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# Obligations - Agreements In Restraint of Competition

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was December 4. Small traces of gas were discovered on November 23, and again on December 2. On December 5, the well began to flow and by December 7, it had been brought in as a producer. The owner of the royalty interest contended that the traces found before December 5 interrupted prescription, even though they were not in paying quantities[18] until about the 5th. The court held that prescription was not interrupted and that the royalty interest was prescribed. Although a royalty interest is not the same as a mineral servitude, in that actual production is required in the former, it is submitted that the situation is analogous for purposes of analysis of the court's view on the prescription of non-user.

When the question is presented to the court as to whether a mineral servitude owner, who at the termination of the prescriptive period has not yet completed a well to a depth at which minerals could reasonably be expected in paying quantities, should be allowed to continue drilling operations, the court should decide that the servitude owner is to be judged by what he has accomplished during the prescriptive period—namely, whether he has drilled to a depth at which there is reasonable hope of minerals in paying quantities—and not by what he intends to do after the expiration of the prescriptive period.

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OBLIGATIONS—AGREEMENTS IN RESTRAINT OF COMPETITION

The vendor of a business contracted not to engage in or become financially interested in the ready-to-wear business for three years in the city, nor within a three and a half mile radius of the location of the business sold, both parties understanding that the vendor would continue to operate a Five and Ten Cent Novelty store also owned by him. *Held*, the vendee was entitled to an injunction prohibiting the vendor from selling in the Five and Ten Cent Store any ready-to-wear or dry goods other than the kind handled when the sale of the ready-to-wear business was made. *Loftin v. Parker*, 253 Ala. 98, 42 So. 2d 824 (1949).

The decision was based on the lawfulness of the restraint imposed. Recognizing that contracts in total restraint of trade

18. To interrupt prescription on a royalty interest it is required that there be actual production of minerals in paying quantities. See Escoubas v. Louisiana Petroleum & Coal Oil Co., 22 La. Ann. 280 (1870); Green v. Standard Oil Co. of La., 146 La. 935, 84 So. 211 (1920); Daggett, Mineral Rights in Louisiana, § 31 (rev. ed. 1949).

were unlawful as against public policy, the court found it unnecessary to inquire into the reasonableness and legality of this particular agreement since those of its type were declared lawful by statute.[1]

The Louisiana cases dealing with agreements not to compete may be divided into two groups: those decided on the issue of the lawfulness of the restraint imposed and those which were invalidated on the ground that the consideration received was not "serious" and that a potestative condition was involved.

Determining the legality of the restraint imposed is in effect a weighing and balancing of the interests involved. The public interest is to insure the benefits of competition by prohibiting the acquisition of monopolies through private contract and to prevent an individual from becoming a burden upon society by contracting away his means of livelihood. On the other hand, the investor must be afforded some protection for his investment, and the vendor seeks to enhance the value of goods or services sold by agreeing not to compete.[2]

In any case, the restraint in order to be lawful must be reasonable and be such that it affords only that protection necessary to the obligee.[3] It must be incidental to and in support of another lawful contract or sale by which the obligee acquires some interest needing protection. One simply contemplating engaging in a business cannot bind himself not to do so in favor of another already in the business.[4]

It has been held that a person may not contract not to pursue at any time and place the calling whereby he earns a livelihood.[5] Following this theory restraints unlimited as to both time and geographical area or limited as to time but unlimited as to area are void. Generally those limited in area are enforceable although unlimited in time of operation.[6]

In each case the situation of the parties, prevailing economic circumstances, and the nature of the business restrained are considerations as important as the elements of time and area. Any factors tending to establish fair protection for the obligee, or to show an undue hardship on the obligor or interference with the

1. Ala. Code (1940) tit. 9, §§ 22-24.
2. Moorman & Givens v. Parkerson, 127 La. 835, 54 So. 47 (1911).
3. M. M. Ullman & Co. v. Levy, 172 La. 79, 133 So. 369 (1931).
4. Webb Press Co., Ltd. v. Bierce, 116 La. 905, 41 So. 203 (1906).
5. Moorman & Givens v. Parkerson, 127 La. 835, 54 So. 47 (1911).
6. Ibid.

