

Sales - Litigious Redemption - Partial Transfer

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of acquiescence, the proposed code does not purport to change the present law.²⁵ It is submitted, therefore, that the conclusion reached in the *Morgan City Co.* case would remain unchanged.

The need to provide a possessor with an expeditious means of clearing his title would seem to justify a limitation on the slanderer's right to appeal devolutively from a judgment in jactitation. This is recognized in the proposed new code.²⁶ However, the possibility of a prohibitively high suspensive appeal bond is reason enough for not denying the devolutive appeal altogether. The *Morgan City Co.* decision appears to impose an onerous condition on the right to a devolutive appeal. It is submitted that the alternative of the defendant in jactitation, to bring either a devolutive appeal without a petitory action, or a petitory action without a devolutive appeal, is not called for by the jurisprudence or by the Code of Practice.

William S. Moss, Jr.

SALES — LITIGIOUS REDEMPTION — PARTIAL TRANSFER

Plaintiff brought suit for breach of a contract to drill an oil well on his property. After trial on the merits in the district court, plaintiff died. Judgment was rendered in behalf of the administrator and defendant appealed to the Supreme Court. Subsequent to judgment in the district court, the four heirs of decedent were put into possession of the estate and were substituted for the administrator as parties plaintiff. Pending the appeal two of the plaintiffs sold their interests in the litigation to a third party who was substituted for them as party plaintiff. Shortly after learning of the transfer defendant filed a motion to remand to the district court in order to institute proceedings for

be taken from such judgment only within thirty days of the applicable date provided in Article 2087(1)-(3)."

Note that the final paragraph of Article 3662 will effect an important change, in that the period allowed for bringing the devolutive appeal will be limited to thirty days. This is only fifteen days longer than allowed for the bringing of a suspensive appeal and serves to minimize the opportunity of the defendant to employ dilatory tactics.

25. *Id.* art. 2085: "An appeal cannot be taken by a party who confessed judgment in the proceedings in the trial court or who voluntarily and unconditionally acquiesced in a judgment rendered against him. Confession of or acquiescence in a part of a divisible judgment or in a favorable part of an indivisible judgment does not preclude an appeal as to other parts of such judgment."

26. The last paragraph of Article 3662 of the Proposed Code of Civil Procedure provides for a devolutive appeal, but only if taken within thirty days of the applicable date. See note 24 *supra*.

the purpose of litigious redemption under the provisions of Article 2652 of the Louisiana Civil Code. The two heirs who had not sold their interests opposed this motion, urging that a remand would be inequitable because they would lose their position on the preference docket, thereby delaying disposition of the action. On the motion to remand, *held*, remanded, to be returned within sixty days to its present position on the preference docket. The right granted by Article 2652 is absolute even in the case of a partial transfer. *Clement v. Sneed Brothers*, 116 So.2d 269 (La. 1959).

Article 2652 of the Civil Code provides that a party against whom a litigious right has been transferred may be released by paying to the transferee the real price of the transfer together with interest from the date thereof.¹ A litigious right is defined as one being contested in litigation.² The Code provides for three exceptions to the application of litigious redemption: (1) when the transfer has been made to either a coheir or to the coproprietor of the right, (2) when the transfer has been made as a dation en paiement to a creditor of a debt due, and (3) when the transfer has been made to the possessor of the estate subject to the litigious right.³ Thus far the doctrine has been applied only to sales,⁴ perhaps in view of the express reference to "price" in Article 2652. At the trial court level, litigious redemption proceedings are instituted by a request that evidence of the price of the transfer be received by the court.⁵ After the determination of the price, the redelector may tender it, thereby effecting his release. At the appellate level, proceedings are instituted by a motion to remand.⁶ The exercise of the privilege afforded by

1. LA. CIVIL CODE art. 2652 (1870): "He against whom a litigious right has been transferred, may get himself released by paying to the transferee the real price of the transfer, together with the interest from its date."

2. *Id.* art. 2653: "A right is said to be litigious, whenever there exists a suit and contestation on the same." A conflicting definition of a litigious right is found in *id.* art. 3556 (18): "Litigious rights are those which cannot be exercised without undergoing a lawsuit." The Supreme Court has resolved the obvious conflict between these two definitions by ignoring the latter. For a discussion of the conflicting code provisions, see Comment, 1 LOUISIANA LAW REVIEW 593, 595 (1939).

3. LA. CIVIL CODE art. 2654 (1870).

4. Comment, 1 LOUISIANA LAW REVIEW 818, 820 (1939). The author points out that though the article has never been applied to exchange in Louisiana, there is some support for the view that it would be so applied, if the question were to reach the court. See LA. CIVIL CODE art. 2667 (1870): "All the other provisions relative to the contract of sale apply to the contract of exchange. And in this last contract each of the parties is individually considered both as a vendor and vendee."

5. *Marshall v. McCrea*, 2 La. Ann. 79 (1847); *Lavigne v. Louisiana Ry. & Navigation Co.*, 12 La. App. 275, 124 So. 609 (1929).

