Private Law: Conventional Obligations - Sales

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Whether a given agreement constitutes a sale or some other kind of transaction will often have bearing upon the proper manner and amount of relief, as well as upon such matters as prescription. For example, if a contractor agrees to furnish materials and to install them in a house or building, it is pertinent to decide whether the contract constitutes a building contract or a sale, because of questions of risk, relief, and prescription. The jurisprudence has developed a test for distinguishing between a contract of undertaking and a sale, based upon a comparison of the relative value of the thing as opposed to the work involved in installing it.¹ In *Brown v. Sanders*² plaintiff had contracted to install a heating system in defendant’s house. Installation was almost complete when the house was destroyed by fire. The court was initially confronted with the problem whether the contract in question was a sale or a contract of undertaking. If the contract was a sale, article 2467³ would place the risk of loss on the buyer, whereas under article 2758⁴ the undertaker would bear the risk of loss prior to the delivery of the thing.⁵ The court held that it was immaterial whether the transaction was a sale or a construction contract, because the defendant had accepted the system as installed and had acknowledged liability for it. There are some indications in the language of the opinion that the court felt the contract was probably a contract of undertaking rather than a sale, but its disposition of the case rendered decision of that issue unnecessary.

In *Beatty v. Vining*,⁶ it became necessary for the court to

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2. 149 So.2d 228 (La. App. 2d Cir. 1963).
3. *LA. CIVIL CODE* art. 2467 (1870): “As soon as the contract of sale is completed, the thing sold is at the risk of the buyer, but with the following modifications.”
4. *Id.* art. 2758 (1870): “When the undertaker furnishes the materials for the work, if the work be destroyed, in whatever manner it may happen, previous to its being delivered to the owner, the loss shall be sustained by the undertaker, unless the proprietor be in default for not receiving it, though duly notified to do so.”
6. 147 So. 2d 37 (La. App. 2d Cir. 1962).
decide whether the transactions in question were sales or acts of partition because of a difference in the law with regard to the action of rescission for lesion. If the transactions in question were found to be sales, the action of rescission for lesion would not lie, because movable property as well as immovable property was involved.\(7\) The court concluded that the transactions in question were partitions, and that they could be rescinded under article 1861\(8\) despite the fact that both movables and immovables were involved. The court stated:

“The transaction between plaintiff and defendant in the instant case can be characterized only as an act of partition. Regardless of the form of an act, the rule is well established in the jurisprudence that every first settlement between heirs or partners of which a state of indivision is terminated is, in substance, a partition, even though the instruments have the form and appearance of sales.”\(9\)

Just as it is often important to distinguish a sale from some other kind of contract, it is also sometimes necessary to decide when a sale has been consummated, or, putting the question another way, whether a particular contract is a contract to sell as opposed to a completed sale. In Plaquemines Equipment & Machinery Co. v. Ford Motor Co.\(10\) plaintiff had ordered a specially built truck from a motor company in New Orleans and had paid a deposit on the agreed purchase price. It was agreed that the balance of the price would be liquidated at the time of delivery of the completed truck. While the cab and chassis of the truck were in possession of the motor company prior to the special installations, they were seized by the local distributor, a creditor of the motor company. Plaintiff contended that the

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7. LA. CIVIL CODE art. 2594 (1870): “Rescission for lesion beyond moiety is not granted against sales of movables and produce, nor when rights to a succession have been sold to a stranger, nor in matter of transfer of credits, nor against sales of immovable property made by virtue of any decree or process of a court justice.”

8. Id. art. 1861 (1870): “The law, however, will not release a person of full age, and who is under no incapacity, against the effect of his voluntary contracts, on account of such implied error or imposition, except in the two following cases:

1. In partition where there is a difference in the value of the portions to more than the amount of one-fourth to the prejudice of one or [of] the parties;

2. In sales of immovable property, the vendor may be relieved, if the price given is less than one-half of the value of the thing sold; but the sale can not be invalidated for lesion to the injury of the purchaser.”

9. 147 So. 2d at 41.

