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# An Exception to the Rules of Form and Parol Evidence

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misrepresentations, whether intentional or negligent, of the police officer and the misstatements of the informer whom the police officer justifiably and in good faith believed to be telling the truth. In the latter instance, the evidence would be admissible, while in the former it would not. Support is given to this distinction by *Mapp v. Ohio*,<sup>24</sup> which established the principle that the purpose of the fourth amendment is to prevent unreasonable police behavior and not improper activity on the part of private citizens.

If this distinction is accepted, the problem then becomes one of determining when to allow an inquiry into the factual veracity of the affidavit. Considering the divergent policy considerations,<sup>25</sup> a proper answer might be to require that a contradictory hearing be held only after the defendant has made an initial showing creating a strong suspicion that there has been intentional or negligent misrepresentations by the police officer, affiant.<sup>26</sup>

*Randolph W. Hunter*

#### AN EXCEPTION TO THE RULES OF FORM AND PAROL EVIDENCE

Offeror signed an agreement to purchase several lots, but the offeree's signature did not appear in the agreement; however, his name was typed above offeror's signature. The deposit stipulated in the written agreement was accepted by offeree. Later, offeree delivered title to one of the lots described in the agreement which was accepted by offeror. Offeror sued for the balance on deposit, asserting that the agreement was not legally binding because it was never accepted in writing. The trial court held that the agreement was valid. In affirming, the Fourth Circuit Court of Appeals *held*, in a contract to sell immovables which lacks the offeree's signature, the acceptance can be proved by some unequivocal act showing the offeree's assent to the offer.<sup>1</sup> *Alley v. New Homes Promotion, Inc.*, 247 So.2d 218 (4th Cir.) *writs refused*, 258 La. 972, 248 So.2d 832 (1971).

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24. 367 U.S. 643 (1961).

25. The public interest, in insuring that the facts alleged in the affidavit are actually true, conflicts with the equally important interest of protecting the anonymity of the informer and insuring a speedy criminal process.

26. See note 8 *supra*.

1. It is recognized that the issue concerning the formal requirements in the instant case was not critical to the decision since the court found

The Civil Code requires generally that all transfers of immovable property be in writing,<sup>2</sup> and specifically, that sales of immovables be made by authentic act or by a writing under private signature.<sup>3</sup> Although article 2440 clearly states the formalities necessary in sales, article 2462 requires only "a writing" to establish a valid promise to sell.<sup>4</sup> Despite this difference in language, it appears that the "writing" required for valid promises to sell must conform to the necessary formalities of sales. Until article 2462 was amended in 1910, it expressly required that promises to sell meet the formalities necessary for sales;<sup>5</sup> however, the Louisiana supreme court has held that this amendment did not change the original intent of the article with regard to form.<sup>6</sup> Thus, the law requires that both sales and promises to sell be made by authentic act or be a writing under private signature. The only requirement of a writing under private signature is that both parties sign the instrument containing the terms of the agreement.<sup>7</sup>

Parol evidence is inadmissible against or beyond what is

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that there was no formal tender of title within the stipulated time. The court's treatment of the formalities required to effectively express assent is taken as a starting point for a study of the legislation and jurisprudence in this area. This note is confined to a discussion of private transactions. The formalities of judicial sales are largely provided in statutes outside the Code and are strictly applied. In *State ex rel. Hinton v. Justice*, 248 So.2d 361 (La. App. 4th Cir. 1971), the court held that even though the constitutional peremptive period had elapsed, the omission of the tax collector's signature on the deed rendered the tax sale invalid. In *Lepine v. Marrero*, 3 Orl. App. 379 (La. App. 1904), *aff'd*, 116 La. 941, 41 So. 216 (1906), this rigid enforcement of formal requirements was rejected in private transactions.

2. La. Civ. Code art. 2275: "Every transfer of immovable property must be in writing . . ."

3. *Id.* art. 2440: "All sales of immovable property shall be made by authentic act or under private signature.

"Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

4. *Id.* art. 2462: "A promise to sell . . . which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same."

