to buy the land in question within two years, a unilateral contract was created and Zemurray came under a duty to convey the property to Creole. But this duty was subject to two conditions — (1) the payment by Creole of the third party's note within five months and (2) the notification of Zemurray by Creole in writing in two years of its intention to exercise the option. Both of these conditions were suspensive under our law and precedent under the common law. Until they were satisfied, the duty of conveyance assumed by Zemurray would not become immediately performable. Creole did not promise to pay the note in question any more than it promised to exercise the option. Its irrevocable power to exercise the option, or, put another way, its conditional right to demand a conveyance, was subject to the payment by it of the note within the time allowed. Since it at no time made a promise to pay the note, a putting in default which constitutes a demand that a party perform as he has agreed would be wholly inappropriate. The writer believes that a putting in default should properly be required only as a means of fixing the time beyond which delay damages may accrue,⁸ yet if it be granted that a putting in default is a prerequisite to the resolution of a contract, this means only that a demand that a promised performance be rendered must be made before the aggrieved party may sue to resolve the contract because of nonperformance. The resolatory condition is implied in all "commutative" contracts and is to take effect in case either of the parties does not comply "with his engagements."⁹ But here there was no engagement or obligation on the part of Creole to pay the note, inasmuch as Creole did not promise to pay it. Finally, the time within which an option is to be exercised is treated properly as of the essence, that is, as a matter of vital importance. Time is what is being bought, and a person who pays for ninety days is not entitled to get more than ninety. Con-

6. *Id.* art. 2042.

7. *Id.* art. 2040.

8. See *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Sale*, 16 LOUISIANA LAW REVIEW 242, 245 (1956).

9. LA. CIVIL CODE art. 2046 (1870).

sequently, if the option is not exercised within the time allowed, it lapses. If the right is further conditioned on the performance of another act within a shorter period of time, this period may be as much of the essence as the term of the option. In any event, the failure of Creole to pay on time was held fatal, which is what should have been the case in the absence of an estoppel. And the court found the plaintiff not estopped.

The case of *Blevins v. Manufacturer's Record Publishing Co.*,¹⁰ which involved the ownership of three tracts of land, turned in the final analysis on the question of whether or not a certain correction deed was ambiguous. The court concluded that it was not and therefore refused to admit parol evidence offered by the defendant to explain its meaning. A note which has appeared elsewhere in this journal¹¹ explores the question of whether, from the standpoint of the laws relating to registry and the admissibility of parol evidence there is or should be a difference between a case where a person's own deed puts him on notice, by way of an exception, of a previously recorded conveyance of a portion of the property, and a case where he has no such notice although there is of record a prior recorded conveyance of the property he buys, the description of which is inadequate to enable him to determine the fact.

An adequate consideration of the problem involved in *Haessler v. Castrogiovanni*¹² would exceed the space limitations for this sort of review. It was held that an option holder is presumed to be making a deposit of earnest money when, on taking up his option, he pays a portion of the purchase price, as required. Suffice it here to say that this appears to be consistent with the principle often stated in the cases that any payment of money in connection with a contract to sell an immovable is earnest money in the absence of a stipulation to the contrary. Under the established jurisprudence the exercise of an option gives rise to a contract to sell which will later ripen into a sale upon the delivery of an act translative of title. The trouble lies not in this case, or the court's disposition thereof, but in the existing presumption.

A limitation of the public records doctrine discoverable in the language of *McDuffie v. Walker*¹³ was applied in *Broussard v.*

10. 235 La. 708, 105 So.2d 392 (1958).

11. Note, 20 LOUISIANA LAW REVIEW 178 (1959).

12. 235 La. 909, 106 So.2d 306 (1958).

13. 125 La. 152, 51 So. 100 (1910).

*Doucet*¹⁴ and a transfer of real estate by way of exchange, where a donation was intended, was annulled as in violation of Article 1497 of the Civil Code even with respect to a vendee of the transferee. In *McDuffie v. Walker* the court explained that a person cannot be charged with fraud simply because he ignores what the law provides is as to him utterly null and void. But the third party here was not in this category. Quite to the contrary he was found to have been an active participant in a scheme to acquire the plaintiff's sole means of support for personal profit without giving an equivalent in return. The basic principle applied was that fraud vitiates all things.

