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## Favaloro v. Favaloro: Classification of Rights Associated With Counter-letters as Real or Personal

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## *Favaloro v. Favaloro*:<sup>1</sup> Classification of Rights Associated With Counter-letters as Real or Personal

### I. INTRODUCTION

John T. Favaloro (John T.) purchased certain immovable property in Metairie, Louisiana, with the assistance of his cousin, John L. Favaloro (John L.) and an investor, Vincent F. Frazone. John T. recorded title to the property in his own name as full owner, however, John L. and Frazone furnished two-thirds of the purchase price. John T. issued a counter-letter<sup>2</sup> to John L. recognizing him as two-thirds owner of the property. John L. in turn issued a counter-letter to Frazone recognizing his one-third ownership. John L. never recorded the counter-letter reciting his ownership interest.

On December 31, 1978, fourteen years after the issuance of the original counter-letter, John L. returned the counter-letter to John T.'s wife, Frieda. John L.'s wife, Gloria, witnessed John L.'s return of the counter-letter to Frieda. John L. agreed to surrender his one-third interest in the property for a promise that he would receive the income from the property for the remainder of his life.

Following John L.'s death, Gloria C. Favaloro (John L.'s wife), filed suit seeking to be recognized as one-third owner of the Metairie property.<sup>3</sup> Gloria claimed that the surrender of the counter-letter by her husband was not a valid transfer of immovable property because the agreement was not reduced to writing.<sup>4</sup>

The fourth circuit granted summary judgment for the defendant (John T.) stating that "a person who receives a counter-letter purporting to convey an interest in immovable property receives only a personal right which may be asserted against the transferor, not an actual ownership right in the property."<sup>5</sup> The court held that "[w]hen a counter-

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1. 561 So. 2d 783 (La. App. 4th Cir.), writ denied, 567 So. 2d 1125 (1990).

2. The word has a Latin origin in which "letter" was what we call an "act." To "give letters" meant "giving a written recognizance." The "counter-letter" is therefore the writing which contradicts another act.

3. While the original counter-letter recognized John L. as two-thirds owner of the Metairie property, Mrs. Favaloro's suit sought only a one-third interest. No claim was made concerning the ownership of the other one-third interest transferred to Frazone through the second counter-letter issued by John L. Therefore, discussion will be limited to the one-third interest claimed in the suit.

4. La. Civ. Code art. 1839.

5. *Favaloro*, 561 So. 2d at 786.

letter evidencing a promise of ownership is delivered to the original transferor in return for valid consideration, the transferee surrenders his right to interest in the property. No written document evidencing the surrender of the right is necessary."<sup>6</sup>

The classification of the counter-letter as representing only personal rights was fatal to Mrs. Favaloro's claim. Mrs. Favaloro based the cause of action on the premise that the counter-letter issued to John L. represented an ownership interest and thus a real right in the property that could be transferred only by an authentic act or act under private signature in accordance with Louisiana Civil Code article 1839. The court's classification of the right as personal allowed for an oral transfer of rights because the counter-letter represented only a promise of future ownership and not an actual ownership interest. This view rendered Article 1839 inapplicable. The implications of a personal right classification go beyond the writing requirement of Article 1839. If the court is correct, the holder of a counter-letter will be unable to enforce his rights in immovable property by instituting a petitory action since such real actions are limited to the holders of real rights.

The fourth circuit cited no authority for its determination that counter-letters create merely personal rights between the immediate parties. This is particularly significant in light of *Peterson v. Moresi*,<sup>7</sup> a 1939 Louisiana Supreme Court decision, which reached a contrary result. It is the purpose of this note to examine the rights associated with counter-letters in the transfer of immovable property and to determine whether these rights are more appropriately classified as personal or real.

First, this note will discuss the uses of counter-letters in simulated transactions. Second, it will list the general characteristics of personal and real rights. Third, it will compare the rights associated with counter-letters to the characteristic of real rights. This note ends with a discussion of the effects of classifying rights associated with a counter-letter as real.

## II. COUNTER-LETTERS: USES IN SIMULATED TRANSACTIONS

Counter-letters are often used in connection with simulated contracts. A contract is simulated when, by mutual agreement, it does not express the true intention of the parties.<sup>8</sup> The simulation generally has two aspects: an apparent act which appears to be valid on its face, but is in reality fictitious, and a serious expression of will which remains secret.<sup>9</sup>

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6. *Id.*

7. 191 La. 932, 186 So. 737 (1939).

