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Sales - Admission of Parol Evidence to Annul an Authentic Act

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the Court has seemingly said that the prior cases have held only that the due process clause, fourteenth amendment, and the constitutional inhibition against impairment of contracts are no bar to legislative alteration of municipal boundaries, but that the fifteenth amendment is such a bar.[14] This reasoning is at least difficult to follow in view of the breadth of the language in the *Hunter* case, wherein the Court stated that with respect to municipal boundary change the state is supreme, unrestrained by *any provision* of the United States Constitution, and the citizens have no right by contract or otherwise to complain of this exercise of power.[15]

Possibly the intention of the Alabama legislature was actually inquired into by the Court in the instant case. It is arguable that the somewhat extreme result produced by the action of the Alabama legislature in reshaping the City of Tuskegee into a twenty-eight sided figure influenced the decision.[16] Conceivably, when the situation presented will produce less extreme results, the Court will return to the position that it has no jurisdiction to rule on the power of a state legislature to alter a municipal boundary. However, it appears that in truth the Supreme Court has decided to give the fifteenth amendment a preferred position in this area. That the right to vote in a particular municipal election should be afforded a more favorable position than due process of law is at least a questionable result.

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SALES — ADMISSION OF PAROL EVIDENCE TO ANNUL AN AUTHENTIC ACT

Plaintiff instituted suit against his wife and son seeking, *inter alia*, to have immovable property which he had transferred to his wife during the existence of the community of acquets and gains between them declared to be property of the com-

14. In a concurring opinion in the instant case, Mr. Justice Whittaker felt that the decision should be based on a denial of equal protection of the fourteenth amendment, rather than the right to vote provision in the fifteenth amendment. He felt that the right to vote does not entitle a person to vote in a particular municipal election, but only the general right to vote.

15. Hunter v. Pittsburg, 207 U.S. 161, 179 (1907). See Laramie County v. Albany County, 92 U.S. 307, 314 (1875).

16. For a diagram of the City of Tuskegee after the redefinition see the instant case at page 131.

munity.[1] The real estate had been conveyed to the wife as a giving in payment which was in authentic form and duly recorded and purported to be by way of compensation to extinguish an indebtedness of plaintiff to his wife. Plaintiff's offer of parol evidence to demonstrate that there was actually no indebtedness to sustain the *dation en paiement* was received, and the trial court concluded that the property in question belonged to the community. On appeal to the Supreme Court of Louisiana, *held*, affirmed. Although the parol evidence contradicts the recital of the authentic act, it is admissible to prove that a *dation en paiement* between husband and wife does not in fact fit one of the exceptions to the general rule prohibiting onerous contracts between spouses.[2] It is well settled[3] that parol evidence is admissible to show that an obligation has been contracted *in fraudem legis*, in contravention of a prohibitory law. *Smith v. Smith*, 239 La. 688, 119 So.2d 827 (1960).

The Louisiana Civil Code prohibits onerous contracts between husband and wife with but three exceptions, and those not falling within these exceptions are invalid.[4] The jurisprudence of this state has not created additional exceptions to the general rule prohibiting onerous agreements between spouses. However, Article 1746 of the Code[5] expressly permits husbands and wives

1. An ancillary hurdle surmounted by the plaintiff involved obtaining judicial recognition of the fact that a subsequent transfer of the realty, in the form of an act of sale, from plaintiff's wife to his son was a simulation designed to defraud him of his interest in the land.

2. Smith v. Smith, 239 La. 688, 695, 119 So.2d 827, 829 (1960): "Since contracts between spouses are specifically forbidden by Articles 1790 and 2446 of the Civil Code, save for the three purposes detailed in Article 2446, it follows that any husband and wife who attempt to contract in violation of those restrictions do so *in fraudem legis*."

LA. CIVIL CODE art. 2446 (1870): "A contract of sale, between husband and wife, can take place only in the three following cases:

"1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

"2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

"3. When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry.

"Saving, in these three cases, to the heirs of the contracting parties, their rights, if there exist any indirect advantage."

Id. art. 2659 provides that the giving in payment is, in general, subjected to all the rules applicable to ordinary contracts of sale.

It is well to point out at the outset that the court neglected to mention Article 1746 of the Code, which provides that donations inter vivos are permissible between husband and wife. Donations, while ordinarily not onerous in nature in any sense of that word, are nonetheless frequently employed as the means of conveying title to property.