5. *Id.* Prior to amendment, the article stated: "To have its effect, either between the contracting parties or with regard to other persons, the promise to sell must be vested with the same formalities, as are above prescribed in articles 2439 and 2440 concerning sales, in all cases where the law directs that the sale be committed to writing." La. Civ. Code art. 2437 (1825) and La. Digest of 1808, bk. III, tit. VII, art. 9 are essentially identical.

6. *Oeschner v. Keller*, 134 La. 1098, 64 So. 921 (1914).

7. La. Civ. Code art. 2241: "It is not necessary that those acts be written by the contracting parties, provided they be signed by them." *Id.* art. 2235: "An act which is not authentic . . . avails as a private writing, if it be signed by the parties."

contained in an instrument transferring an immovable.<sup>8</sup> Since identical formalities are required in both sales and promises to sell, the exclusion of parol evidence should apply in both instances. Thus, under the Code, if one party does not express assent to the contract by his signature, parol evidence is inadmissible to prove this assent.

Despite these specific requirements, the courts have found valid contracts transferring immovable property in forms which do not meet the codal stipulations. Although requiring that promises to sell must have the same form as sales, the jurisprudence indicates that neither promises to sell<sup>9</sup> nor sales<sup>10</sup> need be made by authentic act or by a writing under private signature.<sup>11</sup> The courts require that the agreement be in writing,<sup>12</sup> but it appears that no rigid form is necessary.<sup>13</sup> Acts of sale,<sup>14</sup> deeds,<sup>15</sup> written receipts for the price paid for land,<sup>16</sup> written

8. *Id.* art. 2276: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since."

9. *Cerami v. Haas*, 195 La. 1048, 197 So. 752 (1940); *Joseph v. Moreno*, 2 La. 460 (1831).

10. *Guice v. Mason*, 156 La. 201, 100 So. 397 (1924); *Bradford's Heirs v. Brown*, 11 Mart.(O.S.) 217 (La. 1822); *Neblett v. Placid Oil Co.*, 257 So.2d 167 (La. App. 3d Cir. 1972).

11. The fact that a third person is affected by the contract does not change the court's treatment of the case. *See Lepine v. Marrero*, 3 Orl. App. 39 (La. App. 1904), *aff'd*, 116 La. 941, 41 So. 216 (1906), and cases cited therein.

12. *Ceromi v. Harris*, 187 La. 701, 175 So. 462 (1937); *Linder v. Cotonio*, 175 La. 352, 143 So. 286 (1932); *Rubenstein v. Files*, 146 La. 727, 84 So. 33 (1920); *Oeschner v. Keller*, 134 La. 1098, 64 So. 921 (1914); *Williams v. Alexander*, 193 So.2d 94 (La. App. 1st Cir. 1966); *Jackson v. Dominick*, 166 So. 867 (La. App. 2d Cir. 1936).

13. Although the signatures of both parties are not required, the cases support the assertion that at least one party's signature is essential. *Pierce v. Griffin*, 95 So.2d 190 (La. App. 1st Cir. 1957), indicated that a writing sufficient to transfer immovables could be found on a wooden marker stake on which the vendor had written, "[i]n 1963 this lot 4 sold to . . ." The writer's signature did not appear. The case was actually decided on an admission of the transfer under oath. The writer has found no other case that would support the theory that neither party's signature is required on the writing.

14. *Davis Bros. Lumber Co. v. Smitherman*, 156 La. 607, 100 So. 785 (1924); *Saunders v. Bolden*, 155 La. 136, 98 So. 867 (1924); *Balch v. Young*, 23 La. Ann. 272 (1871); *Madison v. Zabriskie*, 11 La. 247 (1837); *Crocker v. Nuley*, 3 Mart.(N.S.) 583 (La. 1825); *Baudin v. Roliff*, 1 Mart.(N.S.) 165 (La. 1823); *Cinquimani v. Concordia Fire Ins. Co.*, 5 Plt. 290 (La. App. 1922).

