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Sales - Partial or Total Destruction of the Thing Under the Contract to Sell

Julian Clark Martin

SALES — PARTIAL OR TOTAL DESTRUCTION OF THE THING UNDER THE CONTRACT TO SELL

Plaintiff and defendant entered into a written agreement to sell a house and lot.[1] As a private sale of succession property, the agreement was made subject to court approval.[2] Prior to the approval and signing of the act of sale, a substantial portion of a small flower garden, alleged to be one of the property's principal attractions, was ruined by a heavy freeze. Thereafter, court approval of the sale was acquired but the defendant refused to take title to the property. Plaintiff sought specific performance and, in the alternative, forfeiture of the deposit. The trial court dismissed the suit and ordered the deposit returned. On appeal, plaintiff abandoned the demand for specific performance and the Fourth Circuit Court of Appeal ordered the deposit forfeited. On certiorari, the Louisiana Supreme Court reversed. *Held,* the potential vendee under a contract to sell subject to a suspensive condition is entitled to have the agreement dissolved and the deposit returned if the object of the agreement is partially destroyed after entering the contract to sell but before fulfillment of the condition. *Bornemann v. Richards,* 245 La. 851, 161 So. 2d 741 (1964).

The French Civil Code treated a promise of sale as a unilateral contract, binding on the promisor but imposing no obligations upon the promisee.[3] A promise of sale was converted directly into a completed sale by the reciprocal consent of the parties to the thing and price, even though the thing had not yet been delivered nor the price paid.[4] Although the Louisiana Civil Code included a promise of sale in terms taken from the French Civil Code,[5] the law was later amended to state that upon reciprocal consent the promise of sale so far amounts to a sale as to give either party the right to demand specific performance.[6] This modification created a new type of agree-

1. Upon entering the contract to sell, the defendant deposited ten percent of the proposed purchase price. 245 La. at 854, 161 So. 2d at 742.

2. LA. CODE OF CIVIL PROCEDURE arts. 3281-3285 (1960).

3. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 1400, 1401 (1959) [hereinafter cited as PLANIOL].

4. FRENCH CIVIL CODE arts. 1583, 1589.

5. La. Civil Code p. 346, art. 9 (1808), adopted from FRENCH CIVIL CODE art. 1589.

6. LA. CIVIL CODE art. 2462 (1870), as amended by La. Acts 1920, No. 27. As far as movables are concerned, a contract to sell would be a rare occurrence

ment — the contract to sell.[7] Therefore, in Louisiana, the acceptance of a promise of sale may, conceptually, convert the agreement directly into a completed sale, or, as normally done, convert the promise of sale into a bilateral contract to sell and thereafter into a completed sale.

Under both Louisiana and French law[8] a sale formed subject to a suspensive condition creates a binding bilateral contract.[9] Neither party is privileged to withdraw pending fulfillment of the condition; mutual rights and duties exist although performance of the contract is suspended. When the condition has been fulfilled, ownership passes and the rights of the parties are retroactive to the date of the original agreement.[10]

The Louisiana Civil Code articles relative to partial or total destruction of the object of the completed sale are based upon the French Civil Code. The French Civil Code based relief upon two different theories: that of "cause" and that of "risk follows ownership." Whenever the object of the sale was partially or totally destroyed "at the moment of" the sale,[11] or when the

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as a completed sale is formed whenever there is consent as to the thing and price. *Id.* art. 2439. However, if the parties clearly express their intentions, it should be possible to form an agreement binding upon both parties which is not a completed sale, but merely looks forward to the subsequently completed sale of the movable. It appears, though, that this agreement would impose mutual "obligations to do" upon the parties and therefore damages would be the normal remedy for default, rather than specific performance. *Id.* art. 1926.

7. See Smith, *An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money*, 20 LA. L. REV. 522, 529 (1960).

8. LA. CIVIL CODE arts. 2043, 2044 (1870) deal with the suspensive condition and were adopted from the FRENCH CIVIL CODE arts. 1181, 1182. However, courts have made some minor changes in Louisiana law.

