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John Franklin Weeks

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NOTES

WHEN IS A SALE A SALE?

Plaintiff contracted for defendant to furnish and install commercial grade wall-to-wall carpeting in plaintiff's bowling alley. Some three months after the installation was completed the carpet began to show signs of excessive wear. Eighteen months later, plaintiff brought suit in redhibition for return of the purchase price and other damages. The district court accepted defendant's plea of one year prescription for such an action and dismissed the suit. *Held*, plaintiff's petition alleged a breach of a contract to furnish and install wall-to-wall carpeting which constituted a contract of construction, or for work by the job, rather than a sale, and therefore the applicable prescriptive period was ten years. *Kegler's, Inc. v. Levy*, 239 So.2d 450 (La. App. 4th Cir. 1970).

The problem of differentiating sales and construction contracts (or similar contracts calling for work and labor) is a recurring one in the jurisprudence, and the answers given seldom lend themselves to uniformity.¹ The question involves many aspects of the rights and remedies of the parties to the contract; it is important not only in determining prescription,² but also in measuring damages³ and determining upon which party the risk or loss or damage lies.⁴ A further significance of proper classification of the transaction lies in defining the security interest

1. All of the following cases have been held to be sales: *Hinnricks v. Monteleone*, 51 La. Ann. 896, 25 So. 546 (1899) (construction of immovable showcases); *Hunt v. Soares*, 9 La. 434 (1836) (installed mantle pieces); *S & W Investment Co. v. Otis Sharp, Inc.*, 162 So.2d 171 (La. App. 4th Cir. 1964) (swimming pool and accessory equipment); *Brown v. Sanders*, 149 So.2d 228 (La. App. 2d Cir. 1963) (central heating system); *Ziblich v. Metry Upholstery, Inc.*, 148 So.2d 436 (La. App. 4th Cir. 1963) (draperies); *Dugue v. Safety Oil Burners, Inc.*, 142 So. 161 (La. App. Or. Cir. 1932) (automatic oil burner).

In contrast, the following have been held to represent construction contracts: *Airco Refrigeration Service, Inc. v. Fink*, 242 La. 73, 134 So.2d 880 (1961) (installation of contractee's air conditioner); *Rocquin v. Simmons*, 187 So.2d 472 (La. App. 4th Cir. 1966) (landscaping); *Federico v. Kratzberg*, 163 So.2d 843 (La. App. 4th Cir. 1964) (remodeling); *Southern Patio, Inc. v. Varnado*, 153 So.2d 924 (La. App. 4th Cir. 1963) (aluminum siding); *Papa v. Louisiana Metal Awning Co.*, 131 So.2d 114 (La. App. 2d Cir. 1961) (patio cover); *Ducore v. Gross*, 110 So.2d 752 (La. App. 4th Cir. 1959) (draperies); *Mangin v. Jorgens*, 24 So.2d 384 (La. App. Or. Cir. 1946) (automatic oil burner system).

2. LA. CIV. CODE arts. 2534, 2546, 2769, 3544.

3. *Id.* arts. 2531, 2545, 2769.

4. *Id.* arts. 2467, 2758, 2760.

of the transferor.⁵ Although the Civil Code clearly contemplates the distinction between these types of contracts, it defines the contract of sale only in the most general terms.⁶ Thus, the problem of categorizing a particular transaction has generally been left to the courts.

One of the earliest, and most commonly cited, cases in this area is *Hunt v. Suares*.⁷ In determining the nature of a contract to furnish and install mantle pieces, the court construed "the principal contract [as] one of sale of the mantle pieces ready made, and . . . the agreement to put them up and furnish materials for that purpose, does not take the contract as to the mantle pieces out of the rule which governs that species of contract"⁸ In a similar vein, the court in *Papa v. Louisiana Metal Awning Co.*⁹ found a contract for the installation of a covered patio to be a construction contract since "this contract involved more than a mere sale of materials. It involved primarily the furnishing of labor and the contractor's skill in the performance of the job."¹⁰

Beyond this, the courts have reached decisions that seem unclear, and occasionally even contradictory. Contracts to furnish and install oil burners have been held to be both a sale¹¹ "and part of a contract to construct a heating system."¹² Contracts to install draperies likewise have been termed both construction contracts¹³ and sales.¹⁴ However, certain principal features of each category of contract are generally recognized. Commenting on this subject, one author has said,

5. See note 22 *infra*.

6. LA. CIV. CODE art. 2439. In this connection, *id.* art. 1945 is significant: "Legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the following rules:

"

"*Second*—That courts are bound to give legal effect to all such contracts according to the true intent of all the parties."