interests of the public should be included in the determination of reasonableness.[7]

The restraint is dependent upon the continued existence of the interest acquired by the obligee in the contract to which the restraint was incidental. If that interest, such as a lease, terminates with the expiration of the principal contract the restraint cannot be extended beyond it.[8] The obligation is personal and cannot be enforced against third parties to whom the obligor might lease or sell property or by third parties who might succeed the obligee.[9] If the promise made is simply not to "engage" in a particular business, nothing short of actual participation in the management of a competing business with a financial interest therein will suffice as a violation.[10] Serving as a simple employee of a competing firm is not a violation.[11]

In the second type of cases,[12] those involving an agreement not to compete, which were rendered unenforceable on the ground that the consideration was not "serious" and that they were subject to a potestative condition, have all dealt with contracts of employment, terminable at the option of either party with a specified notice given, with the employee agreeing not to compete within a given area for a specified time.

In *Blanchard v. Haber*,[13] the plaintiff hired the defendant to work as a practicing dentist at a salary of sixty dollars a week which was later raised to eighty. The contract was to run for ten years but could be terminated by either party with thirty days' notice. It was stipulated that if the contract was terminated by either party, the defendant was to refrain from practicing dentistry within five blocks of the plaintiff's establishment for ten years. After some time the defendant resigned and set up a dental establishment in violation of the agreement and the plaintiff sued for an injunction. The court, construing the contract in the light of the most extreme possible circumstances, stated that since the contract was terminable at the will of the employer, the only

7. Ibid. Hickman v. Branan, 151 So. 113 (La. App. 1933). For additional cases see Notes, 3 A.L.R. 247 (1919).

8. M. M. Ullman & Co. v. Levy, 172 La. 79, 133 So. 369 (1931).

9. Hebert & Damare v. Dupaty, 42 La. Ann. 343, 7 So. 580 (1890); Simmons v. Johnson, 11 So. 2d 710 (La. App. 1942).

10. Simmons v. Johnson, 11 So. 2d 710 (La. App. 1942).

11. May v. Johnson, 128 So. 540 (La. App. 1930).

12. Blanchard v. Haber, 166 La. 1014, 118 So. 117 (1928); Shreveport Laundries, Inc. v. Teagle, 139 So. 563 (La. App. 1932), action dismissed 144 So. 183 (La. App. 1932); Cloverland Dairy Products Co., Inc. v. Grace, 180 La. 694, 157 So. 393 (1934).

13. Ibid.

right received by the employee is that of employment for the period required for giving notice. Thus it was possible for the plaintiff to discharge the defendant after one month's service and put him out of business as a competitor for ten years. By extending Civil Code Article 2464 to mean that the consideration must not be altogether out of proportion to the obligation, it was said that this consideration was not "serious" and could not support the obligation. Thus, without consideration, the execution of the agreement was made subject solely to the will of the employer. As such, it was subject to a potestative condition, and unenforceable under Civil Code Articles 2024 and 2034.

In the case of *Cali v. National Linen Service Corporation*,[14] the defendant worked as a driver on a delivery route at a salary of thirty dollars a week. The contract stipulated that he should not work in a competing business in the city of New Orleans within one year after its termination. The Federal Circuit Court of Appeals granted an injunction, thereby enforcing the clause preventing competition. The court said:

> "There is nothing in the case of Blanchard v. Haber, supra, compelling a reversal in this case. Doubtless, had the salary paid Haber been considered adequate and the restrictions reasonable, the decision would have been different." [15]

In the subsequent case of *Shreveport Laundries v. Teagle*,[16] the Louisiana Court of Appeals followed the reasoning of the *Blanchard* case. The court took the opportunity to reject expressly the interpretation placed upon the *Blanchard* case by the federal court, saying that although it was intimated that the restriction was unreasonable, the adequateness of the salary was not considered.

