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NOTES

COMMUNITY OWNERSHIP OF IMMOVABLES: BOND FOR DEED CONTRACTS

During the existence of his first marriage, Sidney Cosey entered into, but failed to record, a bond for deed contract for the purchase of immovable property. After his last payment had been made, but before the act of sale was executed and recorded, Cosey divorced and remarried. During his second marriage, the vendor transferred title, naming Cosey and his second wife as vendees. After Cosey's death, plaintiff, a child of the first marriage and sole heir of Cosey, sought a judgment decreeing that the property belonged to the community formerly existing between his parents.¹ The trial court held that the second wife was bound to return the property she had received unduly. The court of appeal reversed, holding that the property formed part of the second community. On rehearing, the supreme court reversed and *held* that Cosey and his first wife were owners in indivision of a one-half interest each in the property. *Cosey v. Cosey*, 376 So. 2d 486 (La. 1979).

The French Civil Code provides that a promise of sale becomes a sale as soon as there is mutual consent as to the thing and the price.² In 1910 Louisiana Civil Code article 2462 was amended³ to provide that the "reciprocal consent of both parties . . . so far amounts to a sale, as to give either party the right to enforce specific performance . . ."⁴ This amendment codified jurisprudence⁵ that had distinguished a promise to sell from a sale, the former being "a bilateral contract to sell, but not a sale, since the latter involves a transfer of ownership."⁶

1. This controversy only concerns a one-half interest in the property since the plaintiff inherited a one-half interest as Cosey's legal heir.

2. FRENCH CIV. CODE arts. 1583, 1589 (J. Crabb trans. 1977). See generally Smith, *An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money*, 20 LA. L. REV. 522 (1960).

3. 1910 La. Acts, No. 249.

4. LA. CIV. CODE art. 2462.

5. See *McDonald v. Aubert*, 17 La. 448 (1841). "[A] promise to sell, when the thing to be sold and the price of it are agreed upon . . . does not place the thing at the risk of the promisee, nor does it transfer to him the ownership or dominion of it." *Id.* at 451.

6. Smith, *supra* note 2, at 529. See 2 S. LITVINOFF, OBLIGATIONS § 121, in 7 LOUISIANA CIVIL LAW TREATISE 220 (1969).

In Louisiana the bond for deed contract is defined as a "contract to sell,"⁷ and the jurisprudence has interpreted it as merely a contract to sell and not as a sale translatif of ownership.⁸ The bond for deed contract is a statutory exception to the Louisiana rule prohibiting conditional sales wherein the seller retains the title while the buyer is bound to pay the price.⁹ It is applicable only to real property and contains technical requirements designed to insure protection of the purchaser, since title does not pass until the condition of payment of a stipulated price has been fulfilled.¹⁰ It must be noted that title does not pass automatically to the vendee; rather, after fulfillment of the condition (payment), the seller "*agrees to deliver* title to the buyer."¹¹ Upon entering into the bond for deed contract, the parties have a right to demand specific performance.¹² That right, although existing from the time that the contract is entered, cannot be exercised until the condition is fulfilled.¹³

The leading community property case involving a bond for deed contract is *Kendall v. Kendall*,¹⁴ in which a husband made most of the payments during his second marriage, but title passed during his third marriage. Finding that the property belonged to the third community, the court relied on Civil Code article 2402,¹⁵ which focuses on the time that property actually is acquired in order to determine its status as community or not. The court reasoned that "[a]cquisition by purchase, within the intendment of this article, clearly means that there must be an act of sale transferring title to

7. LA. R.S. 9:2941 (1950) provides: "[a] bond for deed is a contract to sell real property, in which the purchase price is to be paid by the buyer to the seller in installments and in which the seller after payment of a stipulated sum agrees to deliver title to the buyer."

8. See, e.g., *Pruyn v. Gay*, 159 La. 981, 106 So. 536 (1925); *Campbell v. Richmond Ins. Co.*, 156 La. 455, 100 So. 679 (1924); *Trichel v. Home Ins. Co.*, 155 La. 459, 99 So. 403 (1924).

9. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908).

10. LA. R.S. 9:2941-47 (1950). See Comment, *Bond for Deed Contracts*, 31 LA. L. REV. 587 (1971).

11. LA. R.S. 9:2941 (1950) (emphasis added).

12. LA. CIV. CODE art. 2462. See *Leinhardt v. Marrero Land and Improvement Ass'n, Ltd.*, 137 So. 2d 387 (La. App. 4th Cir. 1962); 2 S. LITVINOFF, *supra* note 6, at 224.

13. 2 S. LITVINOFF, *supra* note 6, at 227, citing *Bourneman v. Richards*, 245 La. 851, 161 So. 2d 241 (1964).

14. 174 La. 148, 140 So. 6 (1932).

15. LA. CIV. CODE art. 2402 (as it appeared prior to 1979 La. Acts, No. 709; 1978 La. Acts, No. 627): "[The] community consists of . . . the estate . . . [acquired] during the marriage . . . by purchase . . . because . . . the period of time when the purchase is made is alone attended to, and not the person who made the purchase."

real property, and not merely an agreement to sell."¹⁶ Therefore, since the act of sale was executed during the third community, the property formed part of that community. The plaintiff, the husband's sole heir, inherited his ancestor's one-half interest in the property, but had only a right of reimbursement for sums paid prior to the third marriage.

In *Connell v. Connell*¹⁷ a husband acquired four life insurance policies before his marriage, and the wife acquired one insurance policy before her marriage; a second policy was acquired during their marriage. The court held that the policy acquired during the existence of the community regime was a community asset, but that the policies acquired before the marriage were separate property, notwithstanding the use of community funds to pay the premiums. Concerning the use of community funds, the court stated that "[i]nasmuch as community funds were used to pay premiums while the community existed, [the individual spouse] is responsible to the community for whatever enhancement in value the policy experienced from the use of community funds."¹⁸

The court has reached different results when confronted with contingent fee contracts and pension plans. In *Due v. Due*,¹⁹ the husband, a lawyer, entered a contingent fee contract which was only partially performed at the time of dissolution of the marriage. The court held the interest in the contingent fee contract to be property that formed part of the community "insofar as its value is based upon the attorney's services performed during the marriage."²⁰ In *T.L. James & Co., Inc. v. Montgomery*,²¹ the husband was entitled to share in the benefits of a retirement plan and a profit-sharing plan, the funds for which were supplied solely by the employer. The court found that the right to share in the proceeds was acquired during the marriage and held that his wife "is thus entitled to be recognized as the owner of one-half the value of the right-to-share, insofar as attributable to the contributions paid into the fund . . . during the existence of the community"²²

There are three theories for determining the status of property as community or separate: time-of-vesting, inception-of-title, and pro

16. 174 La. at 153, 140 So. at 8.

17. 331 So. 2d 4 (La. 1976).

18. *Id.* at 8.

19. 342 So. 2d 161 (La. 1977).

20. *Id.* at 165-66.

21. 332 So. 2d 834 (La. 1976).

22. *Id.* at 851.

rata.²³ The time-of-vesting theory focuses on the time that title is transferred; "the fact that title [passes] during marriage makes ownership presumptively community."²⁴ When confronted with immovable property, as in *Kendall*, the court uses the time-of-vesting theory. The inception-of-title theory is used to classify life insurance policies; the court in *Connell* merely focuses on when each policy has its inception. When the acquisition of other types of *movable* property bridges a change in the status of the parties, the court uses a pro rata method of apportionment, rather than focusing on the time that title vests or the time of the title's inception.²⁵