7. 9 La. 434 (1836).

8. *Id.* at 436.

9. 131 So.2d 114 (La. App. 2d Cir. 1961).

10. *Id.* at 117.

11. *Dugue v. Safety Oil Burners, Inc.*, 142 So. 161 (La. App. Orl. Cir. 1932).

12. *Mangin v. Jorgens*, 24 So.2d 384 (La. App. Orl. Cir. 1946). *Dugue* was distinguished by the court on the grounds that, in that case, the burner was to be attached to an existing system, and article 2769 was not pleaded.

13. *Ducore v. Gross*, 110 So.2d 752 (La. App. 4th Cir. 1959).

14. *Ziblich v. Metry Upholstery, Inc.*, 148 So.2d 436 (La. App. 4th Cir. 1963).

"The principle of weighing the price of the article installed together with the cost and amount of labor and skill involved seems to be the most reasonable way to ascertain the actual intention of the parties with regard to the nature of the contract."¹⁵

This statement reflects the traditional test applied by the courts in approaching such problems. Further, it would appear to have received legislative recognition in the language of the sales tax statutes which define sales price as including any incidental services which are a part of the sale.¹⁶ It would also be in accord with the "essence" test which prevails in common law jurisdictions.¹⁷

In reaching its decision in the instant case, the court, rather than relying on jurisprudence, cited articles 2439, 2456, 2467 and 2475 of the Civil Code. Two prominent factors in the court's reasoning are apparent, however: The carpeting, although part of the manufacturer's stock in trade, had to be woven especially for the plaintiff, and the installation was of a relatively permanent nature.

First, the court emphasized the unusual design of the carpet, and that the defendant had to have it specially made by the manufacturer. This argument is not without precedent. In common law jurisdictions, states following the "New York Rule" hold that contracts for goods to be made in the future are contracts for services, not sales.¹⁸ However, the majority of states follow the "Massachusetts Rule," which limits this result to cases in which the product is not of a type normally produced by the

15. Comment, 7 LA. L. REV. 564, 565-66 (1947).

16. LA. R.S. 47:301(13) (1950). In *Griffin & Zimmer Contracting Co. v. Mouton*, 231 So.2d 644 (La. App. 1st Cir. 1970), this was held to encompass labor incident to fashioning willow mattresses for a bridge foundation.

17. *Clay v. Yates*, 156 Eng. Rep. 1123 (C.P. 1856). This case furnishes a succinct statement of the "essence test." Holding that a printer's contract to publish books was a contract for services, the court stated that the most significant factor was "whether work is the essence of the contract or whether it is the materials supplied . . ." *Id.* at 1124. A similar case, *Lee v. Griffin*, 30 L.J. Q.B. 252 (1861), probably reveals more about the state of dentistry at the time than the state of the law. Holding a contract to fit false teeth to be a sale, the court made the point that "there can hardly be said to be more skill in fitting teeth than in fitting a pair of breeches." *Id.* at 254. See Note, 40 CORNELL L.Q. 803 (1954).

18. *Crookshank v. Burrell*, 18 Johnson (N.Y.) 58 (1820). For a discussion of this point and a compilation of cases, see Annot., 25 A.L.R.2d 672, 681, 714 (1950).

manufacturer.¹⁹ Reason would seem to follow the latter rule; it would certainly be ludicrous to argue that a person who ordered an automobile from the factory had contracted for the "construction" of his car. On this point, it is significant to note that the agreement of the parties called for a "stock, commercial carpet,"²⁰ and that the manufacturer specialized in making carpets of this type for the commercial market.