15. *Dobbins v. Hodges*, 208 La. 143, 23 So.2d 26 (1945); *Beard v. Nunn*, 172 La. 155, 133 So. 429 (1931); *Industrial Lumber Co. v. Rogers*, 158 La. 557, 104 So. 367 (1925); *Savage v. Wyatt Lumber Co.*, 134 La. 627, 64 So. 491 (1914); *Lepine v. Marrero*, 116 La. 941, 41 So. 216 (1906); *Allen v. Whetstone*, 35 La. Ann. 846 (1883); *Stanley v. Addison*, 8 La. 207 (1835); *Bradford's Heirs v. Brown*, 11 Mart.(O.S.) 217 (La. 1822); *Neblett v. Placid Oil Co.*,

offers to sell,<sup>17</sup> promissory notes,<sup>18</sup> and letters acknowledging co-ownership<sup>19</sup> have all been considered sufficient to effect a valid transfer of land without the written assent of both parties. The most important observation drawn from the jurisprudence is that in all the cases where a valid writing has been found, this writing *always* bears the signature of the party asserting the invalidity of the contract.<sup>20</sup>

It has also been required that the party who does not evidence written assent exhibit some outward manifestation of assent beyond oral acceptance in order to make a binding contract.<sup>21</sup> Taking possession of the land,<sup>22</sup> recording a written offer,<sup>23</sup> paying the price,<sup>24</sup> subsequently assigning the land,<sup>25</sup>

257 So.2d 167 (La. App. 3d Cir. 1972); *Jenkins v. Dykes*, 91 So.2d 416 (La. App. 2d Cir. 1956); *Franks v. Scott*, 191 So. 175 (La. App. 1st Cir. 1939).

16. *Kinchen v. Redmond*, 156 La. 418, 100 So. 607 (1924); *Guice v. Mason*, 156 La. 201, 100 So. 397 (1924); *Cousin v. Schmidt*, 143 La. 843, 79 So. 427 (1918); *Barfield v. Saunders*, 116 La. 136, 40 So. 593 (1906); *Hitchcock v. Harris*, 1 La. 311 (1830); *Richards v. Nolan*, 3 Mart.(N.S.) 336 (La. 1825).

17. *Cerami v. Haas*, 195 La. 1048, 197 So. 752 (1940); *Joseph v. Moreno*, 2 La. 460 (1831).

18. *Rachal v. Normand*, 6 Rob. 88 (La. 1843).

19. *Da Ponte v. Ogden*, 161 La. 378, 108 So. 777 (1926); *Bair v. Abrams*, 12 La. Ann. 753 (1857); *Barrett v. His Creditors*, 12 Rob. 474 (La. 1846).

20. *See Caire v. Sullivan*, 162 So.2d 49 (La. App. 1st Cir. 1964), wherein plaintiff sued to be recognized as owner of certain lands. The defendant alleged that plaintiff's ancestors in title had sold his interest in the land to defendant. The only written evidence was a carbon copy of a transfer made and introduced into evidence by the defendant. This writing bore no written assent of the alleged vendor, the plaintiff's ancestor in title. The court held that there had been no valid transfer. Thus, it seems that one party cannot bind another by producing a writing of his own making which bears no evidence of the other party's assent. This case is distinguishable from the instant case because the party asserting the invalidity of the contract had not expressed his written assent.

21. *Savage v. Wyatt Lumber Co.*, 134 La. 627, 64 So. 491 (1914) (payment of the price and assignment of the deed cures the failure of the grantee to sign the deed); *Miller v. Douville*, 45 La. Ann. 214, 12 So. 132 (1893) (written offer to sell is valid without vendee's written acceptance, but vendee must express assent before revocation of the offer). *See also Jenkins v. Dykes*, 91 So.2d 416 (La. App. 2d Cir. 1956). *Accord*, *Herriot v. Broussard*, 4 Mart.(N.S.) 260 (La. 1826), wherein the court noted that since the non-signing party did not evidence his assent to the agreement by sufficient acts, such as payment, there was no valid contract.