In *Cosey*,²⁶ the court reached a result contrary to that reached in *Kendall*, with the only distinguishing fact being that in *Cosey* all the payments had been made during the previous community. Sidney Cosey married Hattie Harris in 1915. They had one child, Sidney Cosey, Jr. (plaintiff). In 1945, Cosey Sr. entered into a bond for deed contract with the C.E. Cates Estate, in which contract Cosey Sr. agreed to pay \$825 in stipulated installments, after which the Cates Estate agreed to transfer title. This bond for deed contract was never recorded. In 1961, Cosey Sr. made the final payments, but because of the death of a co-owner, the Cates Estate delayed the transfer of title to the property. In 1962 Cosey Sr. and Hattie were divorced, and Cosey Sr. married Lillian Tyler. Later that year the Cates Estate transferred the property to "Sidney and Lillian Cosey once married and living together." This deed *was* recorded. Hattie died in 1964, and Cosey Sr. died in 1976; they were survived by their only child, Cosey Jr., who qualified as administrator of the successions of his parents and brought an action against Lillian Cosey and the Cates Estate to obtain a judgment decreeing that the property belonged to the community formerly existing between his parents.

The trial court reasoned that, because the second wife's claim to one-half the property arose through error on the part of the notary naming her as joint purchaser, and because all of the funds used to pay for the property belonged to the first community, the second wife had received property not due her. The court held that she was bound by Civil Code articles 2301 and 2312 "to restore it to him from whom [she had] unduly received it."²⁷ The court of appeal re-

23. W. REPPY, W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES: A COMPARATIVE STUDY BY CASES, MATERIALS AND PROBLEMS 220-21 (1975).

24. *Id.* at 220.

25. See text at notes 19-22, *supra*.

26. *Cosey v. Cosey*, 376 So. 2d 486 (La. 1979).

27. LA. CIV. CODE art. 2301.

versed,²⁸ finding *Kendall* to be controlling. On original hearing, the supreme court affirmed, holding: (1) because the bond for deed contract was unrecorded, the second wife (who was a third party) acquired the property free from any interest the first wife may have had,²⁹ and (2) because there was no error in the act of sale, parol evidence was inadmissible to show that the vendee was someone other than the one named in the deed.³⁰ On rehearing, however, the court reversed itself, holding that at the time of their deaths, plaintiff's parents were owners in indivision of the property and that the second wife was bound by Civil Code articles 2301 and 2312 to return the property.

The vacillation of the court illustrates the difficulty of the case. The trial court and the supreme court on rehearing basically examined the equities and gave the property to the party who had paid for it. On original hearing the supreme court reached the proper result, but applied the public records doctrine³¹ rather than examining the rights of the parties under bond for deed contracts and applying the community property articles to those rights. Upon entering the bond for deed contract, the buyer has the right to demand specific performance.³² However, although the right exists, it may not be exercised until fulfillment of the condition.³³ Therefore, when the question is into which of two communities the property falls, the

28. *Cosey v. Cosey*, 364 So. 2d 186 (La. App. 1st Cir. 1978).

29. It is established in Louisiana that interests in immovable property must be recorded to affect third persons. LA. CIV. CODE arts. 2264, 2266; LA. R.S. 9:2721 (1950). See *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

30. LA. CIV. CODE arts. 2236, 2238, 2276, 2440. See *Eberle v. Eberle*, 161 La. 313, 108 So. 549 (1926).

31. See note 28, *supra*. In the *Cosey* dissent on original hearing, it was observed that any right that the second wife had to the property was as a "successor party" to the bond for deed contract. She should not fall under the protection offered by the *McDuffie* doctrine because the "purpose of the recordation provisions [is] to establish a dependable and functional method by which a prospective buyer can ascertain the title to real estate . . ." Comment, *Registration of Title to Immovables in Louisiana*, 32 TUL. L. REV. 677, 678 (1958) (emphasis added). The second wife should not be able to receive property under an unrecorded contract and at the same time be allowed to claim she is not privy to it. Cf. *Meraux v. R.R. Barrow, Inc.*, 219 La. 309, 52 So. 2d 863 (1951) (grantees in a royalty deed of real property, who were sole stockholders of a corporation which purchased the property, could not claim the corporation to be a third party to exclude a co-grantee in the unrecorded royalty deed); *Porterfield v. Parker*, 189 La. 720, 180 So. 498 (1938) (heirs of the wife could not claim to be third parties unaffected by an unrecorded sale made by the husband during the marriage and before the wife's death).