In remanding the purchaser's suit for a reduction in the purchase price of a house because of certain defects, the evidence having been found insufficient to prove the cost of the necessary remedial work, the court, in *Lemonier v. Coco*,¹⁵ instructed the trial judge to take into consideration that during the appeal the plaintiff had sold the house for a sum in excess of the purchase price. The opinion cautioned that this evidence was to be considered together with all the other available evidence with a view to determining the difference, at the time of the sale, between the value of the thing sold in its defective condition and its value as warranted. This test is in keeping with the usual statement of the rule.¹⁶ A similar measure is applied when the buyer is given the cost of remedying the defects in the absence of evidence of the sound value of the thing. That is to say, without regard to what he paid for the thing, he gets what it would have been worth if it had been sound. Actually, such a measure seems to give him the benefit of his bargain, which is the measure of damages for breach of contract. It puts the buyer in as good a position as he would have been in if the contract had been performed. But when redhibition is allowed, the buyer can recover against the good faith seller only the purchase price plus his out-of-pocket expenses, i.e., the expenses of the sale. Since he is not entitled to damages, the recovery is not designed to put him in as good a position as he would have been in if the contract had been performed. His recovery is based on what he paid, not

14. 236 La. 217, 107 So.2d 448 (1958).

15. 237 La. 760, 112 So.2d 436 (1959).

16. *Foster & Co. v. Baer & Co.*, 7 La. Ann. 613 (1852) ("If for example, the difference of value on the day of sale was 20 per cent, Baer & Co. would be entitled to a deduction of twenty per cent from the price they paid, assuming the price was the fair market value, at the time, of a sound article"). See also *Iberia Cypress Co. v. Von Schoeler*, 121 La. 72, 46 So. 105 (1908).

the actual value of a sound article; it does not include the difference, if any, between the contract and market prices. To illustrate, if the price paid for a thing is \$100, although its market value is \$125, the buyer is entitled upon a rescission of the sale for redhibitory defects, pretermitted expenses, to a return of only \$100. On the contrary, if he should be given a sum sufficient to remedy the defects, he would come out with property worth \$125. Again, if instead of allowing him the cost of remedying the defects, he is given the difference between the thing in its defective condition and its value as a sound article, he would be compensated on the basis of a thing worth \$125. Either of these measures, therefore, seems to give him the benefit of his bargain, which is another way of saying the difference between the contract price and market value. Consequently, when the price paid is lower than the value of the thing as a sound article, the buyer would be better off in an action *quanti minoris* than in a redhibitory action. This possibility could be avoided by using the price paid as the ultimate value of the thing instead of its value as warranted. In the usual case the foregoing considerations would be of no consequence for the simple reason that the price paid would be the same as the value of the thing as a sound article. And of course, if the seller should be in bad faith, the buyer would be entitled to damages designed to give him the value of his bargain.

In *Falk v. Luke Motor Co.*¹⁷ the court reaffirmed its established position that an automobile which will not run or which runs intermittently requiring the frequent attention of a mechanic to keep it going is an abomination, manifestly not fit for the purpose intended, and the sale thereof is subject to redhibition. The purchaser was found to have discharged the burden resting upon him of offering timely to return the vehicle. It was found that an express warranty to make all adjustments and improvements necessary to place the car in proper running condition did not displace the implied warranty governing redhibitory defects under Article 2520 of the Civil Code. The opinion places the risk of serious mechanical failure where it properly belongs — on the seller. It does not disturb the rule reflected in earlier cases that redhibition is not available where mechanical defects in a thing bought can be remedied by adjustments of a kind within the reasonable contemplation of the buy-

17. 237 La. 982, 112 So.2d 683 (1959).

er. This qualification finds its support in the proposition that one who buys a complicated piece of machinery should foresee that some adjustments might have to be made to assure proper performance and consequently voluntarily assumes such risk.

The existence of redhibitory vices goes to the cause of the assumption by the buyer of an obligation to pay the price and consequently constitutes a legal basis for arresting a seizure and sale under Article 739(3) of the Code of Practice according to the interpretation given to this provision by the jurisprudence. This position was reaffirmed in *Coco v. Mack Motor Truck Corp.*,¹⁸ where the plaintiff sought to enjoin the seizure and sale of certain trucks that he had bought from the defendant and to obtain instead a cancellation of the sales for redhibitory vices. The opinion also pointed out that the trial court in decreeing a reduction in the price should have determined the amount of the reduction to which the buyer was entitled.

EXPROPRIATION

Most of the cases dealing with the expropriation of private property for public purposes were concerned with only the amount of compensation to be paid. An important exception was the case of *State v. Macaluso*,¹⁹ which upheld the constitutionality of R.S. 48:441-460 authorizing ex parte expropriations and immediate possession for highway purposes upon the deposit of estimated adequate compensation into the registry of the court.

