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NOTES

THE EXCLUSION OF "APPARENT" MINERAL LEASES FROM THE WARRANTY AGAINST EVICTION

A vendee purchased a tract of land under an act of sale containing no general stipulation of nonwarranty. Numerous inscriptions were listed in the act of sale which indicated extensive mineral activity, including the sale of a mineral servitude on the tract. The purchaser made no pre-sale inspection but later discovered that the tract was being exploited for oil and gas pursuant to a mineral lease which had not been listed in the act of sale. Asserting that extensive mineral operations on a large portion of the tract rendered the property useless for any other purpose, the purchaser brought an action against his vendor claiming a breach of the warranty against eviction because of the vendor's failure to declare the existence of the mineral lease in the act of sale.¹ The Louisiana Supreme Court *held* that the presence of drilling equipment and structures used in mineral operations as visible evidence of a mineral lease prevented the purchaser who made no pre-sale inspection from recovering from his vendor who failed to disclose the existence of the mineral lease. *Richmond v. Zapata Development Corporation*, 350 So. 2d 875 (La. 1977).

The warranty against eviction and appropriate remedial actions originated in the Roman law.² If evicted from the property, the vendee

1. Subsequent to the filing of plaintiff's petition, defendant filed exceptions of no cause of action and prescription, and a motion for summary judgment. Plaintiff filed no opposing affidavits demonstrating the existence of a material factual dispute, and the district court rendered summary judgment for defendant. The court found that the defendant did not warrant the property sold to be free of oil and gas exploration because of the numerous paragraphs in the deed suggestive of mineral activity, especially paragraph (k), which disclosed a 1971 sale of all mineral rights on the property. The court of appeal affirmed, holding that plaintiff had been apprised by the inscriptions recited in the deed which contained facts sufficient to provoke an examination of the title before purchasing. *Richmond v. Zapata Development Corp.*, 339 So. 2d 939 (La. App. 4th Cir. 1976), *aff'd*, 350 So. 2d 875 (La. 1977).

2. 3 P. COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW 405-10 (1854); M. KASER, ROMAN PRIVATE LAW 178-80 (2d ed. R. Dannenbring trans. 1968); F. MACKELDEY, HANDBOOK OF THE ROMAN LAW 318 (M. Dropsie trans. 1883); J. MOYLE, THE CONTRACT OF SALE IN THE CIVIL LAW 111-12 (1892); J. MUIRHEAD, AN OUTLINE OF ROMAN LAW 154 (1947); F. SHULZ, CLASSICAL ROMAN LAW 533-35 (1951); A. WATSON, ROMAN PRIVATE LAW 61-62 (1971). The supporting principle was that in exchange for the price the vendor's primary duty was to provide the vendee with undisturbed possession of the property. H. ROBY, ROMAN PRIVATE LAW 142 (1902). The vendor was thus obliged to defend the vendee against eviction by a third party and was afforded such an opportunity

was allowed to recover damages and restitution of the price from the vendor for breach of the contract of sale and warranty against eviction.³ Although an express warranty against eviction was customarily stipulated in every contract of sale, the stipulation gradually became implied.⁴ However, if no express stipulation of warranty existed in the contract of sale and the vendee had knowledge of the doubtful nature of the right which he purchased, i.e. of the danger of eviction, he was deprived of all claims against the vendor.⁵ In such a case the vendee was considered to have renounced tacitly all claims against the vendor for subsequent eviction.⁶

The influence of Roman law concepts is evident in French law which has more fully developed the warranty against eviction and more clearly defined the rights and obligations of the vendor and vendee. In France the vendor is obliged to warrant the vendee against eviction from sources not declared at the time of the sale.⁷ The vendor may insert a general stipulation of nonwarranty in the contract of sale⁸ in which case the vendor is relieved of paying damages to an evicted purchaser but he must nevertheless restore the price.⁹ In such cases, however, if the purchaser had knowledge of the danger of eviction at the time of the sale,

under the law. J. MOYLE, *supra*, at 118; Comment, *Warranty Against Eviction in the Civil Law: Extent of the Vendee's Recovery*, 23 TUL. L. REV. 140, 141 (1948) [hereinafter cited as *Extent of the Vendee's Recovery*].