8. La. Civ. Code art. 2025.

9. Lemann, *Some Aspects of Simulation in France and Louisiana*, 29 Tul. L. Rev. 22 (1954).

When this secret intention is reduced to writing, it is called a counter-letter.<sup>10</sup> Therefore, the counter-letter reflects the written expression of the parties' will. Counter-letters are most prevalent in simulations involving the transfer of immovable property. The admissibility of parol evidence to attack an apparent sale of immovable property by authentic act or act under private signature is limited.<sup>11</sup> The supposed transferor may prove that the apparent sale of the property was in fact fictitious only by means of a counter-letter or by admissions of the opposing party in pleadings or interrogatories.<sup>12</sup>

Three basic types of simulations exist in which counter-letters are used to affect the transfer of immovable property. First, the transferor and transferee may agree to an absolute simulation.<sup>13</sup> Typically in this situation the parties will perfect an apparently valid act of sale; however, the transferee does not pay the price and the transferor will usually remain in possession of the property. A written counter-letter establishes that the transferor never had the intention to alienate the property and that the transferee is not the true owner.<sup>14</sup> The counter-letter will destroy any claims of ownership by the transferee based on the authentic act.<sup>15</sup>

The second type of simulation is the disguised transfer or relative simulation.<sup>16</sup> In this situation, there is an intention to transfer the property; however, the nature of the transfer differs from what is stated in the authentic act. An example is where an authentic act may appear to be a valid sale, but the transferee does not pay the price and the transferor intends to make a donation.<sup>17</sup> The counter-letter will reflect the intention of the parties that the property was actually transferred by donation rather than by sale.

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10. La. Civ. Code art. 2025.

11. La. Civ. Code art. 1848 states:

Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent, or a simulation, or to prove that the written act was modified by a subsequent and valid oral agreement.

The article does allow parol evidence to be admitted to prove a simulation. However, use of such evidence is limited to claims by third parties in some instances. See La. Civ. Code art. 1848 comment (c). Parol evidence is not admissible between the immediate parties of an absolute simulation. The apparent transferor may not succeed in attacking an absolute simulation in the absence of a counter-letter. See La. Civ. Code art. 2026 comment (b).

12. *Rush v. Landers*, 107 La. 549, 32 So. 95 (1902); Comment, *The Action in Declaration of a Simulation*, 17 Tul. L. Rev. 457 (1943).

13. La. Civ. Code art. 2026.

14. 2 M. Planiol, *Treatise on Civil Law* No. 1188, at 677 (11th ed. La. St. L. Inst. trans. 1959).

15. *Duncan v. Duncan*, 26 La. Ann. 532 (1874).

16. La. Civ. Code art. 2027.

17. Lemann, *supra* note 9, at 23.

Finally, a simulation may be accomplished by the employment of third persons.<sup>18</sup> A person may wish to purchase property while keeping his identity as transferee unknown to third persons. He will employ a prete-nom<sup>19</sup> who will lend his name to the transaction as purchaser; however, the price is furnished by the principal. The prete-nom will issue a counter-letter which recites that he is not the true owner of the property. This type of simulation is not specifically recognized in the civil code but has been recognized in Louisiana jurisprudence.<sup>20</sup>

The counter-letter issued in *Favaloro* is most appropriately categorized as a simulation by employment of third parties. John T. purchased the property in his own name from a willing transferor clearly intending to transfer title to the Metairie property. John L., however, furnished one-third of the purchase price in the transfer. John T. issued a counter-letter which stated that John L. was one-third owner. It appears that John T. purchased one-third of the property on behalf of John L.

### III. PERSONAL AND REAL RIGHTS: GENERAL CHARACTERISTICS

A personal right is the legal power that a person (obligee) has to demand from another person (obligor) to perform an obligation which may consist of giving, doing, or not doing a thing.<sup>21</sup> The Louisiana Civil Code does not expressly define personal rights but definitions of personal rights have developed through the jurisprudence.<sup>22</sup> In *Reagan v. Murphy*,<sup>23</sup> the supreme court stated in dictum that "[a] personal right . . . defines man's relationship to man and refers merely to an obligation one owes to another which may be declared only against the obligor."<sup>24</sup> This definition limits the rights of the obligee to specific performance of the obligation or a compensatory judgment.

