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The practice of law is defined in La. R.S. 37:212. In *Andrus v. Guillot*,³⁰ a collection agency that engaged in the practice of sending out notices to debtors and referring accounts to attorneys for collection on a split fee basis, was held to be practising law in violation of this provision and not entitled to recover the promised fee. In passing, the court observed that it was not undertaking to "outlaw" collection agencies and indicated that, although "peaceful collection or friendly adjustment" would not constitute the practice of law, the collector cannot threaten with legal proceedings or represent a creditor in court proceedings either directly, or indirectly through an attorney engaged by him.

To like effect, recovery was denied to an unlicensed person who had engaged in a series of real estate transactions for others on a fee basis over a period of time.³¹ The court distinguished *Sheppard v. Hulseberg*,³² where recovery was granted to one who on an isolated occasion sold property for another for a \$100.00 fee. The court relied on La. R.S. 14:37 and 14:50.

In *Abry Brothers v. Tillman*³³ the plaintiff contractor's acceptance of a post-dated check of a third party was held not to constitute payment of the debt owed. The court found no agreement, express or implied, to accept the checks in payment. Indeed, there was clear evidence negating any such intent. The French are in accord.³⁴

PARTICULAR CONTRACTS

SALES

*J. Denson Smith**

The Supreme Court has granted a writ of certiorari in the case of *Womack v. Sternberg*.¹ The parties to an agreement for an exchange of properties had affixed their signatures to two

30. 160 So.2d 804 (La. App. 3d Cir. 1964).

31. *Maniscalco v. Glass*, 163 So.2d 438 (La. App. 2d Cir. 1964), *writ refused*, 165 So.2d 479.

32. 171 La. 659, 131 So. 840 (1930).

33. 245 La. 1017, 162 So.2d 346 (1964).

34. See 12 HENRI, LÉON & JEAN MAZEAUD, *LEÇONS DE DROIT CIVIL, OBLIGATIONS* n° 1225 (1962).

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1. 162 So.2d 119 (La. App. 1st Cir. 1964).

acts of sale and certain related agreements in writing devised to effect the exchange. However, in the process some interlineations had been made in pencil on a carbon copy of one of the writings and additional provisions had been written in longhand on a separate sheet of paper by the notary who prepared the acts, and he expressed a desire to have the document retyped. Although the parties considered this procedure unnecessary they agreed to return to affix their signatures to the redraft. Defendant failed to do so and announced his withdrawal. The court of appeal held unnecessary the initialing of the added details, and concluded that the evidence as a whole established a final agreement between parties. It will be interesting to see whether the decision is sustained, and, if not, whether the court will find that inasmuch as the signatures of the parties were not affixed to the additions, the rule requiring written evidence had not been satisfied. This, it appears, is the basic issue, and the point is an important one.

In *Bornemann v. Richards*² the Supreme Court restated the position it took in *Daum v. Lehde*,³ that where partial destruction of a thing covered by a contract to sell occurs before transfer of title, Civil Code article 2455 applies and the buyer has the choice of abandoning the contract or taking what is left, with the price determined by appraisal. On the facts before it, however, the court went on to find article 2044 applicable because the sale was subject to the suspensive condition of court approval. Thus the purchaser had the choice of dissolving his obligation (which he elected), or of taking the thing in the state in which it was, without diminution of price. By its terms, article 2455 applies when, at the moment the sale takes place, the thing has perished in whole or in part.⁴ As stated by Pothier, the underlying theory is that if the thing is then totally destroyed the sale falls for lack of an object, but if it is only partially destroyed the object still exists.⁵ Of course, the ultimate basis of relief rests in the theory of error; article 2455 is grounded on the assumption that the parties are not aware of what has happened.⁶ By giving the buyer who elects to retain the pre-

2. 245 La. 851, 161 So.2d 741 (1964). This case is also noted at 25 LA. L. REV. 569 (1965).

3. 239 La. 607, 119 So.2d 481 (1960).

4. 24 LAURENT, PRINCIPES DE DROIT CIVIL, DE LA VENTE n° 92 (4th ed. 1887).

