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Sales - Refusal of Purchaser to Accept Title Suggestive of Serious Litigation

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accomplished by incorporation of the principles of the Model Penal Code concerning obscenity statutes[28] with those of the *Roth* case.

A revision[29] of the Louisiana obscenity statute might read as follows:

> R.S. 14:106 Obscenity
>
> A. Obscenity is the intentional:
>
> (2) Production, sale, exhibition, gift, advertisement, exchange, or the possession with the intent to sell, exhibit, give, advertise, or exchange, any lewd, obscene, or sexually indecent material,[30] the dominant theme of which, considered as a whole, applying contemporary community standards of the average person, appeals primarily to the prurient interest. Prurient interest, as used in this sub-section, means a shameful or morbid interest in nudity, sex, or excretion, going substantially beyond the customary limits of candor in description or representation of such matters.[31]

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SALES — REFUSAL OF PURCHASER TO ACCEPT TITLE SUGGESTIVE OF SERIOUS LITIGATION

Plaintiff sued for specific performance of an agreement to purchase immovable property. Defendant school board contended

28. See note 13 *supra*.

29. The present statute possibly violates principles of good draftsmanship because of its verbosity; but considering the nature of the conduct intended to be precluded, the many variations of obscene matter, and the difficulties that have arisen in construing obscenity (see generally Note, 21 LA. L. REV. 264 (1960)), conciseness and brevity must be sacrificed for the cause of enforcement. See *The Work of the Louisiana Legislature for the 1960 Term — Criminal Law and Procedure*, 21 LA. L. REV. 66, 68 (1960).

30. It is submitted that as an alternative, keeping in mind the difficulties encountered in enforcement, the materials may be specified as in the present statute. See note 3 *supra*. See also *The Work of the Louisiana Legislature for the 1960 Term — Criminal Law and Procedure*, 21 LA. L. REV. 66, 68 (1960).

31. In People v. Richmond County News, 9 N.Y. 2d 578, 175 N.E. 2d 681 (1961) the court was split 4-3 in favor of setting the constitutional limits at "hard-core" pornography, despite the minority view that *Roth v. United States* did not require such restriction, but merely set forth the minimum test of constitutionality and outlined its limits. There is no Louisiana jurisprudence dealing with this problem. Therefore, an adoption of the proposed redrafting will still result in speculation where the Louisiana Supreme Court will draw its limits. In Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 398 n. 26 (1963), however, it is suggested that MANual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), 18 VAND. L. REV. 251 so limits the *Roth* test.

it was not required to accept title because certain building restrictions prevented the erection of a school building on the property. Plaintiff claimed the title was not unmerchantable since the restrictions were ineffectual as to defendant — a governmental agency vested with the power of eminent domain. The owners of the lots in whose favor the restrictive covenants ran were not parties to the suit. The court of appeal affirmed the district court's judgment for specific performance.[1] On certiorari, the Supreme Court of Louisiana reversed. *Held,* the question whether defendant school board must comply with the building restrictions was unsettled and could be finally decided only in a suit between the nonlitigant adjacent lot owners and the school board; thus the title was suggestive of litigation and defendant could not be compelled to perform. *Gremillion v. Rapides Parish School Board,* 242 La. 967, 140 So. 2d 377 (1962).

One who purchases immovable property seeking to obtain perfect ownership has, as his principal cause, the acquisition of that bundle of legal relations between himself and all others which makes up perfect ownership.[2] If he does not obtain all or any one of these legal relations, such as the right to unrestricted use, he is not getting all that he sought.[3] The immediate end which he had in view, his principal cause,[4] is thus tainted with error such as to vitiate his consent to the purchase contract.[5] Conversely, if the purchaser is aware that some of these legal relations will be denied him, and nevertheless binds himself to accept the property there is no error and his consent is not vitiated. Although never expressly mentioned, the Louisiana courts apparently recognize these principles by holding that a

1. Gremillion v. Rapides Parish School Board, 134 So. 2d 700 (La. App. 3d Cir. 1961).

2. LA. CIVIL CODE art. 491 (1870): "Perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner . . . ."

3. For clarity, the author has dealt only with a purchaser who seeks perfect ownership. Of course, this analysis holds true where the purchaser is merely seeking, for his purposes, less than all of the legal relations that make up perfect ownership. Thus, where he does not obtain one or all of those legal relations actually sought, his contract is subject to a vice of consent as pointed out in the text.

4. LA. CIVIL CODE art. 1825 (1870): "[T]his principal cause is called the *motive,* and means that consideration without which the contract would not have been made." See generally Smith, *A Refresher Course in Cause,* 12 LA. L. REV. 2 (1951).