3. Comment, *Extent of the Vendee's Recovery*, *supra* note 2, at 131.

4. J. MOYLE, *supra* note 2, at 112; Comment, *Extent of the Vendee's Recovery*, *supra* note 2, at 141.

5. J. MOYLE, *supra* note 2, at 123; Comment, *Warranty Against Eviction in the Civil Law: Limitations on the Extent of Vendee's Recovery*, 23 TUL. L. REV. 154, 156 (1948) [hereinafter cited as *Limitations on Recovery*].

6. *Id.*

7. FRENCH CIV. CODE art. 1626; 2 A. COLIN ET H. CAPITANT, COURS ELEMENTAIRE DE DROIT CIVIL FRANCAIS 81 (8th ed. Center of Civil Law Studies trans. 1935); 2 M. PLANIOL, TREATISE ON THE CIVIL LAW § 1494 (La. St. L. Inst. trans. 1959); R. POTHIER, TREATISE ON CONTRACTS: CONTRACT OF SALE § 194 (L.S. Cushing trans. 1839). Two basic obligations of the vendor arise when the vendee is evicted from the property: the first is to restore the price and the second is to reimburse the vendee for all damages caused by the eviction. Comment, *Extent of the Vendee's Recovery*, *supra* note 2, at 142; See A. COLIN ET H. CAPITANT, *supra*, at 89-95. The obligation to restore the price results from the failure of cause which renders the obligation a nullity. R. POTHIER, *supra*, § 186.

8. A. COLIN ET H. CAPITANT, *supra* note 7, at 101; R. POTHIER, *supra* note 7, § 182. The parties may also insert special nonwarranty clauses concerning a particular danger of eviction which have the effect of a general nonwarranty clause as to the particular danger mentioned in the act of sale. A. COLIN ET H. CAPITANT, *supra* note 7, at 101; R. POTHIER, *supra* note 7, § 183; Comment, *Limitations on Recovery*, *supra* note 5, at 158.

9. FR. CIV. CODE art. 1629; A. COLIN ET H. CAPITANT, *supra* note 7, at 101; R. POTHIER, *supra* note 7, § 186; Comment, *Limitations on Recovery*, *supra* note 5, at 157.

the vendor is relieved of any obligation resulting from the eviction.¹⁰ In the absence of a stipulation of nonwarranty, the vendor is bound under the general warranty provisions,¹¹ and must restore the price even though knowledge of the danger of eviction will prevent the purchaser from recovering damages.¹²

French authorities have interpreted article 1638 of the French Civil Code as limiting the application of the warranty against eviction to those charges against the land which are nonapparent and not declared in the contract of sale.¹³ Thus an exception to the general rule of warranty has been traditionally recognized where the source of eviction is an apparent servitude.¹⁴ The distinction between the rule for visible or apparent servitudes and that for nonapparent charges was explained by Pothier, who observed that the kind of real charges against which the purchaser cannot claim warranty consists of the visible servitudes such as those of light and eaves-dropping. No injustice results to the purchaser who is unprotected against these charges "since in visiting the house before purchasing it, he cannot avoid seeing the windows or the eaves."¹⁵ Pothier distinguished the visible servitude from the *champart*, a type of rental arrangement often requiring payment of a portion of the produce,¹⁶ and noted that a purchaser could have knowledge of this type of charge only if he was informed of it.¹⁷

Although the visibility of the charge was emphasized, it is important to note that the visible servitudes discussed by Pothier were predial servitudes, consisting of a duty owed by one estate to a neighboring estate and remaining with the land regardless of changes of ownership. In viewing land burdened with a *champart* or other type of lease, a purchaser may observe mere evidence of the right's existence. However, a purchaser observing a visible predial servitude, in addition to seeing physical evidence of the exercise of a right, would also be apprised of the legal status

10. FR. CIV. CODE art. 1629; A. COLIN ET H. CAPITANT, *supra* note 7, at 101; Comment, *Limitations on Recovery*, *supra* note 5, at 159.