To determine whether or not particular rights are personal, one must examine three factors. First, personal rights involve relations between persons—the obligee who has the right to demand performance, and the obligor who is required to give, do, or not do a thing. Second,

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18. 2 M. Planiol, *supra* note 14, at 678.

19. 3 M. Planiol, *Treatise on the Civil Law* No. 2266-72, at 301 (11 ed. La. St. L. Inst. trans. 1959). Prete-nom is a species of the contract of mandate. The mandatary will usually make his agency relationship with the principal known to the third parties with which he deals. The purpose of the prete-nom is to lend his name to the principal and to conceal the fact that he acts on behalf of the principal from third parties.

20. *Peterson v. Moresi*, 191 La. 932, 186 So. 737 (1939).

21. A. Yiannopoulos, *Property* § 134, in 2 *Louisiana Civil Law Treatise* (2d ed. 1980).

22. *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210 (1958); *Hardwood Oil and Mining Co. v. Black*, 240 La. 641, 124 So. 2d 764 (1960).

23. 235 La. 529, 105 So. 2d 210 (1958).

24. *Id.* at 542, 105 So. 2d at 214.

personal rights are only effective between the parties and cannot be asserted against third persons. Finally, personal rights can only be enforced by obtaining a personal judgment against one or more of the parties to the obligation. Personal rights are not susceptible to possession; therefore, they do not include the right to follow a thing into the hands of a third party.<sup>25</sup>

Real rights appear to be synonymous with rights in things.<sup>26</sup> French doctrine describes real rights as expressing the immediate and direct relation between a thing and a person. The legal relation which stems from a real right is between the person claiming the right and all other persons who must respect the claim of exclusive and preferential use of the thing.<sup>27</sup> Louisiana jurisprudence describes real rights as "synonymous with proprietary interest, both of which refer to a species of ownership. Ownership defines the relationship of man to things and may, therefore, be declared against the world."<sup>28</sup> This definition is somewhat narrow in that it restricts real rights to an interest as owner and does not include dismemberments of ownership such as personal and predial servitudes, usufruct, and habitation which are classified as real rights in the Civil Code.<sup>29</sup>

Although the Civil Code does not expressly define real rights, they are correlative to real obligations.<sup>30</sup> The basic characteristics of real obligations and thus real rights are two-fold.<sup>31</sup> First, a real obligation is transferred automatically with the movable or immovable property. Since the right passes with the property, the holder of a real right has the power to claim the thing even after it has been transferred to a third party. Second, enforcement of the real right does not impose personal liability upon the possessor of the thing. The third party may relieve himself of all liability by abandoning the thing to the holder of

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25. A. Yiannopoulos, Property § 144, in 2 Louisiana Civil Law Treatise (2d ed. 1980).

26. La. Civ. Code art. 476.

27. 2 Aubry and Rau, Property § 172 at 62, in Civil Law Translations (7th ed. 1961).

28. Reagan v. Murphy, 235 La. at 541, 105 So. 2d at 214 (1958).

29. La. Civ. Code arts. 476, 535, 630.

30. La. Civ. Code art. 1763 defines a real obligation as "a duty correlative and incidental to a real right."

31. Article 1764 provides:

A real obligation is transferred to the universal or particular successor who acquires the movable or immovable thing to which the obligation is attached, without a special provision to that effect. But a particular successor is not personally bound, unless he assumes the personal obligations of his transferor with respect to the thing, and he may liberate himself of the real obligation by abandoning the thing.

La. Civ. Code art. 1764.

the real right. This allows the person asserting a real right to exercise this right without obtaining a personal judgment against any party.<sup>32</sup> Common examples of real rights are ownership and dismemberments of ownership such as personal and predial servitudes, usufruct, and habitation. The rights associated with real mortgages, pledges, and privileges on immovables also meet the characteristics of real rights.

#### IV. COUNTER-LETTERS: CHARACTERISTICS OF REAL RIGHTS

The classification of a counter-letter as representing a real or personal right turns on the question of whether the counter-letter represents an ownership interest. If the counter-letter is an act translative of ownership, then the holder of the counter-letter asserts a real right of ownership. The fourth circuit, in *Favaloro*, considered the signed counter-letter a promise to sell<sup>33</sup> or executory contract between John T. and John L. rather than a transfer of ownership. Using language such as "the recipient of a counter-letter receives only the right to sue the transferor for ownership and an accounting,"<sup>34</sup> as well as, "a counter-letter evidencing a promise of ownership,"<sup>35</sup> to describe the rights associated with the counter-letter, the court implied that a counter-letter is a promise to transfer ownership at a future date.