5. 3 OEUVRES DE POTHIER, TRAITÉ DE CONTRAT DE VENTE n° 4 (2d ed. 1861):

6. "If the loss is partial and the buyer knows of it, he may not invoke the option accorded to him by article 1601 [La. Civil Code art. 2455] because he has

served part the right to claim a diminution in the price, consistency is established with the rule which gives the buyer a right to a proportionate reduction in the price in the event of a partial eviction.⁷ On the other hand, if the thing is impaired before the transfer of ownership takes place, such as when there is a suspensive condition, the only obligation of the seller is to deliver it to the buyer in the state in which it is found. Since the risk of impairment is not on the latter, he does not have to take the thing. At the same time, if he elects to take it, he has no claim for a diminution in price. According to Roman law and to Pothier, impairment was at the buyer's risk, that is, if the condition occurred he would have to take notwithstanding and without any diminution. The draftsmen of the Code Napoleon rejected this view on the basis of the principle *res perit domino*.⁸ If this is the controlling principle, it should apply under our law to the case where the impairment of the thing occurs between the confection of a preliminary contract to sell and the delivery of the act of sale, because during this period the vendor is still the owner. This would mean that, by virtue of our rule which leaves risk of loss on the vendor in a contract to sell pending delivery of an act of sale, impairment would not be at the buyer's risk, but neither would the buyer be entitled to a reduction in price if he decided to require delivery of the thing.

Article 2568 of the Civil Code imposes a rigorous limit of ten years on the exercise of a right of redemption. The limit in the Code Napoleon is five years. The purpose of the redactors of the latter in imposing a limitation was to overcome the ancient rule which applied a prescription of thirty years. They considered the reservation of a right of redemption for such a long period as injurious to the public interest in that it did not comport with the necessities of cultivation or with the principle

consented with the intention of buying the thing in the state in which it is found." 24 LAURENT, PRINCIPES DE DROIT CIVIL, DE LA VENTE n° 92 (4th ed. 1887).

7. LA. CIVIL CODE art. 2511 (1870).

8. "This decision [the decision of the Roman law] which Pothier adopted is not in accord with the principle under which, in the case of the suspensive condition, there is no transfer of ownership. That the thing is impaired or has become deteriorated should be at the risk of the debtor, who is still the owner, for the same reason that its loss is at his risk." Explanation of Bigot-Prémeneu. See 13 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 243 (1836). See criticism of rule in 2 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ DE DROIT CIVIL, DES OBLIGATIONS n° 854b (1905). The position of the authors is that the buyer should bear the risk of impairment since he profits by any increase which takes place before the condition occurs.

that ownership should not be rendered uncertain and fluctuating.⁹ In 1909 a landowner conveyed a tract of land for a price of \$114,600.00 and reserved a right to redeem the land for not exceeding \$100.00 after removal of the cypress timber thereon. In *Steib v. Joseph Rathborne Land Co.*¹⁰ the seller's suit to recover the property from a subsequent purchaser was dismissed. The agreement was held to be not a sale of timber nor a *vente a réméré* but a special contract under which the vendee undertook to reconvey the land. Plaintiff's suit was dismissed for failure to tender the agreed price on filing the action. The finding that the transfer was not a *vente a réméré* was in answer to defendant's contention that the ten-year period of redemption had expired and was based on the ground that since the vendor reserved the right to redeem the land after it had been denuded of the cypress he had not reserved the right to redeem the "thing" sold within the meaning of article 2567. This reason seems to the writer somewhat artificial. If the transfer was a sale of land, as found, rather than a sale of timber, it seems to follow that the "thing" which the plaintiff was seeking to redeem was likewise "land." Although no discussion of this kind of problem has been found in the French commentaries, Pothier, in considering the question of whether the redemptive price might be greater or smaller than the price received, observed that there would be nothing illicit in such a provision and nothing repugnant to the nature of the contract.¹¹ Since there is likewise nothing illicit in the vendor's granting to the vendee the right to denude the land of timber and nothing repugnant to the reservation of a right of redemption with respect to the land, the transaction in question might well have been treated as a *vente a réméré*. In addition, the considerations of policy which dictated the adoption of a ten-year period for the exercise of a right of redemption under a *vente a réméré* seem equally applicable to the contract before the court.¹²

An intriguing and baffling problem was presented to the

9. 24 LAURENT, PRINCIPES DE DROIT CIVIL, DE LA VENTE n° 384 (4th ed. 1887).

10. 163 So. 2d 429 (La. App. 4th Cir. 1964).

11. 3 OEUVRÉS DE POTHIER, TRAITÉ DE CONTRAT DE VENTE n°s 413-414 (2d ed. 1861). See also 5 AUBRY ET RAU, DROIT CIVIL FRANÇAIS, DE LA VENTE n° 357 (6th ed. 1946).