3. Citing Kelly v. Kelly, 131 La. 1024, 60 So. 671 (1913); Lazare v. Jacques, 15 La. Ann. 599 (1860); Ducote v. Stark, 87 So.2d 770 (La. App. 1956).

4. LA. CIVIL CODE art. 2446 (1870). *Cf.* note 2 *supra*.

5. LA. CIVIL CODE art. 1746 (1870): "One of the married couple may, either

to transfer property to each other by means of a donation *inter vivos*. A consistent line of cases[6] has upheld the validity of transfers of immovables purporting to be sales or givings in payment as donations in disguise where the expressed consideration was proved insufficient or totally lacking and where the instrument satisfied the requirements of form vital to donations *inter vivos* of immovable property.[7] Hence, an authenticated *dation en paiement* between spouses, for the support of which no indebtedness actually existed, could well be sustained as a donation in disguise if the circumstances attending the transfer were such as would satisfy the requirements for a valid donation.

The general rule of evidence in Louisiana pertaining to the admissibility *vel non* of parol to vary or contradict the recital of an authentic act is one of exclusion.[8] However, one of the jurisprudential exceptions to this rule allows the reception of parol when the attack upon the transfer by authentic act is launched on the theory that the conveyance was one made *in fraudem legis*, or, literally, in fraud of the law. The cases in which this exception has been recognized and parol received, with the result that the transfer has been declared a nullity as one in contraven-

by marriage contract or during the marriage, give to the other, in full property, all that he or she might give to a stranger [disposable portion]."

6. Reinerth v. Rhody, 52 La. Ann. 2029, 28 So. 277 (1900); McWilliams v. McWilliams, 39 La. Ann. 924, 3 So. 62 (1887); Harper v. Pierce, 15 La. Ann. 666 (1860); Wolf v. Wolf, 12 La. Ann. 529 (1857); Sémère v. Sémère, 12 La. Ann. 681 (1856); D'Orgency v. Droz, 13 La. 382 (1839); Rhodes v. Rhodes, 10 La. 85 (1836); Trahan v. McMannus, 2 La. 209 (1831); Holmes v. Patterson, 5 Mart.(O.S.) 693 (La. 1818); Nofsinger v. Hinchee, 199 So. 597 (La. App. 1941).

7. LA. CIVIL CODE art. 1536 (1870): "An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights or actions, under the penalty of nullity."

8. *Id.* art. 2236: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery."

Id. art. 2276: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since."

The only codified exception to Article 2276 is found in *id.* art. 2239, which provides: "Counter letters can have no effect against creditors or *bona fide* purchasers; they are valid as to all others; but forced heirs shall have the same right to annul absolutely and by parol evidence the simulated contracts of those from whom they inherit, and shall not be restricted to the legitimate [legitime]."

On the admission of parol evidence to attack the recital of an authentic act, generally, see Comment, 3 LOUISIANA LAW REVIEW 427 (1941).

Godwin v. Neustadl, 42 La. Ann. 735, 738, 7 So. 744, 745 (1890): "It is hornbook law in our jurisdiction that the verity and reality of authentic sales can be assailed by the parties thereto only in two ways, viz.: (1) By means of a counter letter; (2) by the answers of the other party to interrogatories on facts and articles." *Accord*, Robinson v. Britton, 137 La. 863, 69 So. 282 (1915), and cases cited therein.

tion of a prohibitory rule of law, are dichotomous. There have been cases in which the conveyance, appearing to have been made for consideration received, was overturned by parol proof that the consideration was lacking or insufficient to be counted as serious *and* proof that, as a donation, it would be in violation of the rule forbidding donations of immovables to one's concubine.[9] In the second group of cases parol was received to prove no consideration, in contradiction to the recitation of the act of transfer, *and* adequate evidence was adduced to prove to the courts' satisfaction that the transfer could not be sustained as a donation for the reason that, if a donation, it would be one *omnium bonorum*, divesting the transferor of substantially all of his property in violation of a prohibitory rule of law.[10] With the exception of these two types of cases, no others have stood for the admission of parol for the purpose of attacking the recital of an authentic act evidencing the transfer of immovable property upon the *in fraudem legis* theory.