11. FR. CIV. CODE art. 1626.

12. A. COLIN ET H. CAPITANT, *supra* note 7, at 103; M. PLANIOL, *supra* note 7, §§ 1504, 1509; Comment, *Limitations on Recovery*, *supra* note 5, at 160, 161, 169. The purchaser is denied damages through an extension of the principle announced in FR. CIVIL CODE art. 1599 (LA. CIV. CODE art. 2452) which denies damages to a purchaser who knew the property was not owned by the vendor.

13. A. COLIN ET H. CAPITANT, *supra* note 7, at 82-83; M. PLANIOL, *supra* note 7, §§ 1493, 1495; R. POTHIER, *supra* note 7, § 194.

14. See authorities cited in note 13, *supra*.

15. R. POTHIER, *supra* note 7, § 200.

16. *Id.* § 201.

17. *Id.*

of the right flowing from the physical relationship which exists between two neighboring estates. This distinction is essential in order to define the precise limits of the exception. It follows that only a predial servitude can correctly be termed apparent and included in the exception to warranty.

Application of the warranty against eviction in Louisiana closely resembles French treatment. Under article 2501¹⁸ of the Louisiana Civil Code, the vendor is obliged to warrant the purchaser against eviction from charges not declared at the time of the sale.¹⁹ Relying on article 2505,²⁰ Louisiana courts have held that if the contract of sale contains a general stipulation of nonwarranty, the purchaser may not recover damages but is nevertheless entitled to a restitution of the price.²¹ Under such a contract, however, if the purchaser had knowledge of the danger of eviction he may recover neither damages²² nor a restitution of the price.²³ In cases where the contract of sale contained no general stipulation of nonwarranty, knowledge of the danger of eviction has prevented recovery of damages caused by the eviction,²⁴ but the purchaser has nevertheless recovered the price.²⁵

Relying on the French authorities²⁶ and article 2515,²⁷ Louisiana

18. LA. CIV. CODE art. 2501: "Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold, and against the charges claimed on such thing, which were not declared at the time of the sale."

19. Comment, *Limitations on Recovery*, *supra* note 5, at 163; *see* O'Reilly v. Poche, 162 So. 2d 787 (La. App. 4th Cir. 1964); *Lear v. John*, 6 La. App. 197 (La. App. 2d Cir. 1927).

20. LA. CIV. CODE art. 2505: "Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction, and purchased at his peril and risk."

21. *Berry v. Garrett*, 17 La. App. 262, 131 So. 475 (1930), *aff'd on rehearing* 17 La. App. 262, 135 So. 701 (1931); *Montgomery v. Marydale Land and Lumber Co.*, 46 La. Ann. 403, 15 So. 63 (1894); *Sewall v. Roach*, 5 La. Ann. 683 (1850); *Bowles v. Alfred*, 5 La. Ann. 667 (1850).

22. *See* note 12, *supra*.

23. LA. CIV. CODE art. 2505.

24. *See* note 12, *supra*.

25. *Scott v. Featherston*, 5 La. Ann. 306 (1850); *Hall v. Nevill*, 3 La. Ann. 326 (1848). *See* Comment, *Limitations on Recovery*, *supra* note 5, at 169-70. *But see* *Culver v. Culver*, 188 La. 716, 178 So. 252 (1937) (criticized in Comment, *Limitations on Recovery*, *supra* note 5, at 170).

26. *See* authorities cited in note 13, *supra*.