32. *Leinhardt v. Marrero Land Improvement Ass'n, Ltd.*, 137 So. 2d 387 (La. App. 4th Cir. 1962).

33. 2 S. LITVINOFF, *supra* note 6.

distinguishing fact in *Kendall*—that payments had not been completed, whereas in *Cosey* all payments had been made by the time of dissolution of the first marriage—should make no difference. No greater right exists upon full payment in *Cosey* than the right existing after partial payment in *Kendall*: *Cosey*'s right is merely no longer inchoate. In neither situation has there been a transfer of title.

The sale under a bond for deed contract is a conditional sale. It can be argued that upon fulfillment of the condition, the time title vests is made retroactively effective to the date the contract was entered.³⁴ However, "compliance with the condition only renders the contract executory; makes the reciprocal promises absolute and establishes the rights and liabilities of the parties as of the date of the agreement."³⁵

The right arising in the bond for deed contract is not susceptible to analogy to employee benefit plans and contingent fee contracts. In cases concerning those contracts, the court has held that "among the assets of the community . . . are obligations based upon the right to receive money . . . even though this right is contingent upon the happening of an event at a future time."³⁶ In *Due*³⁷ the court reached the conclusion that property, within the meaning of Civil Code articles 2402 and 2334,³⁸ means all patrimonial rights, *i.e.*, all rights susceptible to pecuniary evaluation.³⁹ Clearly the right under a bond for deed contract fits this definition. The problem arises not with the definition of "property," but rather with what is meant by the phrase "acquire during the marriage . . . by purchase, or in any other similar way . . ."⁴⁰ *Kendall* construed the phrase to mean that "there must be an act of sale transferring title to real property . . ."⁴¹

34. LA. CIV. CODE art. 2041 states: "[t]he condition being complied with, has a retrospective effect to the day that the engagement was contracted. . . ."

35. *Ober v. Williams*, 213 La. 568, 580, 35 So. 2d 219, 223 (1948). *Cf. Wampler v. Wampler*, 239 La. 315, 118 So. 2d 423 (1960) (wife could not claim an undivided one-half interest in an oil and gas mineral lease which was assigned to the husband prior to divorce decree on condition that titles be examined and approved, when the conditions did not occur until after the divorce).

36. *Due v. Due*, 342 So. 2d 161, 163 (La. 1977), *citing* T.L. James & Co., Inc. v. Montgomery, 332 So. 2d 834 (La. 1976).

37. *Due v. Due*, 342 So. 2d 161 (La. 1977).

38. Subsequent to the supreme court's *Due* decision, articles 2334 and 2402 were amended. *See* 1979 La. Acts, No. 709; 1978 La. Acts, No. 627. The recent legislation's impact is treated below. *See* notes 55-61, *infra*, and accompanying text.

39. The court reaches this conclusion citing A. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM § 70, 243 (1971) and A. YIANNOPOULOS, PROPERTY § 1, in 2 LOUISIANA CIVIL LAW TREATISE 2 (1967).

40. LA. CIV. CODE art. 2402 (as it appeared prior to 1979 La. Acts, No. 709; 1978 La. Acts, No. 627).

41. 174 La. at 153, 140 So. at 8.

The fact that under a bond for deed contract one has the right to receive an immovable, rather than a movable, should bar analogy to the *Due* line of cases: the transfer of immovable property must be in writing.⁴² Civil Code article 2402 clearly mandates that "*the period of time when the purchase is made is alone attended to, and not the person who made the purchase.*"⁴³ This suggests that when dealing with immovable property, the pro rata method of distribution should not be followed.

The function of articles 2334 and 2402 is to fix the status of property. The court's error was encouraged by the seemingly inequitable result reached by application of the law. If Cosey had never remarried, a transfer of property to him after his divorce would not have resulted in ownership in indivision by Cosey and his former wife, because the property would not have been acquired "during the marriage."⁴⁴ The fact that the property falls into the second community (because it was acquired during the existence of the second community) has no relation to the determination that it is not part of the first community. The code articles, *vis-a-vis* the second community, do not divest the first community of property which never formed a part of that community.