The instant case seems to provide some basis for a rule admitting parol when the annulment of a transfer of property by authentic act is sought and the contention is simply that the act of transfer is invalid as failing to comply with the requisites *for that particular type of transfer*. The other cases admitting parol when an onerous transfer *in fraudem legis* was alleged apparently received it only when it was proved that the transfer could not be sustained either in its purported form or as a gratuitous do-

9. Succession of Dupre, 218 La. 907, 51 So.2d 317 (1950); Lazare v. Jacques, 15 La. Ann. 599 (1860).

See also Byrd v. Byrd, 230 La. 260, 88 So.2d 214 (1956), in which the court set aside a purported sale on the grounds that there was no actual payment of the recited consideration and that, as a donation in disguise, the transfer would be void under Article 1533 of the Code and jurisprudence consistent therewith to the effect that a donor cannot reserve the usufruct of the donated property to himself. It is not clear from the opinion whether parol was admitted, but it is doubtful that the court could have obtained little of the information needed for the decision in the absence of parol evidence.

10. Kelly v. Kelly, 131 La. 1024, 60 So. 671 (1913) (involving a purported giving in payment by the husband to his wife, in which the court allowed proof by parol of the lack of indebtedness to sustain the transaction as a *dation* and to show that, as a donation, it divested the donor of the means of subsistence and was thus prohibited by Article 1497); Ducote v. Stark, 87 So.2d 770 (La. App. 1956) (in which parol was admitted to overturn a purported sale for which no consideration was given and which was insupportable as a donation, as it would constitute one *omnium bonorum*); Armand v. Armand, 8 La. App. 810 (1928). See also Cahow v. Hughes, 173 So. 471 (La. App. 1937), in which parol was held admissible where the basis of attack was that there was no consideration for the purported sale and that the conveyance could not be sustained as a donation as it would be one *omnium bonorum* and therefore within the prohibition of Article 1497, but in which the court found that the evidence showed that there was in fact ample consideration to support the transfer as a sale.

nation in disguise. However, the court cited some of these cases as authority for their position,[11] without noting any distinction between them and the case at bar. Furthermore, the court expressly refused to follow[12] the case of *Thomas v. Thomas*,[13] recently decided by a court of appeal, in which parol was held inadmissible when offered to show that there had been no actual indebtedness to support a purported *dation* in authentic form where no proof that the transfer was insupportable as a donation was offered. The earlier analogous cases[14] and the *Thomas* case seem to reflect the rule that parol is admissible, under the *in fraudem legis* exception, only to annul transfers by authentic act where the proof is sufficient to demonstrate that the transfer may be sustained as neither an onerous contract, nor a gratuitous donation. And this view seems consonant with the decisions sustaining purportedly onerous contracts as donations in disguise.[15] In light of the fact that donations are ordinarily permissible between spouses, it well may be that the instant case represents a departure from the prior applicable jurisprudence of this state.

Of course, the transfer in the instant case may have been a pure simulation. Were this so, an argument could be made that the plaintiff should be able to prove that there was no indebtedness and that the act merely effectuated the simulated conveyance. Proof of simulation would serve to show the absence of an *animus donandi*, or intention to transfer gratuitously, generally thought to be necessary for valid gratuitous donations.[16] The

11. See note 3 *supra*.
12. Smith v. Smith, 239 La. 688, 699, 119 So.2d 827, 831 (1960).
13. 63 So.2d 468 (La. App. 1953).
14. See notes 9 and 10 *supra*.
15. See note 6 *supra*.
16. Although there is no express code authority for the proposition that an intention to donate, or *animus donandi*, is required for a valid donation, Article 1523 of the Code, which provides, in part, that one kind of donation inter vivos is the donation purely gratuitous and defines this kind as one "which is made without condition *and merely from liberality*" seems indirect basis for this assertion. (Emphasis added.)

Reference to Louisiana jurisprudence related to this matter does not prove productive to any satisfactory extent, but *dictum* in Succession of Desina, 123 La. 468, 482, 49 So. 23, 28 (1909) and LeBlanc v. LeBlanc, 80 So.2d 715, 719 (La. App. 1955) does seem to provide some additional authority for deeming the intention to donate to be requisite for a valid donation of the purely gratuitous sort.

"In the final analysis, whether a contract is a donation or an onerous contract depends upon the determining motive that dominated the party. Basically, a donation stems from an intent to give as opposed to an intent to secure something in return or to discharge an obligation, hence the statement that the cause of a donation is the *animus donandi*. Its legal character therefore depends upon its cause." Smith, *A Refresher Course in Cause*, 12 LOUISIANA LAW REVIEW 2, 7 (1951). See also Snellings, *Cause and Consideration in Louisiana*, 8 TUL. L. REV. 178, 203 (1933).