27. LA. CIV. CODE art. 2515: "If the inheritance sold be incumbered with nonapparent servitudes, without any declaration having been made thereof, if the servitudes be of such importance that there is cause to presume that the buyer would not have contracted, if he had been aware of the incumbrance, he may claim the canceling of the contract, should he not prefer to have an indemnification."

courts have ruled that a vendor of immovable property does not warrant against evictions caused by the existence of apparent servitudes on the land. In *Lallande v. Wentz*,²⁸ the vendee sought to avoid payment of the purchase price because a public levee built pursuant to the levee servitude covered a large portion of the land. The vendee was denied recovery on the ground that the levee servitude should be considered an apparent servitude against which the vendor does not warrant. Citing *Lallande*, the court in *James v. Buchert*²⁹ refused recovery to a purchaser who was evicted from a portion of the tract through the existence of a servitude of passage granted to the neighboring landowner by the vendor. In each of these cases the apparent servitude serving as the source of eviction was a predial servitude and the court's treatment of the exception was consistent with Pothier's explanation.

In the instant case, without making a pre-sale inspection the vendee purchased a tract of land under an act of sale containing no general stipulation of nonwarranty.³⁰ Numerous charges on the land indicating extensive mineral activity were listed in the act of sale,³¹ including a mineral servitude established in 1971.³² However, the vendor failed to declare the existence of an outstanding mineral lease granted in 1930 which was the source of substantial mineral operations causing vendee's eviction from a large portion of the property.³³

Although the charges listed in the act of sale were sufficient to alert the vendee to the danger of eviction, the court reasoned that this knowledge did not bar an action for return of the purchase price because the act of sale did not contain a nonwarranty clause.³⁴ The court noted, however, that Louisiana has long recognized the view expressed by French jurists that a vendor of immovable property does not warrant against evictions resulting from the existence of apparent servitudes.³⁵ Relying on the great emphasis French authorities gave to the visibility of the charge rather than its legal classification, and on the shared characteristics of mineral leases and mineral servitudes in Louisiana, the court derived the rule that a vendee of immovable property should not recover for evictions caused by a mineral lease if there are ample visible signs of

28. *Lallande v. Wentz*, 18 La. Ann. 289 (1866).

29. *James v. Buchert*, 144 So. 2d 435 (La. App. 4th Cir. 1962).

30. *Richmond v. Zapata Development Corp.*, 350 So. 2d 875, 876 (1977).

31. *Id.*

32. *Id.*

33. *Id.* at 877.

34. *Id.* at 879.

35. *Id.*

its existence on the property.³⁶

In extending the exception to include mineral leases, the court relied in part on the similarity between mineral leases and mineral servitudes.³⁷ Since the commencement of extensive oil and gas operations in Louisiana the mineral lease has been given many of the characteristics of a servitude.³⁸ Both the mineral lease and the mineral servitude include the right to explore, develop, and produce minerals, to reduce them to possession, and to assert title to a specified portion of production.³⁹ Both the mineral servitude and the mineral lease are classified as real rights.⁴⁰ Limiting the primary term of a mineral lease to ten years is further indication of a desire to treat the mineral lease in a manner consistent with the treatment given the mineral servitude.⁴¹ Since the court placed primary emphasis on the visibility of the charge, and since mineral operations pursuant to either a mineral servitude or a mineral lease would be equally visible, the court concluded that if the mineral servitude, as an apparent servitude, is included within the exception, the mineral lease should also be included.⁴²

In an effort to transcend traditional legal classifications and to treat the mineral servitude and the mineral lease in the same manner, the court assumed without discussion, although no case has so held, that the mineral servitude is an apparent servitude and should be excluded from the warranty of the vendor when there is ample visible evidence of its existence. However, it should be noted that the mineral servitude is not among the predial servitudes included by Pothier in the exception to warranty.⁴³ In Louisiana the mineral servitude has been designated a

36. *Id.* at 880.

