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Private Law: Particular Contracts

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Partition on Dissolution

*Lester v. Lester*²⁴ is to be noted as a decision very correctly recognizing that, on the termination of the community of gains by separation from bed and board, the wife accepting the community simply may demand an immediate partition regardless of what debts the spouses may have. This, indeed, is exactly what articles 2406-2409 of the Civil Code state; and, moreover, if the Civil Code is construed correctly, not even the wife's acceptance with benefit of inventory may operate to deny to her or the husband the right to an immediate partition regardless of debts. Any other constructions would be inconsistent with article 1047 of the Civil Code, made applicable by R.S. 9:2821 to the wife's acceptance of her share of the community of gains with benefit of inventory.

It is regrettable, however, that the opinion in *Lester* does not demonstrate the correctness of its conclusion on the basis of the legislation. Indeed, the only discussion of legislation in *Lester* is the denial, correct in itself, that article 2403 of the Civil Code implies the necessity of a "liquidation" of the community simply because it specifies that separate debts are to be paid with separate funds and community debts with community funds. That article does no more than state a rule of accounting between the spouses.²⁵ The misunderstandings on this point and many others in the law of the community of gains can be traced to the tendency to regard the community as an "entity" with its own rights and obligations rather than as a purely contractual arrangement between the spouses. The error of this "entity" concept, however, has been alluded to in the previous section and has been demonstrated quite convincingly in a recent student comment.²⁶ The demonstration need not be repeated here.

PARTICULAR CONTRACTS

*J. Denson Smith**

A considerable number of cases decided by the appellate courts during the 1970-71 term dealt with sales, leases, and other

24. 245 So.2d 478 (La. App. 3d Cir. 1971).

25. See Bilbe, Note, 29 LA. L. REV. 409 (1969).

26. LeBlanc, Comment, 30 LA. L. REV. 603 (1970).

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particular contracts, but most of them called for the application of established jurisprudence and were disposed of on the basis of the evidence. Only a few comments may be counted as warranted.

If a seller knows the vice of the thing he sells and omits to declare it, he is answerable under Civil Code article 2545 in damages in addition to a return of the purchase price, and, since an amendment in 1968 to this article, to attorneys' fees as well. Article 2545 seemingly applies to a case where, for example, an immovable covered by a contract to sell is damaged by a fortuitous event prior to the transfer, as known by the seller but not the buyer. In *Reff v. Comeaux*,¹ which involved these facts, the court applied article 2455 rather than 2545. The purchaser was held entitled to a reduction in the price measured by what the repairs would cost. This award is in keeping with general jurisprudence and would have been clearly supportable under article 2545 because of the seller's knowledge at the time of the sale of the damage caused by a hurricane. It is believed that article 2455 properly applies when neither party knows of the partial destruction.²

Under established jurisprudence a lessor may not evict a lessee and also demand rent following the eviction. If judgment is obtained for the rent due to the end of the term of the lease, the tenant is entitled to the possession of the premises. In *327 Bourbon Street, Inc. v. Pepe, Inc.*³ the supreme court sustained a lessor's suit to evict the tenant for non-payment of rent and for failure to satisfy other conditions of the lease, notwithstanding that prior to the suit to evict, the landlord had demanded payment of the rent to the end of the term. Inasmuch as the lessor had not sought to recover the accelerated rent, it was held that he was not seeking at the same time to enforce the lease and also to cancel it. The court was careful to point out by way of a footnote that it was not expressing an opinion concerning the possibility of a lessor's seeking cancellation of the lease for violation of some provision thereof other than the payment of rent following recovery of a judgment for rent to the end of the term. The indication was, however, that a lessor would not be entitled to rent and cancellation of the lease for the same period. The sound-

1. 237 So.2d 720 (La. App. 4th Cir. 1970).

2. See 25 LA. L. REV. 326, 327 (1965).

3. 257 La. 577, 243 So.2d 262 (1971).

ness of this is convincing. Otherwise, the retention of the rent would be *sans cause*.