A careful examination of the opinions in the case leads to the conviction that actually the consideration of public policy was uppermost in the courts' minds. Recognition was given to the unequal bargaining power of the parties,[17] and it was undoubtedly felt that an agreement which a person had entered into only as an alternative between that and immediate discharge or continued unemployment should not be allowed to work a hardship on him. Such conditions are closely akin to duress depriving one of the free exercise of his will.

14. 38 F. 2d 35 (5th Cir. 1930).
15. Id. at 37.
16. 139 So. 563 (La. App. 1932).
17. Shreveport Laundries, Inc. v. Teagle, 139 So. 563, 565 (La. App. 1932).

However, Civil Code Article 2464 has no application to such a case, and the doctrine of "serious consideration" as it is known in our law is in itself a fallacy. The article deals exclusively with the question of price in a contract of sale.[18] Even as such it does not declare that the price be adequate but only that it be certain and be intended to be paid, not a mere pretense. The intent of the provision is to distinguish between a valid sale and a donation disguised as a simulated sale.[19] The doctrine of "serious consideration," as it has been used by our courts, if carried to its logical limits, would render useless the particular provisions of lesion beyond moiety[20] and the restricted circumstances under which they may be applied. The theory of equivalents would be extended to all obligations.

Further, under the guise of serious consideration the court is inquiring into the sufficiency of consideration which is in direct contravention of the basic civilian theory, that if the requisites of a valid contract are present[21]—capacity to contract, consent, object, and a lawful purpose—a man is bound as he sees fit to bind himself.[22]

Having found that the consideration on the part of the employer was not "serious" and hence ineffective, the Louisiana court held[23] that the performance of his obligation was subject to a potestative condition. The legal effects resulting from the fact that one of the promises in a bilateral contract is subject to a potestative condition are substantially the same as at common law where one promise is illusory.[24] The other party is not bound by his promise because he has received in return an unenforceable promise, the performance of which depends solely upon the will of the promisor.

However, the Louisiana court is losing sight of the fact that many valid obligations may be contracted under a potestative condition, but it is only those obligations dependent upon a purely potestative condition, or subject solely to the will of the obligor,

18. Arts. 2456-2466, La. Civil Code of 1870 (Title: How the Contract of Sale is to be Perfected).

19. Spanier v. DeVoe, 52 La. Ann. 581, 27 So. 174 (1900); Saunders v. Busch-Everett Co., 138 La. 1049, 71 So. 153 (1914). See Note, 8 Tulane L. Rev. 178 (1933).

20. Arts. 1860-1880, La. Civil Code of 1870.

21. Art. 1779, La. Civil Code of 1870.

22. Lorenzen, Causa and Consideration in the Law of Contracts, 28 Yale L.J. 621 (1919); Walton, Cause and Consideration in Contracts, 41 L.Q. Rev. 306 (1925).

23. See cases cited note 12, supra.

24. A.L.I., Restatement of Contracts, §§ 2, 79.

which are unenforceable under Article 2034.[25] It is clear that none of the obligations involved was subject entirely to the will of the employer since, in any event, the employment must have continued for a specified time beyond the announcement of either that he wished to withdraw.

In looking to the employee's motive or cause for making his promise not to compete and the conditions under which it was made, the court undoubtedly felt that he had given his promise in return for continued employment during the period provided. If such employment "was thereafter expected to exist or take place, and which did not take place or exist," [26] the contract could be said to be without cause and would have no effect.[27]

If the agreement imposes an undue hardship on the employee and is against the interests of society it should be invalidated as being *contra bonos mores*[28] and unlawful.[29] If the court sees fit to inquire into what has been received by the employee for his promise, it may be done on the basis of determining the legality of the restraint. The value of the consideration received could be weighed along with all other factors in determining the reasonableness of the restraint in the light of its effect on the obligor, the obligee, and the general public.

Conclusions as to what is reasonable will vary from court to court, from person to person, depending to a great extent on the individual making the decision.[30] But if decided on the basis of public policy, the desired uniformity will be attained without doing damage to other fundamental concepts.