Under French law, the parties may agree to suspend the transfer of ownership until the price is paid, even though there has been consent as to the thing and price. The Louisiana Civil Code, with its identical articles, appears to establish the same law, but jurisprudence has definitely established that Louisiana will not allow a conditional sale of a movable in which the payment of the price is suspended. See, *e.g.*, Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908).

9. LA. CIVIL CODE art. 2028 (1870).

10. See *The Work of the Louisiana Supreme Court for the 1958-1959 Term — Particular Contracts, Sales*, 20 LA. L. REV. 226, 227 (1960). Professor Smith notes that a discrepancy appears between the French law and the English translation. The French version indicates that the obligation exists, but is merely suspended pending the occurrence of the event, while the English translation, as applied in Zemurray v. Boe, 235 La. 623, 105 So. 2d 243 (1958), suggests that there is no obligation until the event occurs.

11. The French law holds the sale is null if the thing is totally destroyed, while if the thing is only partially destroyed, the purchaser has the option either to abandon the sale or take the thing with diminution of the price. FRENCH CIVIL CODE art. 1601. From general application of the theory of cause, it follows that

object of the sale was totally destroyed pending the accomplishment of a suspensive condition to that sale,[12] then relief was granted based upon the theory of cause. When the thing was

when the object of the sale is completely destroyed, the principal cause of the agreement no longer exists and the sale is null. See 11 BEUDANT, COURS DE DROIT CIVIL FRANÇAIS nos 74, 75 (2d ed. 1938) [hereinafter cited as BEUDANT]; 9 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 157 (1856) [hereinafter cited as FENET]; 2 PLANIOL no. 1366. Where the partial destruction is so insignificant that it might be assumed the buyer would have contracted anyway, it has been argued that a vigorous application of cause would force the buyer to accept the thing in its diminished state with a diminution in price. See BAUDRY-LACANTINERIE ET SAIGNAT, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL, DE LA VENTE ET DE L'ECHANGE n° 99 (3d ed. 1908) [hereinafter cited as BAUDRY-LACANTINERIE ET SAIGNAT]. However, the redactors gave the purchaser the option to annul the contract or take the thing with diminution of price, thus rejecting a strict application of cause in the case of partial destruction. Further, the French Civil Code failed to state specifically that the buyer should not be able to annul the contract unless the cause of the contract had ceased to exist, thus leading to the argument that any destruction will suffice to allow the buyer to exercise his option. See 2 PLANIOL no. 1367. *But see* BAUDRY-LACANTINERIE ET SAIGNAT n° 99; 11 BEUDANT nos 74, 75, which state that the option should not be allowed for an insignificant partial destruction when the buyer merely wishes to give up the contract.

The Louisiana law is in accord as this French principle was adopted in LA. CIVIL CODE art. 2455 (1870): "If, at the moment of the sale, the thing sold is totally destroyed, the sale is null; if there is only a part of the thing destroyed, the purchaser has the choice, either to abandon the sale, or to retain the preserved part, by having the price thereof determined by appraisement."

The remedies allowed under LA. CIVIL CODE art. 2455 (1870) should apply only where the parties were unaware of the partial or total destruction of the thing when they completed the sale. See BAUDRY-LACANTINERIE ET SAIGNAT n° 99. If, at the time of the sale, the parties were aware of the partial or total destruction, then the intention of the parties shall govern and the buyer will not be allowed to have the contract annulled or the price diminished. See 6 MARCADE, EXPLICATION THEORIQUE ET PRATIQUE DE CODE CIVIL n° 1601 (7th ed. 1875). If only the seller had knowledge of the destruction, there would almost certainly be fraud on his part, thus the buyer could be allowed rescission of the contract of sale due to error. LA. CIVIL CODE arts. 1847, 1881, 1882 (1870). These remedies will not be allowed when the thing was destroyed through the fault of one of the parties. If the thing was destroyed through the fault of the seller, the buyer may take the thing as is and demand damages, or have the contract annulled. See 9 FENET 157.

It is submitted that these remedies under LA. CIVIL CODE art. 2455 (1870) should not be limited to the situation where the destruction occurs at the exact moment of the sale, but should apply any time the parties enter the contract of sale unaware of the damage to the object of the sale.