Second, the court exhibited concern for the fact that the carpet had to be cut to measure and semi-permanently installed. Although return of the goods sold is normally expected in cases of redhibition, the jurisprudence has long held that this is not a necessary prerequisite to the maintenance of such an action.²¹ At any rate, since the plaintiff clearly planned to replace the carpet, it could hardly be maintained that return of the carpet was impossible.²²

In the final argument, the court addressed itself directly to the factors that differentiate sales and constructions. It was noted that more than a simple sale was involved, since the carpet had to be laid, cut, and seamed. Such factors are significant, but their mere presence cannot suffice to alter the principal nature of the contract. The proper test, and the traditional test, would be to determine whether defendant's services or the carpet itself constituted the principal value of the contract. This, however, is only an initial, mechanical inquiry; the ultimate problem that must always be resolved is whether the services involved in the contract are only incidental to the transfer of ownership, or the principal object of the contract. In close cases,

19. *Goddard v. Binney*, 115 Mass. 450 (1874). See Note, 3 BOSTON U. L. REV. 43 (1923); Comment, 20 HARV. L. REV. 363 (1906).

20. *Kegler's, Inc. v. Levy*, 239 So.2d 450, 454 (La. App. 4th Cir. 1970).

21. *Chapman v. Matthews*, 18 La. Ann. 118 (1866); *Lewis v. Morgan*, 14 La. Ann. 401 (1859); *George v. Moses Greenwood & Co.*, 11 La. Ann. 299 (1856); *Smith v. Taylor*, 10 Rob. 133 (La. 1845); *Hivert v. Lacaze*, 3 Rob. 357 (La. 1842); *Alan Randal Co. v. Quality Oil Co.*, 100 So.2d 282 (La. App. 1st Cir. 1958).

22. This argument may point toward deeper concerns. Principally, the court seems to note that carpeting may become an immovable by destination after installation. The effect of this classification is largely on the security of the vendor. Of course, it would not be feasible in such circumstances for the vendor to reclaim his goods. However, immobilization does not affect his right to sequester his share of the proceeds from the sale of the thing rendered immovable. Immobilization per se should not determine the nature of the contract, although it can be of probative value in determining the principal object or major value of the contract. LA. CIV. CODE arts. 468, 3227; LA. CODE CIV. P. art. 1092. For an elaborate discussion of this area of the law, see 2 A. YIANNPOULOS, LOUISIANA CIVIL LAW TREATISE § 49 (1967).

the doubt should be resolved in favor of the classification that yields the longer prescriptive period. In the instant case, it is difficult to conceive how the labor involved could outweigh the value of a commercial grade, all-wool carpet. The court should have required a factual determination of the relative value of these elements in the total contract price.²³

At least insofar as the applicable prescriptive period is concerned, the court's decision may be sustainable in an alternate interpretation of the facts. By removing the contract under question from the realm of sales, the court precluded the necessity of determining the particular nature of the flaw, since the prescriptive period for such construction contracts is ten years in all cases. Testimony cited with approval by the court indicates that the problem arose from a defect in manufacture, which would clearly be a redhibitory vice. However, shortly after making this observation, the court concluded that the "defendant did not supply the quality of carpeting and padding he contracted to furnish and install . . ." ²⁴ This would seem to indicate that the carpet as a whole did not meet the specifications called for by the contract.

Article 2529 of the Civil Code states that "[a] declaration made in good faith by the seller, that the thing sold has some quality which it is found not to have, gives rise to a redhibition . . ." Thus, whether the problem here was a defect in manufacture or non-conforming goods, this article would seem to indicate that the vice was a redhibitory one on which prescription ran in one year.²⁵ However, it can be argued that the redactors of the Civil Code here used the term "redhibition" in 2529 with more of an eye to its etymological origins than its classical legal definition, and meant simply "a returning." Thus, in the case of non-conforming goods, as opposed to defects in manufacture, the one-year prescriptive period peculiar to red-

23. See plaintiff's petition for rehearing, La. App. 4th Cir. Docket no. 3356 (August 17, 1970). In his petition, plaintiff alleged that out of a total contract price of \$11,165, labor amounted to not more than \$654.28.

24. *Kegler's, Inc. v. Levy*, 239 So.2d 450, 455 (La. App. 4th Cir. 1970).