37. *Id.*

38. LA. R.S. 31:16 (Supp. 1974) (comment): "The mineral lease has long been subject to the registry laws. LA. R.S. 9:2721-24 (1950). See article 18 of the Mineral Code. It has been subject to assertion and defense as a real right by use of the real actions, LA. R.S. 9:1105 (1950); La. Code of Civil Procedure art. 3664 (1960). It has been subject to mortgage as a corporeal immovable, LA. R.S. 9:5101 (1950), now Articles 203 and 204 of the Mineral Code. It has been given protection in the event of partition by licitation, La. Civil Code Art. 741 (1870 as amended), now Articles 178-187 of the Mineral Code."

39. *See id.*

40. LA. R.S. 31:16 (Supp. 1974): "The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease. This enumeration does not exclude the creation of other mineral rights by a landowner. Mineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the terms of their existence."

41. LA. R.S. 31:115 (Supp. 1974).

42. 350 So. 2d at 880.

43. R. POTHIER, *supra* note 7, § 200. The servitudes of light and eavesdropping are specifically mentioned.

real right in the nature of a limited personal servitude rather than a predial servitude.⁴⁴ The mineral servitude is considered a real right because it does not terminate with the death of the person in whose favor it is granted. Nevertheless, because the mineral servitude is due to a person rather than a dominant estate it is termed a personal servitude rather than a predial servitude.

In light of the basic nature of the mineral servitude, the court has misinterpreted the concept of visibility as formulated by the French authorities and has assumed erroneously that the mineral servitude should be considered an apparent servitude. Although predial servitudes are susceptible of designation as apparent or nonapparent,⁴⁵ personal servitudes cannot be so classified. A purchaser viewing land burdened by an apparent predial servitude is at that moment apprised of its legal status, i.e. that an obligation exists between specific neighboring estates. However, in observing mineral operations pursuant to a mineral servitude, a purchaser cannot without referring to the public records⁴⁶ ascertain whether operations are being conducted by the landowner, a servitude owner, a mineral lessee, or anyone who has been granted such a right by contract with the party holding the executive right. No specific legal relationship is made apparent by physical evidence of mineral operations on the land. Therefore, neither the mineral servitude nor the mineral lease should be excluded from the warranty of the vendor, even where there is ample physical evidence of their existence. The exclusion of apparent servitudes from warranty should be limited to predial servitudes as envi-

44. See e.g., *Gayoso Co. v. Arkansas Natural Gas Corp.*, 176 La. 333, 145 So. 677 (1933); *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931); *Palmer Corp. of Louisiana v. Moore*, 171 La. 774, 132 So. 229 (1930); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922). See Hardy, *The Birth of Louisiana Mineral Law*, 16 LOY. L. REV. 299, 326, 342 (1970); Sachse, *The Need for Statutory Guidance in Louisiana Mineral Law*, 22 LA. L. REV. 798, 801 (1962); Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law*, 29 LA. L. REV. 1 (1968).

45. LA. CIV. CODE art. 728: "Again, servitudes are either visible and apparent or non-apparent. Apparent servitudes are such as are to be perceivable by exterior works; such as a door, a window, an aqueduct.

Nonapparent servitudes are such as have no exterior sign of their existence; such, for instance, as the prohibition of building on an estate, or of building above a particular height."

46. In consideration of the limited scope of this Note, no attempt will be made to discuss the important policy questions presented by the court's reliance on a somewhat ill-defined concept of visibility rather than applying the public records doctrine to prevent the vendee from bringing an action under the warranty against eviction in cases where the sale of land is by warranty deed.

sioned by French authorities and as previously applied in Louisiana cases.