22. *Kinchen v. Redmond*, 156 La. 418, 100 So. 607 (1924); *Guice v. Mason*, 156 La. 201, 100 So. 397 (1924); *Saunders v. Bolden*, 155 La. 136, 98 So. 867 (1924); *Lepine v. Marrero*, 116 La. 941, 41 So. 216 (1906); *Crocker v. Nuley*, 3 Mart.(N.S.) 583 (La. 1825); *Pierce v. Griffin*, 95 So.2d 190 (La. App. 1st Cir. 1957); *Franks v. Scott*, 191 So. 175 (La. App. 1st Cir. 1939); *Cinquimani v. Concordia Fire Ins. Co.*, 5 Pit. 290 (La. App. 1922).

23. *Cerami v. Haas*, 195 La. 1048, 197 So. 752 (1940); *Savage v. Wyatt Lumber Co.*, 134 La. 627, 64 So. 491 (1914). In these cases an affidavit

and other equivalent acts<sup>26</sup> have all been held sufficient to remedy the absence of written assent. Parol evidence is of course necessary to show this manifestation of assent, and the courts have been liberal in allowing its use.<sup>27</sup>

The instant case is in accord with the jurisprudence. The offeree was asserting that the contract was valid. The defense raised by the offeror was that the agreement could not have legal effect because the writing lacked an essential formality, the signatures of both parties. However, the offeror had evidenced his assent to the agreement by his signature.<sup>28</sup> His assertion that the contract was invalid was based on the fact that the offeree had not signed. Thus this case was consistent with the prior cases in that the party asserting the invalidity of the contract for lack of form had given his own written assent.<sup>29</sup> The court stated that promises to sell must contain the same formalities as sales. However, written assent of both parties was not required. Since parol evidence showed that the offeree had exhibited sufficient acts to evidence his assent, the contract was held valid.

In the instant case the court did not articulate the reasons

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certifying the offeree's acceptance was recorded with the written offer. This seems to weaken these cases as authority for the proposition.

24. *Beard v. Nunn*, 172 La. 155, 133 So. 429 (1931); *Industrial Lumber Co. v. Rogers*, 158 La. 557, 104 So. 367 (1925); *Davis Bros. Lumber Co. v. Smitherman*, 156 La. 607, 100 So. 785 (1924); *Savage v. Wyatt Lumber Co.*, 134 La. 627, 64 So. 491 (1914). See *Stanley v. Addison*, 8 La. 207 (1835), wherein the court stated that when the deed acknowledged receipt of the price, the vendee had discharged his obligation and thus his written acceptance was not necessary. See also *Crocker v. Nuley*, 3 Mart.(N.S.) 583 (La. 1825); *Jenkins v. Dykes*, 91 So.2d 416 (La. App. 2d Cir. 1956).

25. *Saunders v. Bolden*, 155 La. 136, 98 So. 867 (1924); *Baudin v. Rollif*, 1 Mart.(N.S.) 165 (La. 1823). In *Bradford's Heirs v. Brown*, 11 Mart.(O.S.) 217 (La. 1822), the court stated that one who has carried his solicitation into effect cannot urge that the offeree did not accept the offer when the offeree has passed the thing to another. See also *Neblett v. Placid Oil Co.*, 257 So.2d 167 (La. App. 3d Cir. 1972).

26. *Dobbins v. Hodges*, 208 La. 143, 23 So.2d 26 (1945) (accepting payments under a unitization agreement); *Balch v. Young*, 23 La. Ann. 272 (1871) (acceptance can be shown other than by written evidence, e.g., by the offeree availing himself of the stipulation of the contract or by anything clearly indicating an acceptance); *Franks v. Scott*, 191 So. 175 (La. App. 1st Cir. 1939) (paying taxes).

27. *Ceramí v. Haas*, 195 La. 1048, 197 So. 752 (1940); *Da Ponte v. Ogden*, 161 La. 378, 108 So. 777 (1926); *Cousin v. Schmidt*, 143 La. 843, 79 So. 427 (1918); *Balch v. Young*, 23 La. Ann. 272 (1871); *Bradford's Heirs v. Brown*, 11 Mart.(O.S.) 217 (La. 1822); *Jenkins v. Dykes*, 91 So.2d 416 (La. App. 2d Cir. 1956).