6. LA. CODE OF PRACTICE art. 906 (1870) provides: "But if the court shall

Article 2652 must be timely, that is, the party against whom the right has been transferred must institute the proceedings within a reasonable time after learning of the transfer and during the existence of the suit.⁷ Having learned of the litigious transfer, the redeemptor may not continue to contest the cause until final judgment or loss of the suit is imminent.⁸

A special problem is presented where only a partial transfer of the litigious right is made. If, as suggested in some of the earlier cases, a reason underlying the redemption rule is to prevent protraction of litigation,⁹ it can be seen that in this situation, there exists a possibility of prolonging litigation in order to exercise the privilege. In *Smith v. Cook*¹⁰ the Supreme Court for the first time was faced with a situation wherein a partial transfer of a litigious right was made. On the first hearing the court denied the prospective redeemptor's motion to remand to the district court for redemption proceedings, reasoning that the purpose of the rule was to end litigation and that the exercise of redemption would not effect that purpose. However, on rehear-

think it not possible to pronounce definitively on the cause, in the state in which it is, either because the parties have failed to adduce the necessary testimony, or because the inferior court refuses to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law." See also *Lee v. Perkins*, 195 La. 939, 197 So. 607 (1940); *Sterkx v. Sterkx*, 193 La. 409, 190 So. 628 (1939); *Smith v. Cook*, 189 La. 632, 180 So. 469 (1937); *Langston v. Shaw*, 147 La. 644, 85 So. 624 (1920); *Bluefields S.S. Co. v. Lala Ferreras Cangelosi S.S. Co.*, 133 La. 424, 63 So. 96 (1913); Comment, 1 LOUISIANA LAW REVIEW 818, 829 (1939).

7. *Crain v. Waldron*, 210 La. 561, 27 So.2d 333 (1946); *Evans v. De L'Isle*, 24 La. Ann. 248 (1873); *Rhodes v. Hooper*, 6 La. Ann. 355 (1851); *Pearson v. Grice*, 6 La. Ann. 232 (1851); *Leftwich v. Brown*, 4 La. Ann. 104 (1849); *Marshall v. McCrea*, 2 La. Ann. 79 (1847); *Winchester v. Cain*, 1 Rob. 421 (La. 1842); *Lerner Shops of Louisiana v. Reeves*, 73 So.2d 490 (La. App. 1954); *Cucullu v. Hernandez*, 103 U.S. 105 (1880); *Mohawk Oil Co. v. Layne*, 270 Fed. 851 (5th Cir. 1921).

8. *Mohawk Oil Co. v. Layne*, 270 Fed. 851, 856 (5th Cir. 1881), wherein the court said: "Just how far short of final judgment one may go before seeking to avail himself of the provisions of the article depends largely upon the facts of each case."

9. *Leftwich v. Brown*, 4 La. Ann. 104 (1849): "The laws . . . on which the articles of our Code concerning litigious rights are founded, have no other object than the prevention of unnecessary litigation, which is attained in a great measure by the check they impose on the cupidity of speculators in lawsuits. They enable the defendant to take the place of the purchaser of the suit against him, by paying the price he has paid for it, with interest. Thereby the litigation is ended, and the object of the law attained. But, if as the defendant has done in this case, he continues to contest the suit, raises difficulties as to the right of the plaintiff to recover his debt and protracts the litigation, he evidently defeats the very object of the law, and cannot avail himself of the provision which the law has established in his favor for the purpose of terminating litigation. To permit him to do it, would be to defeat the very object of the law." Cf. *Salvadore v. Crescent Mutual Ins. Co.*, 22 La. Ann. 338 (1870); *Lerner Shops of Louisiana v. Reeves*, 73 So.2d 490 (La. App. 1954).

10. 189 La. 632, 180 So. 469 (1937).

ing,¹¹ the court reversed its position stating that it is not necessary that the suit be brought to an end by the redemption and noting that litigation *would* end with respect to that particular interest which had been transferred.¹²

In the instant case, the court was faced with a situation which clearly fell within the ambit of the rule of *Smith v. Cook*. The situation was identical but for the fact that not all of the parties were involved in litigious transfers, two of them having retained their full interest in the litigation. The defendant asked that the case be remanded to hear testimony on the real price of the transfer. It was argued that if this procedure were followed the two parties plaintiff who had retained their full interests in the litigation would lose their position on the preference docket of the court and that the procedure would delay the final determination of the cause.¹³ The court, in the instant case, was able to dispose of the motion without adversely affecting either the prospective redemtor or the parties plaintiff. While stating that defendant's motion to remand could not be denied, the court allowed the appeal to retain its position on the preference docket.

In conclusion, it is submitted that by taking cognizance of the possible adverse effects to the plaintiff's position on the preference docket and its decision to alleviate in part this adversity, the court disposed of the situation in a most equitable manner. It would seem that by its strong language¹⁴ the court indicated that the privilege granted the redemtor by Article 2652 is absolute, and will be extended to all partial transfers of litigious rights.

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11. *Id.* at 493: "We are therefore of the opinion that the defendant in the instant case has the right to invoke the provisions of the Civil Code and upon his complying with the requirements thereof, will have settled his rights to the property in controversy to the extent of the several transfers made."

12. *Smith v. Cook*, 189 La. 632, 180 So. 469 (1937). The rule of litigious redemption had its written beginning in the early part of the 6th century A.D., and was designed by the Emperor Anastasius to prevent the avaricious practices usually carried on by litigious vendees. The law was incorporated into the Code Justinian and later became part of the French law. 2 PLANIOL, CIVIL LAW TREATISE, AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE no. 1650 (1959) casts doubt on the validity of the rule when he says (in respect to the prevention of avaricious practices), "the weight of such argument is today questionable; historically there has never been any other."

13. *Clement v. Sneed Brothers*, 116 So.2d 269, 272 (La. 1959): "[W]e cannot . . . hear the case in this Court until defendants are able to determine whether they will redeem the litigious right purchased."

14. *Id.* at 272: "While we *cannot deny* defendant's legal right to a remand *or hear* the case in this Court until defendants are able to determine whether they will redeem the litigious right purchased . . ." (Emphasis added.)