12. In both France and Louisiana, although the sale has been completed, until the suspensive condition contained in the sale has been fulfilled, the vendor is still the owner of the thing; if the thing is totally destroyed, the cause of the contract no longer exists and it is said the obligation likewise never existed. See 2 PLANIOL no. 1350; LA. CIVIL CODE art. 2044 (1870) (in part): "When the obligation has been contracted on a suspensive condition, the thing, which forms the subject of the contract, is at the risk of the obligor, until the event which forms the condition has happened, subject however to the following restrictions and modifications of his responsibility: If the thing be entirely destroyed, without the fault of the debtor, the obligation is extinguished . . . ."

If the fault of one of the parties prevented the contract from forming, then the other party, who is deprived by such fault of the benefit which he hoped to receive from the contract, should have the right to obtain damages.

As to partial destruction of the object of the contract of sale subject to a suspensive condition, see note 15 *infra*.

partially or totally destroyed before the completion of the sale,[13] when the object of the sale was partially or totally destroyed after completion of the sale,[14] or when the object of the sale was partially destroyed pending accomplishment of a suspensive condition to that sale,[15] the relief was, arguably, based upon the doctrine that risk follows ownership.

13. In both France and Louisiana, all changes, whether augmentation or repairment, affect the vendor. LA. CIVIL CODE arts. 2467-2473 (1870); Smith, *An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money*, 20 LA. L. REV. 522, 545 (1960). The doctrine that risk follows ownership is applicable; the seller still owns the thing and hence the risk is upon him. Generally, the risk transfers from the seller to the buyer upon completion of the sale. See LA. CIVIL CODE arts. 2467-2473 (1870). In Louisiana, as far as movables are concerned, the completion of the sale and the shifting of the risk occurs when the parties consent to the thing and price, even though the thing has not yet been delivered nor the price paid. LA. CIVIL CODE art. 2456 (1870). From the terms of the Louisiana Civil Code, it appears the same rules apply to immovables, with the additional requirement that the contract be written. See *id.* art. 2462. However, the jurisprudence has also required that there be delivery of the deed before the sale is complete. See, *e.g.*, Legier v. Braughn, 123 La. 463, 49 So. 22 (1909).

When the thing is partially or totally destroyed before the completion of the sale, and the purchaser is aware of the destruction, but still enters the contract, the intention of the parties should govern, and he should not be allowed relief from his agreement.

14. After completion of the sale, the thing sold is at the risk of the buyer although the thing has not been delivered nor the price paid. See LA. CIVIL CODE arts. 2456, 2467-2473 (1870). This is simply an application of the principle that risk follows ownership; the buyer is now the owner of the thing and consequently bears the risk. It should be noted, however, that even though the sale be complete, if the thing is partially or totally destroyed after the seller is in default for non-delivery, the seller bears the loss unless it was destroyed by a fortuitous event which would have also destroyed the thing had the buyer possessed it. *Id.* art. 2470.

15. If the object of the sale is totally destroyed pending fulfillment of the suspensive condition, then the cause of the contract no longer exists and the obligation is extinguished. See note 12 *supra*.

In relation to partial destruction of the object of the sale prior to fulfillment of the suspensive condition, Pothier believed that the vendee should suffer in the same manner he would profit if any argumentation occurred. 1 POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS n° 219 (Evan's transl., 3d Am. ed. 1853); 1 POTHIER, TREATISES ON CONTRACTS n° 312 (Cushing's transl. 1839). The redactors of the French Civil Code did not adopt this belief, rather they granted the vendee an option either to annul the contract or take the thing as is without diminution of the price. FRENCH CIVIL CODE art. 1182, which now appears in the Louisiana law as LA. CIVIL CODE art. 2044 (1870): "When the obligation has been contracted on a suspensive condition, the thing, which forms the subject of the contract, is at the risk of the obligor, until the event which forms the condition has happened, subject however to the following restrictions and modifications of his responsibility:

"If the thing he entirely destroyed, without the fault of the debtor, the obligation is extinguished.

"If the thing be impaired, without the fault of the debtor, it is at the option of the creditor, either to dissolve the obligation or to require the thing in the state in which it is, without diminution of the price.