*Clay-Dutton, Inc. v. Plantation Nursing Home*⁴ held that the deficiency judgment provisions of the Revised Statutes do not apply when the lessor of a movable causes it to be sold without appraisal on default by the lessee. It was said that in such case the lessor is selling its own property, not that of its debtor. The court declined to follow a contrary holding by the First Circuit Court of Appeal. The holding in the noted case seems to be a more accurate application of the statutory provisions.

In what appears to be a case of first impression, it was held in *State ex rel. Stolz & Hinton v. Justice*⁵ that the constitutional period of peremption does not apply to a tax deed that does not bear the signature of the tax collector or his deputy. The court found support for its position in an earlier holding by the supreme court that the constitutional provision cannot give validity to a tax title which is void for want of a description by which the property can be identified.⁶

The decision in *Miller v. Patterson*,⁷ which relied on *Boyer v. Amet*⁸ in restricting recovery by an evicted purchaser to what he paid for the property although he had resold it six months after his purchase at an increase of \$1,100.00, seems consistent with an *obiter dictum* contained in the opinion in the cited case. When the resale was annulled the initial purchaser was required to return to his vendee what the latter had paid for the property and was thus deprived of his profit. There is no indication in the opinion that the plaintiff contended that the market value of the property at the time he bought it was greater than the price paid for it. Presumably no such contention was made. It is clear that an evicted vendee is not entitled to recover on the basis of an increase in the value of the property after the sale. This writer is of the opinion, however, that existing jurisprudence does not necessarily preclude recovery by an evicted vendee of an established difference between the price he pays and the actual value of the property at the time of his purchase. If the buyer can prove that he bought for less than the market value of the prop-

4. 239 So.2d 442 (La. App. 4th Cir. 1970).

5. 248 So.2d 361 (La. App. 4th Cir. 1971).

6. *Mouton v. Southern Saw Mill Co.*, 138 La. 813, 70 So. 813 (1916).

7. 240 So.2d 22 (La. App. 2d Cir. 1970).

8. 41 La. Ann. 721, 6 So. 734 (1889).

erty he should be entitled to the benefit of his bargain. This rule is applied when the seller fails to deliver the thing he has sold or contracted to sell.⁹ Consistency requires that the same rule be applied in the event of eviction.

MANDATE

*Milton M. Harrison**

In *Resweber v. Daspit*¹ the court was confronted with the narrow issue of whether a power of attorney to sell "all or any part or parts of the real, personal, or mixed estate" of the mandator was sufficiently descriptive of the property to render valid a sale by the mandatary. The question arises out of an interpretation of Civil Code articles 2994, 2996, and 2997. A mandate "to alienate . . . or give a mortgage, or do any other act of ownership," must be express under Civil Code article 2996. Furthermore, article 2997 provides that "the power must be express and special . . . to sell or to buy"

In the earlier cases of *Rownd v. Davidson*² and *Tensas Delta Land Company v. Fletcher*³ the supreme court had held that powers of attorney to sell all real estate in specified parishes were sufficiently descriptive of the property. The instant case goes one step farther in holding that a power to sell all of the real estate of the mandator, without specifying the parish in which it is located, is sufficiently descriptive. After discussing the history of articles 2996 and 2997 of the Civil Code and comparing their language with the corresponding articles of the French Civil Code,⁴ the court says that it is "aware that this holding in effect strikes the word 'special' from Article 2997."⁵

The courts are to be applauded for their decisions on this issue. However, it would have been preferable if, instead of focusing attention on the possible conflict between articles 2996 and 2997 and of striking the word "special" from article 2997, the court had simply interpreted article 2994. Civil Code article

9. See *Womack v. Sternberg*, 247 La. 566, 172 So.2d 683 (1965); *Rosenberg v. Derbes*, 165 La. 407, 115 So. 637 (1928); see also *Eanes v. McKnight*, 251 So.2d 491 (La. App. 1st Cir. 1971). See *Smith, Recovery of Damages for Non-Delivery and Eviction in Louisiana*, 17 LA. L. REV. 253 (1957).

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1. 240 So.2d 376 (La. App. 3d Cir. 1970).

2. 113 La. 1047, 37 So. 965 (1905).

3. 132 La. 1021, 62 So. 129 (1913).

4. FRENCH CIV. CODE art. 1988.

5. 240 So.2d 376, 379 (La. App. 3d Cir. 1970).