10. 148 So. 2d 815 (La. App. 4th Cir. 1963).
sale was complete by virtue of articles 2439 and 2456 of the Civil Code, whereas the distributor argued that ownership had never vested in the plaintiff and that his seizure was proper. The court of appeal concluded, agreeing with the trial court, that because the thing which the motor company had agreed to sell to the plaintiff had never come into existence—that is, a specially equipped truck—no sale had been completed, and that the seizure by the distributor was valid.

Article 2480 of the Civil Code provides: "In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale." In Wilson v. Moore plaintiff-vendor brought suit against defendant-vendee contending that a sale of record of real property was actually a simulation, and was also void for fraud. The court held for the defendant, primarily because it did not believe the plaintiff's witnesses or his testimony on the facts. It was stated that the article 2480 presumption does not apply as between the parties, but arises only in cases where third persons are involved in the matter. This interpretation of article 2480 would appear consistent with the prior jurisprudence, as well as with the purpose of that provision.

In Brumfield v. Paul plaintiff sought to annul a sale of land made by her to the defendant on the ground that she was at the time of the sale under sedation and therefore incapable of contracting. She also argued that she had received no part of the purchase price. Defendant's principal argument was that the authentic act of sale was susceptible of attack as between the parties only by means of a counter letter or interrogatories, or by alleging fraud or error. The court stated that although the

11. LA. CIVIL CODE art. 2439 (1870) : "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.

"Three circumstances concur to the perfection of the contract, to-wit: the thing sold, the price and the consent."

Art. 2456: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."

12. 146 So. 2d 669 (La. App. 3d Cir. 1962).


14. 145 So. 2d 46 (La. App. 4th Cir. 1962).
defendant's theory of law was correct, in the instant situation parol evidence was admissible because of the allegations of plaintiff's petition pertaining to her capacity to contract. The court stated that the allegations of the petition were pertinent to the ability of plaintiff to give consent, rather than to any facts which might vitiate consent legally given.

_Sohio Petroleum Co. v. Hebert_15 was a concursus proceeding wherein plaintiff sought to have itself declared the owner of royalty payments which had accrued from two gas production units. The ownership of the funds depended upon a determination of the ownership of strips of property underlying a canal and a public road. Plaintiff's contention was that in a sale of the property encompassing the canal and public road the language "less right of way for canal and public road on the west and south side" meant that the fee title to the land stated in that reservation was preserved by the vendor. The court concluded that the language did not reserve title to the land, but merely amounted to a reservation of a servitude for canal and road purposes. The court laid stress upon the fact that the dimensions of the right of way reportedly reserved in the sale were not given in the deed, and stated that the "use of the term 'right of way' usually indicates that only a servitude or a right of passage is being conveyed or reserved, and . . . it should be construed as meaning only a servitude unless the instrument, considered as a whole, indicates that the parties intended for it to mean the fee title."

The case of _Trumbull Chevrolet Sales Co. v. Maxwell_17 dealt with the effect of the purchaser's giving a worthless check in payment upon passage of title to an automobile; it has been discussed in another issue of this _Review_.

Article 2652 of the Civil Code allows a litigant against whom a right in litigation has been transferred to terminate the litigation by paying to the transferee of the right the real price of the transfer together with interest.19 The party seeking to exercise the right of litigious redemption must do so timely; he cannot wait to see what the outcome of the litigation may be be-

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15. 146 So. 2d 530 (La. App. 3d Cir. 1962).
16. Id. at 532.
17. 142 So. 2d 805 (La. App. 2d Cir. 1962).
19. 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."
fore seeking to avail himself of the right. In *A. N. & J. Solari, Ltd. v. Fitzgerald* the court concluded that the defendant's attempted exercise of the right of litigious redemption was not timely. It was found that the defendant had had knowledge of the assignment of the claim for at least eleven months prior to trial, and thereafter tried the case to conclusion before seeking to avail himself of the provisions of article 2652.

It is apparently fairly well-settled that an unrecorded judgment of divorce will not affect the rights of a third person who deals with the husband with regard to community real property. In *Speights v. Nance* the wife sought to pursue her rights as a creditor of the community against a vendee from her divorced husband of his one-half interest in the community. The court concluded that as the rights of the wife against the community property were not recorded in the conveyance records, the judgment of divorce and the rights flowing therefrom were void as to the property acquired from the husband.