Upon the termination of the first community, the wife has a right of reimbursement from Cosey Sr.'s separate estate for one-half the community funds used to purchase the property.⁴⁵ This debt is extinguished by confusion upon the death of Harriet and Cosey Sr. because the creditor (heir of Harriet, Cosey Jr.) and the debtor (heir of Cosey Sr., Cosey Jr.) are the same person.⁴⁶ However, upon termination of the second community, Cosey Sr.'s separate estate is owed a reimbursement for his "separate funds" used to purchase the property. One-half of the reimbursement is paid by the second wife. Therefore, the reimbursement provision in the Civil Code adequately protects all parties.

Cosey questions the validity of past, correct jurisprudence: the court ignores the construction given to article 2402 in *Kendall* by

42. LA. CIV. CODE art. 2440.

43. LA. CIV. CODE art. 2402 (as it appeared prior to 1978 La. Acts, No. 627) (emphasis added).

44. Succession of Fay, 161 La. 1022, 109 So. 824 (1926); Succession of Le Besque, 137 La. 567, 68 So. 956 (1915). *But see* Golding v. Golding, 43 La. Ann. 555, 9 So. 638 (1891).

45. LA. CIV. CODE art. 2408 (as it appeared prior to 1979 La. Acts, No. 709; 1978 La. Acts, No. 627); *Kendall v. Kendall*, 174 La. 148, 140 So. 6 (1932); *Jefferson v. Stringfellow*, 148 La. 223, 86 So. 774 (1920); *Pennison v. Pennison*, 157 So. 2d 628 (La. App. 4th Cir. 1963) *cert. denied*, 245 La. 585, 159 So. 2d 290 (1964).

46. *Guillory v. Desormeaux*, 166 So. 2d 575 (La. App. 3d Cir. 1964).

focusing not on *when* the property is acquired, but rather, on *who contributes* toward its acquisition.⁴⁷ After determining that the property belongs to the community which contributed to its acquisition, rather than the one which acquired it, the court further relies on the absence of facts evincing Cosey's desire that his second wife share in the property with him.⁴⁸ In the absence of a dual declaration,⁴⁹ this inquiry should have no relevance, even if this action had been brought by Cosey against his second wife.⁵⁰ In contrast, the *Kendall* rationale provides an easy and dependable method of fixing the ownership of immovable property.

Although on the *Cosey* facts the inception-of-right theory and the pro rata method yield the same result, the difference in rationales is significant. If the inception-of-right theory⁵¹ is used, the property forms part of the first community, because the acquisition process began during the first marriage. This method of classification is also acceptable when dealing with immovable property, because, as in application of the time-of-vesting theory,⁵² a single, definite event is controlling. Under the pro rata method,⁵³ the property would belong to the first community because all the payments were made with community funds. The result is acceptable under the *Cosey* fact situation. What if the payments, however, had been made at three different times (e.g. during both communities and while Cosey Sr. was single)? By speaking in terms of the "interest" in the property, the court suggests, like the *Due* court, that an *interest* acquired during marriage becomes community property.⁵⁴ Yet how are third persons put on notice as to each person who may have an "interest" in the property?

Under the amendments to the Louisiana Civil Code community property articles,⁵⁵ the result reached by the court would be correct:

47. 376 So.2d at 491.

48. *Id.* at 492.

49. See *Sharp v. Zeller*, 110 La. 61, 34 So. 129 (1902). In making this inquiry into Cosey Sr.'s intent, the court has abandoned the rule that property bought by the husband during marriage is *conclusively* presumed to be community property in the absence of a declaration in the act of sale stating that: (1) the husband's separate funds were used and (2) it is the husband's intent that the property belong to his separate estate.

50. A further interesting "reason" for the result reached by the court is the lack of evidence showing the second wife "realized" her interest "by virtue of her rights in the community." 376 So. 2d at 492. There has never been a requirement of knowledge to invoke articles 2334 and 2402.

51. See notes 23-24, *supra*.

52. See notes 23-24, *supra*, and accompanying text.

53. See note 25, *supra*, and accompanying text.

54. 342 So. 2d at 165.