A promise to sell must be in writing when it relates to immovable property. It is not effective as a transfer of property but instead gives the recipient of the promise the right to demand specific performance for ownership of the immovable.<sup>36</sup> Promises to sell appear to be personal rights because they can only be enforced by obtaining a personal judgment against the obligor. This view corresponds with the holding in *Peck v. Bemiss*.<sup>37</sup> In *Peck*, Sims, acting as agent for Overton, the owner of immovable property, executed a written promise to sell the property to Peck. This promise to sell was recorded in the public records. The property was later sold by Overton to Mrs. Bemiss. Peck filed a petitory action against Mrs. Bemiss claiming ownership of the property. The supreme court held that the promise to sell did not convey an ownership

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32. Nonpersonal judgments include Petitory Actions, provided for in La. Code Civ. P. art. 3651, Declaratory Judgments, provided for in La. Code Civ. P. art. 1871, and Partitions, provided for in La. Code Civ. P. art. 4606-4607, because they can be attained without subjecting another party to personal liability.

33. La. Civ. Code art. 2462 provides: "A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and 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."

34. *Favaloro v. Favaloro*, 561 So. 2d 783, 786 (La. App. 4th Cir. 1990).

35. *Id.*

36. La. Civ. Code art. 2462.

37. 10 La. Ann. 160 (1855).

interest in the property to Peck. Therefore, Peck had no right to file a petitory action against Mrs. Bemiss.

Whether a promise to sell immovable property creates real or personal rights is unclear. The supreme court in *Kinberger v. Drouet*<sup>38</sup> stated that "[a] promise of sale, duly accepted and recorded, confers a real right on the purchaser . . . ."<sup>39</sup> The confusion stems from the fact that a promise to sell, once recorded, can have effects on third persons.<sup>40</sup> For example, in *Peck v. Bemiss*,<sup>41</sup> had Peck first sued Overton for specific performance based on the contract to sell, he could have then joined Mrs. Bemiss by filing a petitory action seeking ownership of the property. Peck could have perfected his ownership interest in the property as of the time of recordation of the promise to sell and recovered the property from the hands of a third party. In this situation Peck could assert a real right of ownership against a third party. However, between the immediate parties of a promise to sell there is only a personal right to obtain specific performance for the transfer of ownership.

Under a fact pattern similar to *Favaloro*, the supreme court in *Peterson v. Moresi*<sup>42</sup> addressed the issue of whether a counter-letter represents a contract to sell or an actual ownership interest in property. In *Peterson*, A.P. Moresi purchased seven acres of land from William McFarlain. On the same day, Moresi signed an instrument which he called a "Recognition of Interest."<sup>43</sup> The instrument recognized the undivided ownership of the plaintiffs in the seven acres and stated that "said named persons have paid their pro rata share and portion of said purchase price, and when so requested I will execute an act of transfer conveying to them or their assigns their respective interest in said premises."<sup>44</sup> Plaintiffs later filed suit against A.P. Moresi's widow to be decreed the owners of the undivided interests in the land as set forth in the counter-letter. Mrs. Moresi claimed that the counter-letter represented only an executory contract because it contemplated the future execution of an act or transfer between A.P. Moresi and the persons named in the counter-letter. The court determined that the expression in the counter-letter "did not mean that an act of transfer by A.P.

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38. 149 La. 986, 90 So. 367 (1922).

39. *Id.* at 999, 90 So. at 372.

40. La. R.S. 9:2721 (1991). "No sale, contract, counter-letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated . . . ."

41. 10 La. Ann. 160 (1855).

42. 191 La. 932, 186 So. 737 (1939).

43. The court stated: "The instrument is more of the character of a counter-letter than of any other instrument that has been suggested." *Id.* at 940, 186 So. at 739.

44. *Id.* at 935-936, 186 So. at 738.