12. It may be noted, also, that the fruits of the thing belong to the purchaser until the right of redemption is exercised (LA. CIVIL CODE art. 2575 (1870)), and even if the vendee might not be permitted to cut growing timber except for his own use (*but see id.* art. 551, and *Patterson v. Bonner*, 19 La. 508 (1841)).

Third Circuit in *Humble Oil Ref. Co. v. Boudoin*.¹³ At issue was the question whether the heirs of a deceased mother could assert their rights by way of inheritance to her one-half interest in community property sold after her death by the father to an heir of a second marriage. All the heirs of both marriages had unconditionally accepted their father's succession. On rehearing, the court reversed its original opinion and held the plaintiff heirs estopped to assert their rights. It is clear that if the sale by the father had been to a stranger, the plaintiffs, having accepted their father's succession unconditionally, would have been estopped to contest the buyer's title.¹⁴ Since the transferee was an heir who had also accepted, unconditionally, his father's succession, the court had to decide whether estoppel would operate in his favor. It so held. Two judges, dissenting, believed that the theory of estoppel should operate against the transferee as well as the plaintiff heirs, and that mutual cancellation would take place. The writer finds himself in sympathy with this result. It seems inaccurate to say, as did the majority opinion, that the father owed only a duty to pay damages to the heirs whose property he had undertaken to transfer.¹⁵ He owed them, as the owners of a half interest in the property, the obligation to render to them that which was theirs, which would comprehend the negative obligation not to do anything prejudicial to their right.¹⁶ Having violated this obligation, his primary duty, therefore, was to restore them to their former position. The existence of this duty should not be affected by the fact that he might not have been able to fulfill it, or that another form of relief might have been available to them, namely, revendication.

13. 154 So. 2d 239 (La. App. 3d Cir. 1963).

14. *Griffing v. Taft*, 151 La. 442, 91 So. 832 (1922); *Robinson v. Dunson*, 65 So. 2d 643 (La. App. 1st Cir. 1953).

15. "The point, at which we fell into error in our original opinion, was in stating that Pierre Boudoin, by attempting to sell the one-half interest of the six heirs, became obligated to return this interest to said heirs. We now perceive that Pierre had no legal duty to return to the heirs their interest in the property. He could not return it. He never owned it. After the sale to Leon he didn't even own his own one-half interest. Pierre's liability to the six heirs was solely for damages." *Humble Oil & Refining Co. v. Boudoin*, 154 So. 2d 239, 250 (La. App. 3d Cir. 1963).

16. "It makes no difference that he who has sold as his own a thing that he knows belongs to me, possesses it without title, or by virtue of a just title . . . for although he possesses it under onerous title, although he bought it in good faith, as long as he knows that it belongs to me he has not the less contracted the obligation to render it to me. The natural law does not prohibit only the taking, but also the retaining of the property of another." 3 *OEUVRES DE POTHIER, TRAITÉ DE CONTRAT DE VENTE* n° 773 (2d ed. 1861). See also *Kramer v. Freeman*, 198 La. 244, 3 So. 2d 609 (1941); LA. CIVIL CODE arts. 535, 2301, 2312 (1870).

It follows, therefore, that when the transferee accepted his father's succession he assumed this duty. Furthermore, he was in a position to discharge it by an act recognizing the interest of the plaintiff heirs. Thus, the duty he owed them should have nullified his right to demand that they defend his acquisition.

The Uniform Commercial Code gives to the parties to commercial transactions a very considerable latitude with provisions relating to price. The price can be left open, or for further agreement, or for fixing on the basis of an agreed market or by one of the parties, for example, and the contract will be found binding, if the parties so intend, and enforced on the basis of a reasonable price.¹⁷ Our courts have not been so lenient. In *Princeville Canning Co. v. Hamilton*¹⁸ an agreement in writing covering the purchase and sale of sweet potatoes over a period of time contained a provision reading, "Contract prices will increase according to market rise." The court apparently construed this provision as constituting an agreement on the part of the parties to buy and sell at the market price, but found no agreement between them on how the market price was to be established. It therefore concluded that the agreement was too indefinite to be enforceable. The legislature is contemplating consideration of the Uniform Commercial Code for adoption in Louisiana. If it had been applicable, a different judgment might have been rendered in this case, but this possibility should cause no alarm. There is much to be said in favor of enforcing commercial agreements.