28. *Cf. Caire v. Sullivan*, 162 So.2d 49 (La. App. 1st Cir. 1964) at note 20 *supra*.

29. See text accompanying note 20 *supra*.

behind its decision to find a valid contract in a writing that clearly did not satisfy the codal requirements, but the leading case of *Bradford's Heirs v. Brown*<sup>30</sup> was explicit in this regard. Plaintiffs sued to be recognized owners of certain lands. They alleged that a transfer deed was invalid because it did not exhibit the vendee's signature and that parol evidence could not be used to supplement the faulty deed. The court allowed the use of parol evidence and held for the vendee, stating:

"[A]ssent of the vendee . . . cannot be denied by the vendor, because he is estopped by his deed from denying what he has solemnly admitted therein, [and vendee's] assent may be proved by matter *aliunde* . . ."<sup>31</sup>

Thus, where the facts reveal that a party who has given his written assent to a contract later asserts that the agreement is invalid for lack of the other party's written assent, the court considers him estopped to assert this lack of formality.

The estoppel created by the jurisprudence seems equitable even though it violates the legislation concerning form and parol evidence.<sup>32</sup> These particular provisions are not rules of public order,<sup>33</sup> but rather, are rules of evidence established to defeat fraudulent claims based on easily fabricated oral testimony.<sup>34</sup> In situations like the instant case, deviation from the codal requirements creates no danger of fraud; the party who is contesting the validity of the contract has given his express written assent to the agreement. Therefore, the judgment is not based entirely on testimony, but is founded on reliable written evidence emanating from the party who asserts the invalidity.<sup>35</sup> Further, the party whose signature is lacking has demonstrated

30. 11 Mart.(O.S.) 217 (La. 1822).

31. *Id.* at 220.

32. LA. CIV. CODE arts. 2275, 2276, 2440, 2462.

33. 1 PLANIOL, CIVIL LAW TREATISE no. 285 (La. St. L. Inst. transl. 1959); 2 PLANIOL, CIVIL LAW TREATISE nos. 1106, 1355 (La. St. L. Inst. transl. 1959); 1 AUBRY & RAU, CIVIL LAW TREATISE no. 306 (La. St. L. Inst. transl. 1965). See 1 S. LITVINOFF, OBLIGATIONS § 341 (1969) for an explanation of solemn and evidentiary formalities. This distinction was recognized early in *Packwood v. Dorsey*, 6 Rob. 329 (La. 1844). LA. CIV. CODE art. 2275 allows for a valid transfer of immovable property by a confession under oath, without any writing, thus lending support to the assertion that the provisions in question are not rules of public order.

34. 2 PLANIOL, CIVIL LAW TREATISE nos. 1106, 1355 (La. St. L. Inst. transl. 1959); 1 AUBRY & RAU, CIVIL LAW TREATISE no. 306 (La. St. L. Inst. transl. 1965).

35. 2 PLANIOL, CIVIL LAW TREATISE no. 1125 (La. St. L. Inst. transl. 1959).

his unequivocal assent to the proposition by substantial acts. To invalidate the agreement because of an alleged lack of consent on his part would be an unnecessary inequity.

The fact that other jurisdictions reach identical results in similar situations is a persuasive indication that the Louisiana courts have sound reasons for developing a narrow exception to the rules of form and parol evidence. The French Civil Code provides basically the same rules governing form and parol evidence as the Louisiana Civil Code.<sup>36</sup> In addition, the French code expressly provides for the situation in *Alley* through the concept of "commencement of proof."<sup>37</sup> Even though formal requirements are not met, the agreement is given legal effect if there exists a writing signed by the person against whom the contract is alleged. In common law jurisdictions the Statute of Frauds provides that a transfer of land is valid if there exists a writing signed by the party charged with the contract.<sup>38</sup>

Influenced by equitable considerations, the Louisiana courts have consistently found valid contracts transferring immovable property based upon evidence that violates the codal provisions

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36. FRENCH CIV. CODE art. 1341 (La. St. L. Inst. transl. 1942): "An act before a notary or under private signature must be made of all obligations . . . exceeding one-hundred fifty francs in sum or value; and no parol evidence shall be admitted against or beyond what is contained in the acts . . ." In France, the signatures of both parties are essential for a valid act under private signature. 2 *PLANIOL, CIVIL LAW TREATISE* no. 58 (La. St. L. Inst. transl. 1959).