Further support for the theory that valid donations spring, generally, from

difficulty with this modus operandi is that the essence of the *in fraudem legis* exception seems to be simply that the general rule against verbal attacks on authentic acts of transfer should not pose a bar to the annulment of transfers which are absolutely prohibited by law, such as donations *omnium bonorum*, donations of immovables to one's concubine, or, ordinarily, onerous obligations between husband and wife. Therefore, it appears that the *in fraudem legis* exception should permit the use of parol only when the purpose of the offerer is to prove that the conveyance was a forbidden transfer. However, the law does not forbid simulations, reprobated as these artifices may be; although if they are confected to the prejudice of interested third persons, these injured parties may bring an action in declaration of the simulation and avail themselves of parol proof that the contract was simulated. But, even granting *arguendo* that consideration was lacking, simulations are not provable by parol by parties to the contract.[17] Consequently, it does not seem that a husband, party to the act of transfer, should be allowed to prove by parol that the authentic act actually represented a pure simulation. The court's position, in disallowing parol, could either have been that parties to simulated transfers in authentic form are barred from establishing that fact by parol, or that the transfer was a sus-

the *animus donandi*, or the spirit of liberality which motivates the donor to divest himself of his property in favor of the intended donee gratuitously, is to be found in the writings of several French doctrinal authors. *E.g.*, 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) n° 2509 (1959); 5 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS, DONATIONS ET TESTAMENTS, n° 313 *et seq.* (2d ed. 1957); 6 BEUDANT, COURS DE DROIT CIVIL FRANÇAIS, LES DONATIONS ENTRE VIFS ET LES TESTAMENTS, n° 43 (2d ed. 1934); BAUDRY-LACANTINERIE ET COLIN, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 1 DES DONATIONS ENTRE VIFS ET DES TESTAMENTS, n° 59 (2d ed. 1905); 1 POUJOL, TRAITÉ DES DONATIONS ENTRE VIFS ET DES TESTAMENS, SECTION PREMIÈRE n° 3 (1836).

17. See note 8 *supra*. It is conceivable that the court might decide to admit the parol offered to show no consideration and that the transfer from husband to wife was simulated. Such a decision would be grounded on the fact that the intention to simulate negatives any *animus donandi*, and therefore there could be no valid donation in disguise. Furthermore, it would not be a valid onerous contract since these are permissible between husband and wife in only three cases, and the agreement under consideration could be none of these in the absence of indebtedness. LA. CIVIL CODE art. 2446 (1870). However, it is submitted that to admit parol on the strength of this reasoning would be questionable. First, simulations are not prohibited contracts, and the *in fraudem legis* exception runs only to such agreements. In the second place, it is the well-established policy of the law to disallow the parties to simulations to establish their true nature by means of parol. This policy was established, it seems not unlikely, for the reason that ordinarily simulations will be made for fraudulent purposes, and it is not the purpose of the law to encourage persons who attempt to perpetrate frauds in their efforts to profit by such actions. "[W]e think . . . that courts of justice are not reduced to the humiliation of adjusting among dishonest men the results of their unholy speculations or of protecting one party against another while engaged in a common purpose, at war with the best interests of society and sub-

tainable donation in disguise.[18] This determination would depend upon the husband's apparent intention, as found by the court.

On the basis of the foregoing considerations, it is suggested that the instant case is an unwarranted deviation from the rule against the admission of parol to vary the recital of an authentic act. The *in fraudem legis* exception, as applied prior to the instant case, seems perfectly appropriate as a policy matter, for it appears to implement the expressed intention of the lawmaker. However, the application of this exception in the instant case could lead to the overturning of authentic acts of transfer which, in view of the fact that simulations are not prohibited by law and the jurisprudence recognizing the validity of disguised donations, would not violate any prohibitory rule of law.

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versive of public order." Gravier's Curator v. Carraby's Executor, 17 La. 118, 130 (1841), in which the deceased's curator had sought to recover property allegedly part of the estate of which defendant was executor, as the result of simulated sales.

See Burch v. Nichols, 126 So.2d 713 (La. App. 1961), which relied on the instant case for authority to a considerable extent, but which involved a sound application of the rule that forced heirs may introduce parol to annul the simulated contracts of those from whom they inherit.

18. See note 7 *supra* and accompanying text.