55. See 1979 La. Acts, No. 709.

the property would fall into the first community. There is a rebuttable presumption that things in possession of a spouse during the existence of a community regime are community property.⁵⁶ Article 2338 states that "community property comprises . . . [that] property acquired with community things . . . unless classified as separate property under article 2341 . . ." ⁵⁷ This requirement does not focus on *when* the property was acquired, but rather on *what* was used to acquire it. Furthermore, article 2341⁵⁸ does not address the situation in which property is acquired after termination of a community property regime. Therefore, the new classification scheme allows property to be classified as community property regardless of when title was transferred, provided that community funds were used to acquire the property. The second wife's claim that the property formed part of the second community is erroneous, because the property was not "acquired during existence of the legal regime *through the effort, skill, or industry* of either spouse; [nor] acquired *with community things* . . ." ⁵⁹

The decision in *Cosey*, read in conjunction with Act 709 of 1979, could signal the application of the pro rata classification scheme to immovables. The court's focus on the "interest" in the property suggests that the court may be ready to expand even further the definition of property used in *Due*.⁶⁰ Perhaps most significantly, the deci-

56. LA. CIV. CODE art. 2340.

57. LA. CIV. CODE art. 2338. The present text states:

The community property comprises: property acquired *during the existence* of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

(Emphasis added).

58. LA. CIV. CODE art. 2341:

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse *prior to the establishment of a community property regime*; property acquired *by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used*; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; and damages or other indemnity awarded to a spouse in connection with the management of his separate property.

(Emphasis added).

59. LA. CIV. CODE art. 2338 (emphasis added).

60. "Included among the assets of the community . . . are obligations based upon the right to receive money to become due in the future . . ." 342 So. 2d at 163.

sion is bolstered by the removal of the requirement that "the period of time when the purchase is made is alone attended to"⁶¹ by Act 709 of 1979.

William L. Hearne

Baten v. Taylor: SURVIVORSHIP CLAUSES SURVIVE THE CIVIL LAW

Gordon D. Baten died testate at his domicile in Beaumont, Texas, leaving separate immovable property situated in Louisiana to his wife on the condition that she survive him by thirty days. In the event that the condition was not fulfilled, the property was to go to his nephews. The decedent's sister, his presumptive intestate heir, unsuccessfully attacked the will in district court. The decision was reversed by the Third Circuit Court of Appeal, which held that the disposition conflicted with Civil Code article 1520, prohibiting "substitutions" as defined by that article, and article 1609, which, in the absence of forced heirs, gives the universal legatee seizin of the succession immediately upon the testator's death.¹ Despite the obstacles posed by these two articles, the Louisiana Supreme Court reversed, *holding*: (1) the disposition contained none of the essential characteristics of a prohibited substitution as defined by article 1520, and (2) a universal legacy subject to a suspensive condition does not conflict with the seizin provisions of the Civil Code. *Baten v. Taylor*, 386 So. 2d 333 (La. 1979).

A condition which depends upon the occurrence of a future or uncertain event is classified as either suspensive or resolutive.² That which takes effect only upon the happening of the event is said to be suspensive,³ while that which takes effect immediately but is defeated by the event is deemed resolutive.⁴ A testator is free to impose such conditions upon a testamentary disposition,⁵ provided that they are not illegal, immoral, or impossible.⁶ Conditions such as that in the present case, known generally as survivorship clauses,

61. LA. CIV. CODE art. 2402 (as it appeared prior to 1979 La. Acts, No. 709; 1978 La. Acts, No. 627).

1. Succession of Gwathmey, 364 So. 2d 226 (La. App. 3d Cir. 1978).

2. LA. CIV. CODE arts. 2021, 2043, 2045.

3. LA. CIV. CODE arts. 2021, 2043.

4. LA. CIV. CODE arts. 2021, 2045.

5. LA. CIV. CODE arts. 1519, 1527, 1698, 1699.

6. LA. CIV. CODE arts. 1519, 1527, 2031.