Moresi to the co-owners named in the instrument would be essential to joint ownership which was acknowledged in the instrument. A.P. Moresi acknowledged in the instrument, not only that each of the other parties named in the instrument owned the interest stated, but also that he himself owned only the remaining 4/21 interest in the seven acres of land."<sup>45</sup> Mrs. Moresi also claimed that the enforcement of the counter-letter was barred by prescription of ten years on personal actions.<sup>46</sup> This defense was based on the fact that the plaintiffs sought specific performance of A.P. Moresi's offer to execute an instrument of transfer and was, therefore, a personal obligation. The court held that "the suit being founded upon a written acknowledgement by the defendant that the property was bought by him as the agent for the plaintiff, and was paid for by the plaintiff and actually belongs to him—is not a personal action, but a real action, and is not barred by the prescription of ten years under article 3544 of the Civil Code."<sup>47</sup> The plaintiffs were not limited to a personal judgment of specific performance but were issued a declaratory judgment acknowledging their ownership interest.

The supreme court, in *Peterson*, recognized the plaintiffs' real right of ownership in the seven acres based on the counter-letter. Since the counter-letter represented an ownership interest and not a promise to sell, the plaintiffs were declared owners of an undivided interest without obtaining a personal judgment against the record owners. Applying this holding to *Favaloro*, it appears that Gloria Favaloro had more than a promise of ownership based on the counter-letter which recognized John L.'s one-third interest in the Metairie property. She had a real right of ownership which could be asserted without the need of obtaining a personal judgment for specific performance against John T.

The assertion that counter-letters may reflect a right of ownership in immovable property is strengthened by the fact that counter-letters possess the two major characteristics of real rights. The recipient of a counter-letter may recover immovable property from third persons (once the counter-letter has been recorded), and he may also exercise his right to ownership without obtaining a personal judgment.

The fact that recorded counter-letters may affect third persons is recognized in Louisiana legislation,<sup>48</sup> as well as in the jurisprudence.<sup>49</sup>

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45. *Id.* at 938-939, 186 So. at 739.

46. La. Civ. Code art. 3544 (1870). La. Civ. Code art. 3499 now provides: "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years."

47. *Peterson*, 191 La. at 941-43, 186 So. at 740.

48. La. R.S. 9:2721 (1991). (For text of the statute see *supra* note 40.)

49. See *Stevens v. Claiborne Co.*, 305 So. 2d 570 (La. App. 4th Cir. 1974); *Metairie Bank and Trust Co. v. Wendryhoski, DeBlanc, and Associates*, 338 So. 2d 978 (La. App. 4th Cir. 1976).

In *Stevens v. Claiborne Co.*,<sup>50</sup> Mrs. Stevens acquired record title of immovable property through an act of sale in 1964. The recorded deed recited that the property was purchased with Mrs. Stevens' separate funds. In 1967, Mr. and Mrs. Stevens recorded a counter-letter which stated that the 1964 purchase was actually made with community funds. Subsequent to the recordation of the counter-letter, Mrs. Stevens, acting individually, granted a mortgage on the property to the Claiborne Company. Claiborne later attempted to foreclose on the mortgage and Mr. Stevens intervened asserting the community's freedom from the mortgage. The fourth circuit stated that "[w]hile counter-letters cannot affect persons who became creditors or purchasers prior to the recordation of the counter-letters . . . the recorded counter-letter is valid against one who takes from the prior record owner a mortgage subsequent to the recordation of the counter-letter . . . ."<sup>51</sup> Based on the recorded counter-letter, the community was recognized as owner of the property and the mortgage that the wife attempted to grant on the community property was declared invalid. If we apply the facts of *Stevens* to current Civil Code article 2347, the same result would be reached had Mrs. Stevens attempted to alienate the property subsequent to the recordation of the counter-letter. Once ownership is vested in the community by virtue of a recorded counter-letter, any attempt to transfer the property to a third party would be declared null, without the concurrence of both spouses.<sup>52</sup>

The ability of the holder of a counter-letter to exercise his rights without obtaining a personal judgment is evident in the holder's right to institute a real action such as a petitory action.<sup>53</sup> In *Ducros v. Couret*,<sup>54</sup> Sidney J. Ducros (Sidney) took title to certain immovable property in Jefferson Parish. On the same day he executed a counter-letter to his brother, Robert L. Ducros (Robert). The counter-letter declared that title was placed in the name of Sidney at the request of, and for the convenience of Robert, who was the real purchaser, and the purchase price was in reality paid by Robert. The counter-letter was recorded in the parish records. Following Sidney's death, a three-sixteenths interest in the property was vested in Mrs. Claire Ducros Couret by judgment of possession. Robert made a demand upon Mrs. Couret to acknowledge his ownership by quitclaim deed. When his demand was rejected, Robert filed suit. The court stated that "[t]he petition seeks to have Robert L.