5. LA. CIVIL CODE art. 1819 (1870): "Consent being the concurrence of intention in two or more persons with regard to a matter understood by all . . . and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent . . . where it has been produced by error." See Smith, *A Refresher Course in Cause,* 12 LA. L. REV. 2, 9-15 (1951), in which

purchaser is not compelled to accept a title which is suggestive of serious future litigation.[6]

A party asserting a title to be suggestive of litigation must show more than a remote possibility of litigation.[7] If the third party's claim raises an unsettled issue of law[8] or requires resolution of disputed facts,[9] the courts will uphold the refusal of the vendee to accept title without delving further into the merits of the claim. Conversely, if the foreshadowed litigation is patently without any real basis,[10] the courts will decide the merits and compel acceptance of title.[11] Likewise, if the vendor rebuts evidence of an outstanding claim, the court will find the danger of litigation not to be serious.[12]

The Louisiana courts have held title to be suggestive of litigation if: (1) a patently valid, outstanding claim on the prop-

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the author states: "Considering the nature of the contract, realization of the principal cause or motive is understood to be the basis upon which consent is given and it therefore becomes a tacit condition of the contract. This is because the final and principal motive for assuming an obligation must lie in the obvious end being sought, for example, obtaining ownership, or use, or services, or conferring a benefit. If this cause fails, the will is vitiated and the contract falls." *Id.* at 10.

6. City of New Orleans v. Ricca, 217 La. 413, 46 So. 2d 505 (1950); Lear v. Great National Development Co., 215 La. 749, 41 So. 2d 668 (1949); Doll v. Meyer, 214 La. 444, 38 So. 2d 69 (1948); Schaub v. O'Quin, 214 La. 424, 38 So. 2d 63 (1948); Marsh v. Lorimer, 164 La. 175, 113 So. 808 (1927); Praegner v. Kinnebrew & Ratcliff, 156 La. 132, 100 So. 247 (1924); Rodriguez v. Shroder, 77 So. 2d 216 (La. App. Orl. Cir. 1955); Oubre v. Stassi, 56 So. 2d 598 (La. App. Orl. Cir. 1952); *accord*, Kinler v. Griffen, 251 F. 2d 655 (5th Cir. 1958).

7. Grasser v. Blank, 110 La. 493, 34 So. 648 (1903).

8. Schaub v. O'Quin, 214 La. 424, 38 So. 2d 63 (1948) (whether tutor must observe statutory procedures before sale of minor's property); Bodcaw Lumber Co. v. White, 121 La. 715, 46 So. 782 (1908) (issue in litigation in another suit); Michener v. Reinach, 49 La. Ann. 360, 21 So. 552 (1896) (same).

9. See Kinler v. Griffen, 251 F. 2d 655 (5th Cir. 1958); Doll v. Meyer, 214 La. 444, 38 So. 2d 69 (1948).

10. *E.g.*, a claim involving an issue of law that is well settled. Metairie Park v. Currie, 168 La. 588, 122 So. 859 (1929) (public records doctrine); Norton v. Enos, 158 La. 423, 104 So. 194 (1925) (certificate stating existence of encumbrances on property not necessary).

11. Rabouin v. Dutrey, 181 La. 725, 160 So. 393 (1935) (claim of outstanding building restrictions); Henry v. Barker, 130 La. 431, 58 So. 138 (1912) (contention that property had been sold to state for unpaid taxes); Woolverton v. Stevenson, 52 La. Ann. 1147, 27 So. 674 (1900) (contention that vendor's ancestor in title had conveyed the property by way of in an invalid donation); *In re* Louisiana Savings Bank, 48 La. Ann. 1428, 20 So. 909 (1896) (contention that vendor's ancestor in title had conveyed property through an invalid revocable donation without proof of existence of persons in a position to revoke donation).

12. Grasser v. Blank, 110 La. 493, 34 So. 648 (1903) (upon contention that revocable donation was part of vendor's chain of title, vendor showed all heirs had become majors and five-year period for action revoking donation had passed); see Meibaum v. Brennan, 49 La. Ann. 580, 21 So. 853 (1897); *In re* Louisiana Savings Bank, 48 La. Ann. 1428, 20 So. 909 (1896).

erty rests in a nonlitigant third party;[13] (2) a questionable claim exists of such substance as to necessitate further litigation between the owner of the property and a nonlitigant third party;[14] (3) there exist undisclosed restrictions affecting the future use of the property,[15] or an unknown present violation of known restrictions;[16] (4) the vendor's chain of title reveals the property was sold by a married woman,[17] unless the vendor rebuts the presumption that all property sold during the marriage belongs to the community;[18] or (5) the vendor attempts to show title by acquisitive prescription unconfirmed by judgment.[19]

Recognizing that the question whether a school board must comply with building restrictions was *res nova* in Louisiana, the court in the instant case concluded it could be conclusively resolved only in a suit between the property owner in question and those entitled to enforce the restrictions. From this it followed that defendant's title was suggestive of future serious litigation, since to compel it to accept title without deciding the issue would leave defendant vulnerable to a possible attack from the covenant holders. And to adjudicate this issue merely for purposes of settling the dispute between the parties in the in-