"If the thing be impaired through the fault of the debtor, the creditor has the right to dissolve the obligation, or to require the thing in the state in which it is with damages."

The granting of the option to the vendee by the redactors of the French Civil

However, there exists a situation peculiar to Louisiana in which the object of the agreement may be partially or totally destroyed after the formation of a contract to sell but before completion of the sale. There are no code articles which directly govern this problem. The closest analogy to existing code articles must be drawn with article 2455,[16] which applies to destruction of the object of the sale at the moment of the sale and is based upon the principles of cause, and article 2044,[17] which applies if the sale is contracted subject to a suspensive condition and grants relief mainly upon the principle that risk follows ownership.

In the instant case, the purchaser desired only to abandon the contract to sell and recover the deposit. The court, in holding for the purchaser, seems to have applied article 2455 primarily,[18] but stated as a further reason for the annulment of the contract to sell that the suspensive condition in the agreement brought article 2044 into operation. Pretermitting the question whether application of either article is proper, it should be noted that both articles, by their terms, offer the relief the purchaser desired. However, had the purchaser under the contract to sell desired to take the thing in its diminished state, the court would have been faced with an important res nova issue. In the latter situation the two articles offer different remedies: article 2455 allows the purchaser to take the thing with diminution of the price, while article 2044 allows the purchaser to take the thing without diminution of the price. It appears that

Code, which was subsequently adopted into the Louisiana Civil Code, did not pass without dissent. The argument was raised that the option is inconsistent with the Code in that the seller is not granted the same option if the object of the sale increases in value prior to fulfillment of the condition. 4 MARCADE, EXPLICATION THEORIQUE ET PRATIQUE DE CODE CIVIL 470 (7th ed. 1873); 11 DURANTON, COURS DE DROIT FRANÇAIS nos 73-80 (1834). It appears that the reasoning for the granting of the option was based upon the principle that risk follows ownership. As the vendor remained owner of the thing until the condition was fulfilled, it seemed unfair to force the vendee to take the thing if partially destroyed. See 8 FENET 243.

Article 2044 deals with obligations formed subject to a suspensive condition and is not limited to the contract of sale. Therefore, it should also be applied to the situation where the parties have entered into a "contract to sell" subject to an express suspensive condition. Such was the situation in the instant case.

16. LA. CIVIL CODE art. 2455 (1870), quoted in note 11 *supra*.

17. *Id.* art. 2044, quoted in note 15 *supra*.

18. It should be noted that the court allowed the purchaser to annul the contract under LA. CIVIL CODE art. 2455 (1870) when the amount of the partial destruction was less than one percent of the proposed purchase price. Unless weight is to be given to the fact that this house was located within the "Garden District" of New Orleans, it appears the court is not going to require "substantial" destruction in its application of article 2455. See note 11 *supra*.

neither the language of the court nor the facts of the instant case offer a solution to this problem. However, the opinion implies that but for the express suspensive condition — the requirement of court approval — article 2044 would not have been applicable. Apparently, if the parties had merely agreed to come together at some future date and deliver title, the court would have applied article 2455.[19]

It is submitted that by its terms article 2455 is inapplicable as *direct* authority, either for the solution of the instant case, or for the solution of the related problem in which the purchaser demands the thing in its diminished state, because in neither case is there a completed sale. Article 2455 should be applied as direct authority only when the parties enter into a completed sale unaware of the partial or total destruction of the object of the sale. This should include the situation where the parties entered into a prior contract to sell and then later actually formed a completed sale unaware of the partial or total destruction of the thing.[20] It is submitted that article 2044 should be applied to the contract in the instant case as there exists, in fact, an obligation subject to a suspensive condition — a contract to sell subject to court approval.