37. FRENCH CIV. CODE art. 1347: "The above rules are subject to exception when there is a beginning of proof in writing.

"This term denotes any written act which emanates from him against whom the demand is made . . . and which renders probable the facts alleged." The La. Digest of 1808, bk. III, tit. IV, art. 244(2), provided a similar commencement of proof which allowed parol evidence. Without comment in the *Projet*, this article was excluded from the 1825 Code. Speculation that tacit continuation of this article is the basis for the court's decisions is clearly dispelled by the jurisprudence which has held that there is no beginning of proof in Louisiana since the adoption of the 1825 code. See *Ackerman v. Peters*, 113 La. 156, 36 So. 923 (1904); *Wright-Blodgett Co. v. Elms*, 106 La. 150, 30 So. 311 (1902); *Patterson v. Bloss*, 4 La. 374 (1832).

38. RESTATEMENT OF CONTRACTS § 178 (1932); "The following classes of informal contracts are by statute unenforceable unless there is a written memorandum thereof signed by the party against whom enforcement of the contract is sought . . ." *Id.* § 207: "A memorandum, in order to make enforceable a contract within the Statute, may be any document . . . signed by the party to be charged . . ." This writer has not found that Louisiana courts have adopted the Statute of Frauds in resolving these cases. However, an identical result would be reached under the Statute of Frauds since all the writings which are valid in Louisiana jurisprudence would satisfy the Statute. It should be noted that the Louisiana jurisprudence reveals no line of cases even remotely resembling the common law doctrine of "part performance."



of form and parol evidence. The courts have not explicitly delimited this narrow exception, but it appears that there must be a writing signed by the party who alleges that the contract is invalid for lack of form; and that the non-signing party must have manifested his assent to the contract by unequivocal acts. As long as the application of this doctrine is confined to situations like *Alley*, no danger of fraud is likely, and the possible harsh results which would result from rigid enforcement of formalities are averted. Given this consistent approach by Louisiana courts, it is expected that this concept will be applied in future cases.

*William A. Jones, Jr.*

#### THE LIMITS OF "PUBLIC INTEREST"

Plaintiff sued for allegedly defamatory statements published by defendant in a magazine article on electronic eavesdropping. The article stated that plaintiff had persuaded a detective previously hired by her husband to "sell out" and work for her in connection with her ensuing divorce action. Defendant urged that the *New York Times v. Sullivan*<sup>1</sup> doctrine denied recovery to a "public official" or a "public figure" for a defamatory statement concerning them unless it was made "with knowledge that it was false or with reckless disregard of whether the statement was false or not."<sup>2</sup> The trial court found the doctrine inapplicable because plaintiff was neither a "public official" nor a "public figure." The Fifth Circuit Court of Appeals reversed and held the *New York Times* doctrine applied to defamatory statements concerning private individuals involved in matters "of public or general interest."<sup>3</sup> *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972).

At common law, defamation is a false statement of fact which tends to hold a person up to "public contempt, ridicule, or shame."<sup>4</sup> In order to establish a prima facie case, the plaintiff

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1. 376 U.S. 254 (1964).

2. *Id.* at 280.

3. *Rosenbloom v. Metromedia*, 403 U.S. 29, 31-32 (1971).

4. *Triggs v. Sun Printing & Publ. Ass'n*, 179 N.Y. 144, 154, 71 N.E. 739, 742 (1904); see also *Sydney v. MacFadden Newspaper Publ. Corp.*, 242 N.Y. 208, 151 N.E. 209 (1926); *Bennet v. Commercial Advertiser Ass'n*, 230 N.Y. 125, 129 N.E. 343 (1920). The same concept is worded somewhat differently in RESTATEMENT OF TORTS § 559 (1938): "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."