In *Succession of Clark*¹⁹ a married son with two children made a transfer in the form of a sale to his father. It was held that the plaintiff, as a forced heir of the transferor, was entitled to establish by parol evidence that no price was paid and that the transfer was a donation. It was further held that the transfer was reducible to the extent that it exceeded the disposable portion. The court observed that article 2239 establishes only a rule of evidence, not a property right; that it does not enlarge the right of a forced heir to the legitime or decrease the disposable portion. The conclusion was, therefore, that plaintiff was entitled to annul or reduce the transfer to the extent it impinged on the legitime. Since the transfer was not to a forced

17. UNIFORM COMMERCIAL CODE § 2-305.

18. 159 So.2d 14 (La. App. 1st Cir. 1963).

19. 155 So.2d 37 (La. App. 4th Cir. 1963).

heir the conclusion seems correct. It is not clear, however, whether this was based on the allegations in plaintiff's petition or on the theory that in no event could such a transfer be annulled in its entirety. Where the evidence shows that a simulated transfer was intended rather than a real transfer by way of donation, disguised, however, in the form of a sale, a pronouncement of total invalidity would be in order even with respect to the disposable portion.²⁰

In *Succession of Lewis*²¹ a father's attempt to prejudice the rights of his forced heirs to his separate property by a sale to a third party followed by a reconveyance to him and his second wife was declared a fraudulent simulation and annulled in its entirety. Of course, the ancestor manifestly intended to benefit his wife out of a spirit of liberality and he could have made a donation to her that would have been effective with respect to the disposable portion. Nevertheless, his undertaking, by means of the two sales, to establish in her a right to a share in the property as a partner in the existing community could clearly not be given such effect notwithstanding that the sales were in authentic form.

LEASE

Of Things

In *Morrison v. Faulk*²² it was properly held that the purchase by a lessor of the lessee's right of occupancy did not defeat his privilege on the movables of the lessee notwithstanding that the sale of the right of occupancy was made first. The lessee's attempt to distinguish the case of *Ranson v. Voiron*²³ on this basis was found without merit.

The mere acceptance by a lessor of less than the whole rent due at any time does not evidence an intention voluntarily to surrender the right to the balance due, nor is any element of estoppel present. This was the view the court took in *Nagem v.*

20. Whether such a result was intended by the amendment to art. 2239 has been questioned. See Lemann, *Some Aspects of Simulation in France and Louisiana*, 29 TUL. L. REV. 22, 48 (1954). But see *Schalaida v. Gonzales*, 174 La. 907, 142 So. 123 (1923); *Johnston v. Bearden*, 127 So.2d 319 (La. App. 2d Cir. 1961), cert. denied; *Westmore v. Harz*, 111 La. 305, 35 So. 578 (1902).

21. 157 So.2d 321 (La. App. 4th Cir. 1963).

22. 158 So.2d 837 (La. App. 4th Cir. 1963), writ refused, 245 La. 643, 160 So.2d 229 (1964).

23. 176 La. 718, 146 So. 681 (1933).

Foret's Drug Store.²⁴ The lessor, however, had consented to a reduction for a period of three months and his right should have been limited accordingly. The opinion appears to suggest the contrary. If acceptance by the lessee of the proffered reduction was considered lacking it might well have been inferred from his continuing to occupy the premises and make payments on the rent.

A lessor, under a lease which prohibited sub-leasing without his consent, rejected a tendered sub-lessee and then leased similar space to the same person. The lessee sued for cancellation of the lease and damages. It was held that a cause of action had been stated.²⁵ Although the court recognized prior jurisprudence to the effect that the provision in article 2725 reading, "this clause [interdicting sub-leasing] is always construed strictly" requires strict construction against the lessee, it concluded that on the clear proof before the court the lessor did not have the right arbitrarily to reject the sub-lessee. The language of the French Code is, "*cette clause est toujours de rigueur.*" A translation less ambiguous than that in article 2725 might have been, "this clause is always to be enforced rigorously." There is no doubt this is what the redactors meant. At the same time, the French courts have now tempered the application of the provision and have assumed control over the legitimacy of the lessor's refusal under the doctrine of the abuse of rights or on the ground that when the contract expressly recognizes the possibility of sub-leasing there is an implied obligation on the part of the lessor not to cause prejudice to the value of the lessee's interest by his own act.²⁶

Labor or Industry

In *Pitcher v. United Oil & Gas Syndicate, Inc.*²⁷ the Supreme Court, by way of dictum, said of a contract binding the employer to provide employment for a longer period than allowed by article 167 of the Civil Code: "But if the employee has given, in

24. 162 So. 2d 354 (La. App. 3d Cir. 1964), *writ refused*, 246 La. 368, 164 So. 2d 358 (1964).