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50. 305 So. 2d 570 (La. App. 4th Cir. 1974).

51. *Id.* at 571.

52. La. Civ. Code art. 2347.

53. La. Code Civ. P. art. 3651. "The petitory action is one brought by a person who claims the ownership, but who is not in possession, of immovable property or of a real right therein, against another who is in possession or who claims the ownership thereof adversely, to obtain judgment recognizing the plaintiff's ownership."

54. 82 So. 2d 782 (La. App. Orl. 1955).

Ducros recognized as the owner of property alleged to be in possession of the defendant. It has all the elements of a petitory action, and in the trial court it was apparently regarded as such by both plaintiff and defendant."<sup>55</sup> The court held that Mrs. Couret had no claim or title to the undivided three-sixteenths interest based on the counter-letter reflecting Robert's ownership of the property.

In *Ducros*, the counter-letter was recognized as an act translative of ownership sufficient to maintain a petitory action against the record owner, Mrs. Couret. The only real distinction between the counter-letter in *Ducros*, and the counter-letter described in *Favaloro*, is the fact that Robert Ducros recorded his counter-letter in the parish records. Recordation, however, does not change the nature of the right from personal to real. If the counter-letter is translative of ownership, failure to record has no effect on the immediate parties to the transaction. It is only when dealing with third parties that recordation becomes essential to the exercise of real rights involving immovable property. The public records doctrine requires that an act translative of ownership must be recorded before it can affect third persons.<sup>56</sup> The doctrine is basically a policy decision to promote the stability of title to immovable property in Louisiana. The purchaser of immovable property acquires a real right of ownership; however, the exercise of this real right is limited by the laws of recordation. Therefore, when immediate parties are involved as in *Favaloro*, failure to record the counter-letter has no effect on the exercise of real rights.

Another example of the ability of the holder of a counter-letter to exercise his rights without obtaining a personal judgment is found in *Charles Tolmas, Inc. v. Bressler*.<sup>57</sup> This case involved a suit for partition of immovable property.<sup>58</sup> Max Bressler purchased sixteen lots in the city of New Orleans. Record title was placed in his name as owner. On the same day Bressler issued a counter-letter to Charles Tolmas, Inc. recognizing its one-half ownership in the property. The corporation recorded the instrument. Unwilling to remain any longer as an owner in indivision, Charles Tolmas, Inc. petitioned the court for a partition of the property in kind or by licitation. The court, recognizing the corporation's undivided ownership interest by virtue of the recorded counter-letter, ordered a partition of the property by licitation.

The common thread which bonds these cases is the fact that counter-letters reflect an ownership interest in immovable property. As such, a

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55. *Id.* at 783.

56. See La. Civ. Code arts. 517, 1839; La. R.S. 9:2721, 2754, 2756 (1991). See also *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909).

57. 230 La. 1087, 90 So. 2d 55 (1956).

58. La. Code Civ. P. art. 4606 (partition in kind); La. Code Civ. P. art. 4607 (partition by licitation).

recorded counter-letter is effective against third persons who acquire the property subsequent to recordation. Also, the recipient of a counter-letter may exercise his rights of ownership by asserting nonpersonal actions such as a petitory action or partition. The real rights associated with counter-letters are the rights of ownership. In the next section we will look at this real right classification as it affects the *Favaloro* decision.

#### V. EFFECTS OF A REAL RIGHT CLASSIFICATION ON *FAVALORO*

Mrs. Favaloro based her claim on the fact that the counter-letter issued to her husband, John L., represented a one-third ownership interest in the Metairie property. As such, the surrender of the counter-letter was ineffective as a transfer of immovable property. This ownership interest could only be validly transferred by a written agreement between the parties.<sup>59</sup> If, as we have seen, the counter-letter does represent a real right of ownership, Mrs. Favaloro's claim is not wholly without merit. Article 1839 declares that "[a] transfer of immovable property must be made by authentic act or by act under private signature."<sup>60</sup> It appears that in order to conform with this writing requirement John L. should have first recorded his counter-letter in the parish records and then executed an act of sale of the one-third interest to John T.