Through the misapplication of the concept of visibility of legal relationships, and the resulting inclusion of the mineral servitude and the mineral lease in the exception to warranty, there is danger that the warranty provisions will be further weakened. The mineral lease continues to share many of the characteristics of an ordinary lease, and the courts have continued in proper cases to apply to mineral leases the Civil Code articles governing ordinary leases, notwithstanding the designation of the mineral lease as a real right.⁴⁷ Since *Zapata* extends the traditional exception to include one type of lease arrangement, there is no conceptual obstacle to further extension which would exclude other visible encumbrances from the warranty of the vendor.

Although the court reached the correct conclusion under the facts of the instant case, its analysis could yield undesirable results in future cases. There is, however, an alternative which would provide an equitable solution and eliminate the conceptual difficulties should the court desire to distinguish the case from similar cases in the future. At the time of the sale both a mineral lease and a mineral servitude had been established on the tract. Although the vendor failed to list the outstanding mineral lease in the act of sale,⁴⁸ he did declare an outstanding mineral servitude on the tract.⁴⁹ Under the Louisiana Mineral Code, the mineral servitude owner enjoys the right to explore for and produce minerals, including the right to lease the property for the production of minerals.⁵⁰ Thus, from the aggregate of the rights of the mineral servitude owner, the mineral lease may be created, and the mineral servitude owner is considered the mineral lessor.⁵¹ The very definition of the mineral lease emphasizes its nature as contract. To declare the existence of the mineral servitude is to declare the right and power of the servitude owner to exploit through any form of contract, and a declaration of all contracts subordinate to the mineral servitude should not be required. Such a rule would require the *vendor* to search the records to discover the various contractual rights which have been granted by the mineral servitude owner so that each might be listed in the act of sale and thereby excluded

47. *Davis v. Laster*, 242 La. 735, 138 So. 2d 558 (1962); *La. Oil Refining Corp. v. Cozart*, 163 La. 90, 111 So. 610 (1927); *Succession of Rugg*, 339 So. 2d 519 (La. App. 2d Cir. 1976).

48. 350 So. 2d at 877.

49. *Id.*

50. LA. R.S. 31:21 (Supp. 1974).

51. La. R.S. 31:116 (Supp. 1974) (comment): "[I]t is proper to require that the mineral lessor be one who is the owner of or has executive rights over the property being leased."

from warranty. This is indeed an absurd result which could not possibly have been intended; yet *Zapata* would seem to require vendors to list all such contracts.

In the instant case, the outstanding mineral lease was created by the landowner in 1930, forty-one years before the creation of the mineral servitude. Nevertheless, the mineral servitude owner became the successor in interest of the landowner as to the minerals and the mineral lessor as to the outstanding mineral lease at the time the mineral servitude was created. Thus the source of the eviction was the outstanding mineral servitude from which flowed the mineral lessees's contractual right to conduct mineral operations.⁵² In future cases the court should find that in listing the mineral servitude in the act of sale, the vendor is relieved of any obligation in warranty for evictions caused by the exercise of contractual rights subordinate to the mineral servitude.⁵³

Zapata poses a threat to the warranty provisions of the Civil Code by breaking down conceptual barriers to the extension of the exception to warranty where apparent servitudes are the source of eviction. If future purchasers of land are to be fully protected by warranty, the court must re-evaluate its analysis of the function and scope of the traditional exception to warranty.

Richard Keith Colvin

VICARIOUS LIABILITY AND INTENTIONAL TORTS: *LeBrane* Refined

Defendant, the president and majority stockholder of a closely held corporation, purchased additional insurance on the life of the plaintiff, a former vice-president of the corporation, and made the corporation the beneficiary. Shortly thereafter, the defendant and two corporate employees brutally beat the plaintiff late one evening outside of his home. The Third Circuit Court of Appeal held that the tortious acts were not committed during the course and scope of the defendant's employment. The Louisiana Supreme Court reversed and *held* that the defendant's actions were in large part motivated by his desire to improve the corporation's

52. LA. R.S. 31:114 (Supp. 1974).

53. LA. CIV. CODE art. 2501.