**Redhibition and Quanti Minoris**

Most of the cases decided during this period were actions for rescission of a sale or for reduction of the purchase price because of redhibitory vices or defects. The usual approach as to the proper measure of recovery in an action *quanti minoris* has been to award the purchaser by way of reduction of the purchase price an amount equal to the difference between the value of the thing as warranted and its value as sold in its defective condition. It has been pointed out that in the situation where the purchase price of the thing was something less than its real value, the purchaser is placed in a better position by being successful in an action *quanti minoris* than by securing the return of the entire purchase price in a redhibitory action. It has been suggested that this anomaly could be avoided in such a situation by taking the price paid as the ultimate value of the thing rather than its value as warranted.

In *Pursell v. Kelly* a different approach to this problem was suggested. In that case the situation was complicated to an

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20. 150 So. 2d 896 (La. App. 4th Cir. 1963).
22. 142 So. 2d 418 (La. App. 2d Cir. 1962).
24. Ibid.
25. 244 La. 323, 152 So. 2d 36 (1963).
extent by the fact that the thing sold was a building. The jurisprudence has apparently established a rule to the effect that "in actions for quanti minoris involving the sale of realty, the measure of recovery is the amount necessary to convert the unsound structure into a sound one. The reason given for this exception is that the usual rule—that the measure of the recovery is the difference between the value of the thing sold in its defective condition and its value as warranted...—cannot be applied in cases of this sort inasmuch as the difference in value of real estate is not readily or easily ascertainable unless there has been an immediate resale of the property."26 The court, confronted with evidence that it would require $9871.15 to repair a building worth at the time of the sale $12,000, stated:

"In the event it were held in the instant case that the defendant was liable for a reduction in price, application of the aforementioned method of measuring recovery would appear to be highly inequitable, for this would require defendant to pay the costs, amounting to almost $10,000.00, to repair a building valued at only $12,000.00 at the time of the sale. In instances where the cost of the repairs are so far out of proportion with the price paid for the property, it would seem that a rescission of the sale would be the only just and proper remedy, and the vendee has shown that he is able to place his vendor in substantially the same position as he was prior to the sale."27

That the technique of using the amount necessary to effect the needed repairs as the proper measure of recovery in quanti minoris actions is applicable only to sales of realty is illustrated by the case of Delta Equipment & Construction Co. v. Cook.28 The court, after concluding that the sale of a dragline was not complete in Mississippi because of the intention of the parties to execute a formal sale with a mortgage, but was complete in Louisiana, went on to apply the Louisiana law of quanti minoris. It was urged that the proper measure of recovery should be the amount necessary to effect the essential repairs. The court refused to adopt that measure of recovery, distinguishing or rejecting several court of appeal cases and pointing out that the Supreme Court has never allowed that measure of recovery except in sales of real property. The court stated:

27. 152 So. 2d at 39-40n.
28. 142 So. 2d 427 (La. App. 1st Cir. 1962).
"We believe the soundness of the rule thus established by the Supreme Court's refusal to use the cost of repairs as the measure of diminution of price in all redhibitory action cases is demonstrated by the fact that cost of repair is impossible of application to vices in irreparable objects, such as unsound corn."²⁹

The court then accepted testimony of expert witnesses as to the difference between the value of the thing as sold and as warranted and applied that difference as the proper measure of recovery.

In an action for return of the purchase price because of redhibitory defects, the law requires the buyer to tender a return of the object sold except where return is made impossible by reason of the nature of the thing or by reason of its destruction through the very defects complained of. Several recent cases bear upon that obligation on the part of the buyer. In *Kennedy v. Jacobson-Young, Inc.*,³⁰ plaintiff brought a redhibitory action with regard to the sale of an automobile. The seller argued that the buyer's action in dismantling the engine in his attempt to effect the necessary repairs rendered the automobile unfit for tender of return, so that the redhibitory action could not be maintained. His primary reliance was on the 1952 case of *Poor v. Hemenway*,³¹ wherein the court had concluded that the buyer's almost complete dismantling of a yacht had rendered it unfit for a proper return to the seller. The court in the *Kennedy* case concluded that *Poor v. Hemenway* was inapplicable in the instant situation, by reason of the fact that no such major overhaul had been undertaken on the automobile in question. It appeared that all had been done was "to pull the head" from the engine of the car. The court stated that the facts of the instant case more nearly resembled those of the case of *Madiere v. Sharp*,³² where the buyer's action to rescind the sale of a cabin cruiser by reason of redhibitory defects was sustained notwithstanding his attempts at some repairs, the court concluding that the repairs undertaken were only those necessary to insure that the vessel stay afloat. In the instant case the court concluded that a sufficient tender of return had been made, and granted redhibition to the buyer. In *Davis v. Brown Chevrolet, Inc.*,³³ the seller con-