There is, however, another factor which must be considered when examining the ownership rights associated with counter-letters. The basic purpose of a counter-letter is to contradict an authentic act. It proves that the authentic act is fictitious and true ownership is in reality vested in the party holding the counter-letter. The parol evidence rule<sup>61</sup> limits the use of oral evidence to negate or vary the contents of an authentic act. Parol evidence is not admissible between the immediate parties to prove an absolute simulation. In this situation, the authentic act is presumed to be valid and may be attacked only by the introduction of a written counter-letter or by admissions of the opposing party in pleadings or interrogatories. The holder of an unrecorded counter-letter, by surrendering it to the record owner, effectively surrenders his right to attack the validity of the authentic act. He is estopped from claiming his ownership interest because he lacks written evidence that the apparently authentic act was in reality fictitious. The end result is the holder's loss of ownership by surrendering the counter-letter to the record owner. Mrs. Favaloro, however, is not barred from asserting her own-

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59. Note that Mrs. Favaloro did not appear to claim that the transfer was invalid under La. Civ. Code art. 2347 (alienation of community property; concurrence of the other spouse). She appears to concede the fact that she consented to the surrender of the counter-letter. Therefore, this issue will not be addressed.

60. La. Civ. Code art. 1839.

61. See *supra* note 11.

ership claim under the parol evidence rule. John T. admitted the existence of the counter-letter, as well as, the oral transfer of John L.'s one-third interest in his answer. Based on this admission, Mrs. Favaloro should be allowed to prove that the oral transfer of interest in the immovable property was invalid.

*Favaloro* could have been resolved by the court without classifying the rights associated with counter-letters as real or personal. Ironically, Mrs. Favaloro's claim is defeated by the same Civil Code article which she used to support her cause of action. The second sentence of Article 1839 states that "an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath."<sup>62</sup> Mrs. Favaloro admits that an oral transfer took place between her husband, John L., and the defendant John T. The facts indicated that John L. actually received the income from the property in consideration for the transfer of the one-third interest. The court also stated that "[a]uthentic real estate titles which are valid on their face, properly recorded, and accompanied by delivery and continuous control as owner afford potent presumptions of ownership."<sup>63</sup> It appears that John T. was in possession of the property. Applying Article 1839 to these facts, the oral transfer of John L.'s one-third interest is a valid alienation of his ownership interest.<sup>64</sup> No writing requirement is necessary, therefore, Mrs. Favaloro states no cause of action.

## VI. CONCLUSION

The basic purpose of a counter-letter is to contradict an authentic act in simulated transfers of immovable property. It proves that the authentic act is fictitious and true ownership is in reality vested in the party named in the counter-letter. In *Favaloro*, the counter-letter was used to establish that John L. had in fact purchased a one-third interest in the *Metairie* property.

The fourth circuit's holding that a counter-letter evidences only a promise of ownership and thus a personal right, appears to be contrary to Louisiana legislation and jurisprudence. The Louisiana Supreme Court has recognized that a counter-letter reflects an ownership interest. As such, the recipient of a counter-letter may exercise his real right of ownership by asserting nonpersonal actions such as a petitory action or a partition of immovable property. A recorded counter-letter is valid

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62. La. Civ. Code art. 1839.

63. *Favaloro v. Favaloro*, 561 So. 2d 783, 786 (La. App. 4th Cir. 1990) (quoting Litvinoff, *The Action in Declaration of Simulation in Louisiana Law*, in *Essays on the Civil Law of Obligations*, at 139 (1969)).

64. See *Lemoine v. Lacour*, 213 La. 109, 34 So. 2d 392 (1948).

against third persons who acquire the property subsequent to recordation. However, failure to record the counter-letter does not change the nature of this real right of ownership between the immediate parties to the transaction.

The alienation of the rights conferred by a counter-letter should be required to conform with the writing requirement of Article 1839. The counter-letter represents an ownership interest and should be validly transferred by authentic act or by act under private signature. An oral agreement followed by manual delivery of the counter-letter is insufficient to alienate ownership rights in immovable property. There are, however, two exceptions which may apply. First, in situations where parol evidence is not admissible to prove a simulation, delivery of the counter-letter to the second owner will effectively bar subsequent claims of ownership by the party surrendering the instrument. The second exception is the situation faced by the court in *Favaloro*. The oral transfer and delivery of the counter-letter is valid when the record owner is in actual possession of the property and the transferor of the counter-letter recognizes the manual delivery when interrogated under oath.

*Randal J. Robert*