If the case of *Loftin v. Parker* had arisen in Louisiana, it is to be expected and desired that the same result would have been

25. Kennon v. Brooks-Scanlon Co., 148 La. 120, 86 So. 675 (1920); Morrison v. Mioton, 163 La. 1065, 113 So. 456 (1927); Nabors Oil Corp., Inc. v. Samuels, 170 La. 57, 127 So. 363 (1930); Colbert v. District Grand Lodge No. 21, Grand United Order of Odd Fellows, 178 So. 694 (La. App. 1938).

26. Art. 1897, La. Civil Code of 1870.

27. Arts. 1893, 1894, 1896, 1897, La. Civil Code of 1870.

28. Arts. 1895, 1893, La. Civil Code of 1870.

29. La. Act 133 of 1934 (La. R.S. [1950] 23:921), prohibiting the issuance of injunctions to enforce contracts of this character. Also note the manner in which common law jurisdictions have handled agreements of this sort by limiting the circumstances under which they will be declared lawful. For example, Samuel Stores, Inc. v. Abrams, 94 Conn. 248, 108 Atl. 541 (1919); Goff v. Saxon, 174 Ky. 330, 192 S.W. 24 (1917); Tarr v. Steerman, 264 Ill. 110, 105 N.E. 957 (1914).

30. See Lindstrom v. Sauer, 166 So. 636 (La. App. 1936), which takes an extremely limited view of all agreements in restraint of trade.

reached since the determination of the lawfulness of the restraint is much the same in civil, as in common law.

THEODORE C. STRICKLAND

SALES—EFFECT OF RECORDATION ON COMMUNITY RIGHTS

Leaving his wife at the marital domicile in Mississippi, Isiah Payne came to Louisiana. He purchased immovable property in Bossier Parish, reciting his marital status as *single* in the recorded act of sale. A divorce was subsequently obtained by the husband in Bossier Parish by substituted service without his wife's knowledge; the judgment was not recorded in the conveyance records of the parish. Defendant then bought the property from the husband and again the recorded sale stated that the husband was a single man. Plaintiff, aware of the husband's true marital status, went to Mississippi and bought the wife's undivided one-half interest in the property. He then immediately brought a petitory action, seeking to be adjudicated owner of a one-half interest in the property. *Held*, under Article 2266 of the Civil Code[1] the unrecorded divorce judgment affecting the immovable property in controversy was utterly null and void as to the defendant, a third party relying on the public records. *Humphreys v. Royal*, 215 La. 567, 41 So. 2d 220 (1949).

Article 2266 is the codal basis for what has come to be known as the doctrine of *McDuffie v. Walker*: third parties who engage in transactions that involve immovable property are entitled to rely upon the public records, even if they have actual notice of unrecorded claims against the property.[2] Behind this established doctrine stands the public policy of protecting the security of real estate transactions.

The doctrine of *McDuffie v. Walker* has at various times come into conflict with other settled rules of law. Among these are the

1. "All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording.

"The recording shall have effect from the time when the act is deposited in the proper office, and indorsed by the proper officer." Art 2266, La. Civil Code of 1870. See also Arts. 2262, 2264, 2265, La. Civil Code of 1870.

2. McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909), doctrine discussed in: Coyle v. Allen, 168 La. 504, 509, 122 So. 596, 598 (1929); Westwego Canal and Terminal Co., Inc. v. Pizanie, 174 La. 1068, 1071, 142 So. 691, 692 (1932); State ex rel. Hebert v. Recorder of Mortgages, 175 La. 94, 143 So. 15 (1932); Masters v. Cleveland, 158 So. 382, 385 (La. App. 1935); Gulf Refining Co. v. Evans, 181 So. 666, 670 (La. App. 1938). See also Notes, 14 Tulane L. Rev. 16 (1939), 22 Tulane L. Rev. 208 (1947), 23 Tulane L. Rev. 259 (1949).