²⁹. 142 So. 2d at 440.
³⁰. 244 La. 101, 151 So. 2d 368 (1963).
³¹. 221 La. 770, 60 So. 2d 310 (1952).
³². 230 La. 723, 89 So. 2d 214 (1956).
³³. 148 So. 2d 800 (La. App. 4th Cir. 1962).
tended that the buyer's tender of return was inadequate because the vehicle involved had been damaged in an accident. The court stated that subsequent damage could not alter the fact that the truck had been unusable at the time of the sale, and that the seller could be protected by being given full credit for the damage caused by the buyer to the vehicle. In *Ziblich v. Metry Upholstery, Inc.*, the buyer contended that draperies sold and installed by the defendant were defective. The court concluded that they were defective and that a sufficient tender of return had been made by the purchaser by merely calling the seller on the telephone and requesting that he send someone to remove the draperies. The seller's contention was that Civil Code article 2520 requires an actual tender of return. The court stated that actual tender is ordinarily necessary whenever it is reasonably possible to physically tender the return of a defective article, but that the requirement has no application in a situation where the seller is also the installer of the article purchased.

The implied-in-law warranty against redhibitory vices and defects, like almost any other provision of law, can be renounced by the party in whose favor the law imposes it. Two recently decided cases involved questions of what constitutes a waiver of this warranty. In *Stevens v. Daigle and Hinson Rambler, Inc.*, the contention of the seller was that plaintiff had waived his right to bring the redhibitory action by accepting from the seller a pamphlet entitled "Rambler Owner's Manual," wherein warranties were made by the manufacturer of the vehicle, and wherein it was stated: "Your authorized Rambler dealer, independently and not as agent of manufacturer or American Motor Sales Corporation . . . extends to you as purchaser of a new Rambler a like warranty." The seller's contention was that the quoted language constituted a waiver of the warranty against redhibitory defects. In rejecting that argument, the court stated:

"In our opinion there must be an express waiver or modification of the warranty by agreement between the vendor and vendee. Such agreement cannot be said to have been made between the parties by the delivery only of a manual.

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34. 148 So. 2d 436 (La. App. 4th Cir. 1963).
35. LA. CIVIL CODE art. 2520 (1870): "Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice."
36. 153 So. 2d 511 (La. App. 1st Cir. 1963).
to purchaser and his acceptance thereof without a meeting of the minds expressly limiting the warranty. In other words, the vendor by any act on his part alone may not modify the warranty implied in all sales in Louisiana but such warranty can only be changed or modified by express agreement of both parties."  

In *Harris v. Automatic Enterprises of Louisiana, Inc.* 38 a redhibitory action was brought seeking rescission of the sale of laundry equipment. The seller's defense was that the defects were minor, and that there was a printed warranty on the invoice which excluded all other warranties. It appeared that language on the back of the invoice did waive the warranty against redhibitory vices and defects. The court refused to give effect to that waiver, stating that such a stipulation can have no effect against a buyer unless called to his attention. This result is of course consistent with the general rule that the fine print on the back of a receipt or invoice will not bind an unwary party to the transaction.

In an action in redhibition, if the seller had no knowledge of the defect in question, the buyer can recover only the purchase price and the expenses occasioned by the sale. 39 On the other hand, if the buyer had knowledge of the defect, damages can also be awarded. 40 The jurisprudence has evolved a rule that knowledge of the defective qualities in a thing sold is to be imputed to the manufacturer thereof, thereby justifying an award of damages against him. 41 However, thus far the courts have refused to impute such knowledge to a seller who is not also the manufacturer of the article, unless the seller has labelled the goods as his own or has in some way held them out to be manufactured by him. In *Samaha v. Southern Rambler Sales, Inc.* 42 the purchased automobile had a defective seat bracket which

37. *Id.* at 514.