The cases involving a determination of value reflect the well-established principle that in determining market value, that is, what a willing purchaser would pay to a willing seller, sales of comparable property constitute the best guide.²⁰ In this connection it is appropriate to consider so-called "monopoly sales" to a person already owning adjacent property.²¹ In the absence of satisfactory evidence of comparable sales a determination of value may be based on the opinions of experts, in which case the opinion of each should be given effect if it appears to be well grounded both from the standpoint of sincerity and good sense.²² An application of the income method of evaluation based on rent-

18. 235 La. 1095, 106 So.2d 691 (1958).

19. 235 La. 1019, 106 So.2d 455 (1958).

20. *City of Alexandria v. Jones*, 236 La. 612, 108 So.2d 528 (1959); *State v. Tolmas*, 238 La. 1, 113 So.2d 288 (1959).

21. *State v. Grand Consistory*, 237 La. 1005, 112 So.2d 692 (1959).

22. *Shreveport v. Jones*, 236 La. 727, 109 So.2d 72 (1959).

al value is a proper factor.²³ And in such cases it is also proper for the court to appoint an appraiser and for the latter to base his determination on a capitalization of the net rental income compared with the estimated reproduction cost.²⁴ A rate of capitalization of 7½% was approved and the court observed that there is no fixed rule on the point.

In other cases the court rejected the contention that the taking by the state of a devolutive instead of a suspensive appeal from a judgment of dismissal destroyed the effectiveness of the order of expropriation inasmuch as the trial court's judgment had divested the title of the state.²⁵ The motion to dismiss was found to be without merit since it was based on an assertion of the very issue to be determined on the appeal. The only case finding an appropriation unlawful was that of *Board of Commissioners for the Pontchartrain Levee District v. Baron*.²⁶ This was based on lack of evidence that the land appropriated for levee purposes was burdened with a servitude in favor of the public in keeping with Article 665 of the Civil Code.

LEASE

The Civil Code provides that a lessor is obligated to deliver the premises to the lessee in good condition and free of the need of any repairs.²⁷ He also guarantees the lessee against any vices or defects that may prevent the use of the premises, although he may have no knowledge of them and whether they exist at the time the lease is entered into or arise thereafter.²⁸ It was held in *Brunies v. Police Jury of Parish of Jefferson*²⁹ that these provisions support a cancellation of a lease by the lessee upon the discovery of structural defects which result in the condemnation of the premises by the public authorities. To the contention that the lessee was obliged to suffer the repairs to be made, the court replied that the necessary remedial work involved reconstruction and not mere repairs. It was also found that a provision of the lease contract under which the lessee accepted possession of the premises in their then condition could not be held to cover vices

23. *Efurd v. Shreveport*, 235 La. 555, 105 So.2d 219 (1958).

24. *Orleans Parish School Board v. Paternostro*, 236 La. 223, 107 So.2d 451 (1958).

25. *State v. Sumrall*, 237 La. 372, 111 So.2d 313 (1959).

26. 236 La. 846, 109 So.2d 441 (1959).

27. LA. CIVIL CODE art. 2693 (1870).

28. *Id.* art. 2695.

29. 237 La. 227, 110 So.2d 732 (1959).

and defects so radical as to justify condemnation. The holding seems clearly sound. The defects in question existed at the time the lease was entered into and there is no correspondence between such a situation and one where during the course of the lease repairs become necessary and cannot be postponed. It is the latter situation that is dealt with in Civil Code Article 2700. Surely when the lessor delivers to the lessee premises subject to defects that prevent their use the lessee should be entitled to cancellation on the authority of Article 2695 unless he has contractually assumed the risk.

SECURITY DEVICES

*Joseph Dainow**

Suretyship

The Louisiana Motor Vehicle Safety Responsibility Act¹ provides that a person who has had an automobile accident not covered by insurance will have his licenses and registration certificates suspended unless he puts up "security." The case of *State v. Ray*² held that the Commissioner may accept a surety bond signed by private individuals. This interpretation of the statute is sustained by the court on the basis of an analysis of several of its provisions, and in this particular case it resulted in obtaining some recovery for the widow and children of the man who had been killed by the uninsured driver. If the legislature feels that private sureties are sufficient protection in such situations, nothing further need be done; however, if there is any question about this, the statutory provisions should be restudied and amended.

This case also held that individual sureties are liable in accordance with the responsibility specified in the bond despite their assertion that (and even if in fact) they had not read the first page of the document when they appended their signatures on the second page. In the light of the exceedingly generous attitude of the law towards the gratuitous private surety, this may seem a little rough on sureties who may have been misled by the representations of the debtor-driver for whom they were going

*Professor of Law, Louisiana State University.

1. LA. R.S. 32:851 (Supp. 1952).

2. 237 La. 599, 111 So.2d 786 (1959).