13. Lear v. Great Nat'l Dev. Co., 215 La. 749, 41 So. 2d 668 (1949) (third party had valid recorded title to part of the property); Doll v. Meyer, 214 La. 444, 38 So. 2d 69 (1948) (prospective vendor failed to sue former proprietor in prior action to quiet title); Scheuermann v. De Latour, 130 La. 549, 58 So. 223 (1912) (outstanding rights resting in minor heirs of prospective vendor's ancestor in title); Lyman v. Stroudback, 47 La. Ann. 71, 16 So. 662 (1894) (mortgage on property); Beer v. Leonard, 40 La. Ann. 845, 5 So. 257 (1888) (acquisition of property by prospective vendor's ancestor in title null for lack of writing); Rodriguez v. Shroder, 77 So. 2d 216 (La. App. Orl. Cir. 1955) (outstanding rights resting in heirs of prospective vendor's ancestor in title); Germain v. Weller, 67 So. 2d 332 (La. App. Orl. Cir. 1953) (undisclosed, valid restrictive covenants in favor of third parties); Stauss v. Kober, 51 So. 2d 121 (La. App. Orl. Cir. 1951) (same).

14. Kay v. Carter, 150 So. 2d 27 (La. 1963); Schaub v. O'Quin, 214 La. 424, 38 So. 2d 63 (1948); *accord*, Kinler v. Griffen, 251 F. 2d 655 (5th Cir. 1958).

15. Germain v. Weller, 67 So. 2d 332 (La. App. Orl. Cir. 1953); Stauss v. Kober, 51 So. 2d 121 (La. App. Orl. Cir. 1951).

16. Oubre v. Stassi, 56 So. 2d 598 (La. App. Orl. Cir. 1952).

17. Neuhauser v. Barthe, 110 La. 825, 34 So. 793 (1903); Carter v. Morris Bldg. & Land Imp. Ass'n, 108 La. 143, 32 So. 473 (1902); Gogreve v. Dehon, 41 La. Ann. 244, 6 So. 31 (1889); Succession of Rogge, 49 La. Ann. 37, 21 So. 170 (1897); Bartels v. Souchon, 48 La. Ann. 783, 19 So. 941 (1896); Bachino v. Coste, 35 La. Ann. 570 (1883).

18. Succession of Rogge, 49 La. Ann. 37, 21 So. 170, 171 (1897); Bachino v. Coste, 35 La. Ann. 570, 571 (1883).

19. City of New Orleans v. Ricca, 217 La. 413, 46 So. 2d 505 (1950); *accord*, Kinler v. Griffen, 251 F. 2d 655 (5th Cir. 1958). *But see* Meibaum v. Brennan, 49 La. Ann. 580, 21 So. 853 (1897), in which the court sustained a plea of prescription after determining that there were no parties who could enforce or bring suit on a claim of ownership, since no adverse claimant had appeared in over twenty-three years and none was known to be presently available.

stant case would be premature and prejudicial to the rights of the covenant holders.[20]

Since the real basis of the serious litigation rule appears to be error, the primary consideration should be whether the vendee knew of the outstanding restrictions at the time of the contract. If so, there is no error and the vendee should not be heard to complain. As the opinion in the instant case makes no mention of the knowledge *vel non* of the defendant, it might appear that a lack of knowledge is not required to invoke the rule. It is submitted that the courts should consider application of the doctrine of serious future litigation only after the vendee has shown affirmatively that he had no knowledge of the restrictive covenants.

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WORKMEN'S COMPENSATION — BORROWED EMPLOYEES — LIABILITY OF EMPLOYERS

While engaged in the business of hiring out welders, plaintiff's insured furnished defendant an employee who was subsequently injured while welding under defendant's supervision. Following a compensation settlement with the injured borrowed employee, plaintiff instituted suit seeking contribution from defendant or his insurer. The district court sustained defendants' exception of no cause of action. The Third Circuit Court of Appeal affirmed. *Held,* though borrowing and lending employers are liable in solido for workmen's compensation to the injured borrowed employee, the lending employer, as between the two employers, is ultimately liable for the whole compensation when he is engaged in the business of hiring out his employees. Therefore, the lending employer is not entitled to contribution from the borrower. *Casualty Reciprocal Exchange v. Richey Drilling & Well Service,* 137 So. 2d 127 (La. App. 3d Cir. 1962).

In determining the locus of workmen's compensation respon-

20. Since the adjacent landowners in whose favor the covenants ran were not parties to the suit, the issue would not be res adjudicata as to them. However, a decision on the question would have precedential value in a subsequent suit between the covenant holders and the school board. If the court had decided adversely to the covenant holders in the instant case — school board not bound by restrictions — they would be prone to follow that decision in a subsequent suit between the covenant holders and the school board,