38. 145 So. 2d 335 (La. App. 4th Cir. 1962).

39. LA. CIVIL CODE art. 2531 (1870): "The seller who knew not the vices of the thing is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits, which the purchaser has drawn from it, be sufficient to satisfy those expenses."

40. *Id.* art. 2545 (1870): "The seller, who knows the vices of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages."

41. See, e.g., LeBlanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952); Doyle v. Fuerst & Knaermer, Ltd., 129 La. 538, 56 So. 906 (1911); George v. Shreveport Cotton Oil Co., 114 La. 498, 38 So. 432 (1899).

42. 146 So. 2d 29 (La. App. 4th Cir. 1962).
broke while plaintiff was driving up an incline, causing him to fall backward and strain his back while struggling to retain control of the car. He sought damages against the seller of the automobile. The court refused to award him damages, stating that there was no showing that the seller knew of the defect, and that such knowledge could not be imputed to him.

**Leases**

An interesting question with respect to renewal of leases was presented in *Woods v. Cities Service Oil Co.* The lease contract provided that lessee could extend for an additional year by giving written registered notice of the intention to do so to lessor prior to a month before termination. The lease was due to expire on December 31, 1961. At 5:02 p.m. on November 29 lessee wired lessor notice of renewal. The telegram was received in Olla, the town of lessor's domicile, at 8:25 the following morning by the Western Union agent, who at that time phoned lessor to inform him of the receipt of the telegram, but was unable to reach anyone at lessor's residence. Shortly thereafter on the same morning the agent told lessor's son that he had received a telegram for lessor. The son informed the agent that lessor was out of town, and instructed the agent to mail the telegram to lessor, which the agent immediately did. Lessor testified that he did not receive the telegram from his post office box in Olla until December 2, 1961, and argued that notice of renewal was not timely given, since the use of an unauthorized method of transmission of notice—i.e. telegram—meant that lessee was at its peril that the notice would not be timely received by lessor. The court in answering this argument stated:

"We do not necessarily accede to appellant's argument that the leased requirement 'written, registered notice' of renewal was intended to designate registered mail as the exclusive method of giving notice and to exclude the use of the telegraph. Nevertheless, the use of a different method of transmission of the notice of renewal than that contemplated by the lease does not, if timely received, make the notice defective, when the substituted method of transmission performs the same function and serves the same purpose as the authorized method."
The court pointed out that if the notice had been given by registered mail at the same time as it was given by telegram, it would have been timely and nevertheless would have been received no earlier than it was under the instant facts. This case seems a sound application of accepted principles with regard to lease renewal.

Under R.S. 9:3221, subject to certain qualifications, an owner-lessee of premises can escape liability to third persons for injuries caused by reason of defects in the leased premises by entering into a contract with the lessee whereby the latter assumes responsibility for the condition of the premises. Several questions about the proper construction of the statute have remained unsettled. The question whether a lessee who has assumed responsibility for the condition of the premises may escape his liability to persons on the premises by securing an assumption of liability from a sublessee was involved, but not specifically dealt with, in the case of Abbott and Barnes Credit Clothiers, Inc. v. Crane Clothing Co. Defendant, lessee of a building from the owner, assumed responsibility for the condition of the premises in the contract of lease. Plaintiff occupied the lower floor of the building as sublessee. In the contract of lease from defendant there was also an assumption of responsibility for the condition of the premises. Plaintiff's merchandise suffered water damage as a result of faulty plumbing in an upstairs apartment in the building occupied by another subtenant. Plaintiff was held entitled to recovery. The court did not meet the problem whether defendant might under other circumstances escape liability by entering into a contract of assumption with his sublessee, stating that “the 'hold harmless' clause of the lease under LSA-R.S. 9:3221 cannot avail defendant because defendant, having authorized the installation [of the faulty plumbing], is charged with responsibility therefor, required that the work be done by competent plumbers and the same as though it had contracted therefor. It should have with municipal approval.”

45. La. R.S. 9:3221 (1950) : "The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time."
47. 141 So. 2d 916 (La. App. 4th Cir. 1962).
48. Id. at 919.