The agreement in the instant case is not the normal contract to sell in which the parties are merely "looking ahead" to a sale and which contains no express suspensive condition. The ordinary contract to sell cannot properly be construed as an obligation subject to a suspensive condition in order to allow direct application of article 2044, because, properly speaking, a suspensive condition is one which depends "either on a future and uncertain event, or an event which has actually taken place, without its being yet known to the parties."[21]

19. The court would have done this even though application of article 2455 would have been contrary to the court's express acknowledgment that there is a difference between the contract to sell and the completed sale, that the Louisiana Civil Code does not intend the result to be the same for both, that the instant agreement is a contract to sell, and that article 2455 by its terms deals with destruction of the object of the contract at the moment of the sale. "It occurs to us that we are compelled to note the vastly different language used in the articles pertaining to a promise to sell (looking forward to a future sale) and in those which permit the dissolution of a completed sale, and to conclude that because of such differences the redactors of the Code did not intend that the result in the two situations would be the same." 245 La. at 858, 161 So. 2d at 744.

20. See note 11 *supra*.

21. LA. CIVIL CODE art. 2043 (1870).

The court in determining a suitable remedy in the instant case should also consider the related problem in which the purchaser under a normal contract to sell desires to take the thing in its diminished state. In determining a suitable remedy for the related problem, it appears that the same solution is drawn from two different reasoning processes. It may be reasoned that a contract concerning the sale of property has been formed which requires the occurrence of a condition before ownership may be transferred — the condition being that the parties come together and transfer title. Thus the contract to sell might be sufficiently analogous to a contract under a suspensive condition to justify application of article 2044.[22] Also, the court, rather than applying a code article by analogy, might resolve the problem under general principles of law. Looking to the substance of the agreement, it is clear that the vendor under a contract to sell is still the owner of the thing and therefore he should bear the risk if any partial or total destruction of the thing occurs after the contract to sell is formed. This situation is to be distinguished from the case where the object of the contract was already partially or totally destroyed before the contract to sell was formed;[23] in the latter situation the court has granted relief on the basis of cause as reflected in the articles of the Louisiana Civil Code relating to error.[24] Thus, in the case where the thing is destroyed during the existence of the contract to sell, application of the principle that "risk follows ownership" seems in order, rather than application of the principle of "cause," which applies when the thing was destroyed before the formation of the contract to sell or "at the moment" of a completed sale. The remedy allowed by the Code under the principle of "risk follows ownership" permits the purchaser to rescind the contract or take the thing in its diminished state without reduction of the price. If the latter remedy be thought too harsh, it

22. *The Work of the Louisiana Supreme Court for the 1959-1960 Term — Particular Contracts, Sale*, 21 LA. L. REV. 313 (1961).

23. See Stack v. Irwin, 246 La. 777, 167 So. 2d 363 (1964) where the vendor and the purchaser entered a contract to sell looking forward to a subsequent sale of the house. Although the facts are not completely clear, it appears the house was already "partially destroyed," or contained a defect, before the contract to sell was formed. The damage was discovered by the purchaser before the sale was perfected. The court held the determining motive or cause of the purchaser was to secure a residence so free of substantial defects that no major repairs would be required. As such, there was error relating to the principal cause of the contract that warranted a rescission of the contract and a return of the deposit.

24. LA. CIVIL CODE arts. 1820-1849, 1881-1882 (1870).

must be remembered that the purchaser may always dissolve the existing contract completely and renegotiate for the damaged property at its true worth.[25]

In order to provide a proper solution for this problem, it is submitted that legislative action should be taken to define the consequences of destruction of the thing under a contract to sell. Alternatively, it is suggested that the courts re-evaluate their approach to the problem. The theoretical basis for future decisions in this area should be altered in order to preserve symmetry in different factual situations, including the case in which the purchaser under a contract to sell desires to take the partially destroyed thing in its diminished state. Thus, the purchaser under a contract to sell, who seeks relief because the object contracted for has been totally or partially destroyed, should be granted the option either to dissolve the contract or take the thing in its diminished state at the previously agreed upon price.

Julian Clark Martin

25. It appears the purchaser would be unable to complete the sale and then attempt to claim redhibiton because the "defect" in that event would not be hidden when the sale was completed, since the purchaser previously had knowledge of the "defect" or destruction. *Id.* arts. 2520-2523.

The purchaser should not be able to complete the sale and demand reduction of the price under article 2455 because the purchaser had knowledge of the partial destruction and the intention of the parties should govern. See note 11 *supra*.