25. "When declarations of quality are involved, it might be better to restrict the application of the rules of redhibition to cases where the declaration is made with respect to specified goods identified otherwise than by their quality. This would mean that when the seller contracts to deliver goods of a stated quality, the delivery of goods of a different quality would constitute a breach of contract." *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Particular Contracts*, 27 LA. L. REV. 465, 466-67 (1967).

hibition is inapplicable. This argument was rejected by our supreme court in the case of *George v. Shreveport Cotton Oil Co.*,²⁶ but a more recent appellate decision, *Victory Oil Co. v. Perret*,²⁷ reached the opposite conclusion on facts which appear indistinguishable. The fact that writs were denied in this case could mean that the supreme court no longer adheres to the position taken in the *George* case. At any rate, reason and fairness would seem to favor the *Victory Oil* opinion. Thus, while it is submitted that the result ultimately reached by the court in the instant case is correct, the decision could have been based soundly on an interpretation of article 2529 which would conform with the decision in the *Victory Oil* case. Such an opinion would be more persuasive than the court's uneasy classification of this contract as one for construction.

It is noteworthy that article 2529 has no counterpart in the French Civil Code. French cases involving contracts in which the goods delivered are not of the quality ordered treat the problem as an implied error in the contract, for which the applicable prescriptive period is ten years.²⁸ A French court deciding the present case would presumably find such error present, assuming that the carpet delivered was not of the quality contemplated.

Returning to the question of the nature of the contract under question, there are two analogous cases which are of interest. In *Ducore v. Gross*,²⁹ an interior decorator's contract to furnish and install draperies fabricated for him by a third party was held to be a construction contract. This decision would appear to give some support to the instant case. However, four years later in *Ziblich v. Metry Upholstery, Inc.*,³⁰ the same court held that a similar contract in which the defendant actually fabricated the draperies was a sale. *Ducore v. Gross* was not cited in the court's opinion. Superficially, it would appear that these two cases are irreconcilable. However, it is submitted that both could quite

26. 114 La. 498, 38 So. 432 (1905). Delivery of an improper grade of cotton oil cakes, unsuitable for plaintiff's needs, was held to give rise to an action in redhibition.

27. 183 So.2d 360 (La. App. 4th Cir.), *cert. denied*, 249 La. 65, 184 So.2d 735 (1966). In this case, the court held that the plaintiff had breached his contract by delivering diesel oil of a lower grade than contracted for. See *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Particular Contracts*, 27 LA. LAW REV. 465, 466 (1967).

28. 2 PLANIOL, CIVIL LAW TREATISE no. 1467 (La. St. L. Inst. transl. 1959).

29. 110 So.2d 752 (La. App. 4th Cir. 1959).

30. 148 So.2d 436 (La. App. 4th Cir. 1963).

likely be correct. The distinction could lie in the quality of the materials, the expertise of the maker, or the overall nature of the fabricator's business. In such an area of the law, dogmatic classifications and mechanical tests should be avoided.

The two traditional tests of our law, principal value and intent of the parties, provide a sound vehicle for proper determination of the nature of the contract. Through their interplay, they can provide a reliable determination of the essence of the contract. It is to be hoped that courts passing on similar questions in the future will more carefully develop and elaborate the peculiar facts of the case. It is even conceivable that the present case could be justified by a more complete factual determination. As reported, however, *Kegler's, Inc. v. Levy* only confuses an already uncertain area of our law.

John Franklin Weeks

LOUISIANA'S STATUTORY WILL:
THE ROLE OF FORMAL REQUIREMENTS

The attestation clause of the contested statutory will¹ was dated "October____, 1966." Finding no general principle at either civil or common law which required that testaments be dated, the supreme court reasoned that unless specifically required by statute the date of execution need not be included in the instrument. The court *held*,² that the testament was a valid statutory will because, when a statutory will is incompletely dated, the date of execution may be established by ordinary proof. *Succession of Gordon*, 257 La. 1086, 245 So.2d 319 (1971).

By creating the statutory will,³ the legislature established

1. Provided for under the terms of LA. R.S. 9:2442-2443 (Supp. 1964), commonly referred to as the Louisiana Wills Statute.

2. Justice Barham authored the majority opinion with one justice concurring, two justices concurring in the decree, one justice dissenting, and one justice recused.

3. LA. R.S. 9:2442 (Supp. 1964): "In addition to the methods provided in the Louisiana Civil Code, a will shall be valid if in writing (whether typewritten, printed, mimeographed, or written in any other manner), and signed by the testator in the presence of a notary public and two witnesses in the following manner:

"(1) In the presence of the notary and both witnesses the testator shall signify to them that the instrument is his will and shall sign his name on each separate sheet of the instrument. If, however, the testator declares that he is not able to sign his name because of some physical infirmity, express mention of his declaration and of the cause that hinders him from