25. *Gamble v. New Orleans Housing Mart, Inc.*, 154 So. 2d 625 (La. App. 4th Cir. 1963).

26. 5 AUBRY ET RAU, DROIT CIVIL FRANCAIS, DU LOUAGE 253 and note 8 (6th ed. 1946); 6 *id.* 461. See also 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no 1752 and note 42 (1959).

27. 174 La. 66, 139 So. 760 (1932).

addition to the services which he promised to perform, a consideration, whatever the nature of such consideration be, then he has in effect purchased, for a valuable consideration, an option to keep the employment for the term specified; and such a contract is a valid one." This writer believes that this is sound doctrine not in conflict with the prohibition against an employee's binding himself for a period exceeding ten years as now allowed.²⁸ Indeed, it is also believed that the employer should be able to bind himself for any term even if his only purpose in doing so is to induce the employee to accept employment on an "at-will basis" as far as the employee is concerned. The notion that an employer cannot legally bind himself for a term unless the employee binds himself for a like term is contrary to the genius of our system and to a recent pronouncement of the Supreme Court.²⁹ The prohibition in the Code seems clearly designed to *protect* an employee against the possibility of binding himself for a period longer than ten years. Surely this policy should not be held to deprive the employee of the benefit of an employer's promise of a lifetime job given in return for surrender by the employee of his claim for workmen's compensation. Nevertheless, the discharged employee's suit was dismissed in *Smith v. Sohio Petroleum Co.*³⁰

The Supreme Court has granted an application for a writ of certiorari in the case of *S. & W. Investment Co. v. Otis W. Sharp & Son*,³¹ wherein the lower court imposed on the owner the risk of loss of the shell of an incompleated swimming pool for which he had contracted. This holding resulted from an application of article 2761 of the Civil Code, which covers work composed of detached pieces, or made at the rate of so much a measure, and a finding that the owner had made a "progress payment" of \$3,000.00 upon the completion of the shell. Judge Yarrut dissented. There is need for a clarification of the rights of the parties under construction contracts calling for progress payments. It is doubtful that payments on account during the course of construction work should be counted as an acceptance of what has been done at least in the absence of a special impu-

28. LA. CIVIL CODE art. 167, as amended by La. Acts 1964, No. 355.

29. See *Long v. Foster & Associates*, 242 La. 295, 136 So.2d 48 (1961); LA. CIVIL CODE art. 2036. Even the common law doctrine of consideration does not require a different result. *Newhall v. Journal Printing Co.*, 105 Minn. 44, 117 N.W. 228 (1908).

30. 163 So.2d 124 (La. App. 3d Cir. 1964).

31. 162 So.2d 171 (La. App. 4th Cir. 1964).

tation of the payment by the contract to the completed portion or portions.³²

The decision of the Fourth Circuit Court of Appeal in *Diesel Equipment Corp. v. Epstein*³³ has been affirmed by the Supreme Court³⁴ and will be reviewed next year.

TORTS

*Wex S. Malone**

The enlarged scope of the Symposium on the Work of the Louisiana Appellate Courts faces the reviewer with a choice of three approaches. First, in considering the several hundred torts decisions of the past year the reviewer could list and give a bare abstract of all the cases. This, I am sure, can be better done by the commercial digesters. Second, he can select for a little more detailed discussion those cases which he regards as "important" and ignore the remainder; or, finally, he can carve out of the mass of cases just a few areas that he regards as offering an unusual challenge. This highly limited approach makes possible a relatively full discussion within its narrow compass. This reviewer has chosen the last of these three alternatives. My choice was dictated almost entirely by personal preference and the feeling that I can be of more service in this way. The reader, however, will recognize that many important decisions that otherwise would deserve discussion have been ignored.

LIABILITY OF PROPRIETORS OF PUBLIC PLACES

Res Ipsa Loquitur

At times difficult duty problems lurk behind what appear to be simple matters of evidential proof. While Mrs. Pilie was proceeding down an aisle in a Baton Rouge National Food Store, two six-bottle cartons of Coca-Cola suddenly fell from a display

32. See 5 AUBRY ET RAU, DROIT CIVIL FRANCAIS, DU LOUAGE, n° 374 (6th ed. 1946).

33. 159 So. 2d 1 (La. App. 4th Cir. 1960).

34. 169 So. 2d 61 (La. 1964).

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