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Civil Code and Related Subjects: Conventional Obligations

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portunity to overrule this unfortunate jurisprudence. It restrained itself, however, to the mere statement that the status of marriage was incompatible with parental custody.

CONVENTIONAL OBLIGATIONS

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During the period here being considered, the supreme court had before it nine cases under this title involving the admissibility of parol evidence in relation to a written act. In general, the cases adhere to the view that except where fraud or error is alleged or the act is indefinite or ambiguous parol evidence is inadmissible to vary or contradict any recital, whether factual or promissory, contained therein. A further limitation exists in the rule that where a charge of error rests only a lack of knowledge concerning the provisions of the act, occasioned by a failure to read it or to listen attentively while it is being read, relief will not be granted.

The last mentioned rule was relied on in *Rousseau v. Rousseau,*[1] in rejecting an offer of parol evidence to contradict a recital that the property covered by a deed was being purchased with the wife's paraphernal funds.

The rule that parol evidence is admissible for the purpose of explaining the terms used in a written act if they are incomplete or their meaning is uncertain was applied in *Walker v. Ferchaud*[2] to complete the description of the property covered by an offer to purchase which referred to it only by its municipal street number, and in *Plaquemines Oil and Development Company v. State*[3] to explain the meaning of the words "east" and "west" in a patent prepared by the Registrar of the State Land Office. Similar evidence was admitted in *Krauss v. Fry*[4] to explain the true intention of the parties in a deed containing a mineral reservation clause.

A kindred problem was presented in *Gulf Refining Company v. Garrett.*[5] The dispute concerned the interpretation of a settlement agreement between a widow and certain heirs of the decedent. On rehearing the case was remanded for the introduction of parol evidence. The Chief Justice and Judge Rogers dissented,

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1. 209 La. 428, 24 So.(2d) 676 (1946).
2. 210 La. 283, 26 So.(2d) 746 (1946).
3. 208 La. 425, 23 So.(2d) 171 (1945).
4. 209 La. 250, 24 So.(2d) 464 (1945).
5. 209 La. 674, 25 So.(2d) 329 (1946).

their position being that the procedure of remanding the case was improper under the circumstances because (1) it was not requested by the parties litigant, (2) no evidence of any consequence was excluded and (3) the case had been pending a number of years and warranted final disposition. Parol evidence is admissible, of course, to explain an ambiguity, but it is difficult to read the case without feeling that the position of the dissenters was correct.

The case of *Fontenot v. Jones*[6] presented the question of the admissibility of parol evidence to show a contemporaneous oral agreement suspending the effectiveness of a lease. The court found it unnecessary to determine the admissibility of the proffered evidence inasmuch as it was considered insufficient in any event to sustain the defendant's theory. Although evidence of this type would be admitted at common law, its admissibility in Louisiana is open to considerable doubt in view of Louisiana Civil Code Article 2276.

Louisiana has long recognized the propriety of reforming a contract so as to cause it to express the true intention of the parties where mutual error is the basis of the relief sought. This rule was applied in *Brulatour v. Teche Sugar Company, Incorporated*[7] where parol evidence was admitted to show mutual error in the description of property in a deed.

This rule was also apparently the basis of the acceptance in *Baker v. Baker*[8] of parol evidence offered by an eighty-three year old negro who was unable to read or write to show that an act of sale was intended to be an act of mortgage. The court then held that the evidence was likewise admissible for the purpose of showing that a subsequent retransfer of the property for a purported consideration of three hundred dollars was for the purpose of revesting the record title in the plaintiff. It was said that since the two acts were co-related and vitally connected, evidence admissible as to one was pertinent, relevant, and admissible as to the other. The contest was between the heirs of the original owner and a second wife who was basing her claim that the property was community property on the charge that it was acquired by the community at the time of the re-transfer.

Another suit to reform a deed went up as *Taylor v. Taylor*[9] where the court permitted parol evidence to show that the real

6. 210 La. 166, 26 So.(2d) 490 (1946).
7. 209 La. 717, 25 So.(2d) 444 (1946).
8. 209 La. 1041, 26 So.(2d) 132 (1946).
9. 208 La. 1053, 24 So.(2d) 74 (1945).

consideration was the settlement and discharge of claims in a pending suit, instead of a personal donation as recited therein. It must be taken that the nature of the action distinguishes this case from earlier ones where parol was not admitted to vary a recital of consideration. A full discussion of this problem will be found in a previous issue of this review.[10]

The case of *Stoufflet v. Duplantis*[11] involved an attempt to set aside a quitclaim deed on the basis of fraud. The suit failed, because the plaintiff was unable to show a degree of fraud sufficient to justify the relief prayed for.

The morality of the civil law was forcefully defended in *American Guaranty Company v. Sunset Realty and Planting Company*[12] where on rehearing the court recognized the plaintiff's right to set aside two quitclaim deeds on the ground that they had been obtained through fraud. The fraud consisted in partially true statements made by the purchaser who was possessed of much more information than that given to the seller. The court reaffirmed the rule that although the parties to a contract are not obligated to make any statement with reference to the title, condition, or value of the subject matter, any party undertaking to speak with reference thereto is obligated to tell the whole truth and may not conceal or suppress any material facts. It also expressed the opinion that an invitation by such person to the other that he make his own investigation was, under the circumstances, an aggravating factor. The rule was extended so as to encompass material facts peculiarly within the knowledge of the principal who was acting through an agent. The court also held invalid a second quitclaim deed, purporting to be a re-draft of the first, because it contained material alterations surreptitiously inserted by the purchaser. The position taken by the court seems eminently sound and should serve as a warning to those who would undertake to lead others to believe that the whole facts as known are being stated when material facts are being intentionally withheld.

In *Herbert v. American Society of Composers, Authors, and Publishers*,[13] the court applied the generally well-recognized rule that a prohibition against assignment is for the benefit of the debtor of the obligation and may be waived by him. The

10. Comment, Parol Evidence to vary a Recital of Consideration (1941) 3 LOUISIANA LAW REVIEW 427.
11. 208 La. 186, 23 So.(2d) 41 (1945).
12. 208 La. 772, 23 So.(2d) 409 (1945).
13. 210 La. 240, 26 So.(2d) 732 (1946).

effort on the part of the plaintiff to revoke an assignment previously recognized by the debtor, on the sole ground that the by-laws of the association forbade the assignment was found without legal support. The assignment itself, being part of a judicially approved settlement of the community effects between the plaintiff and his former wife, was held to constitute the law between the parties. The court also upheld the propriety of the debtor's action in interpleading the claimants under Act 123 of 1922.

An allegation of lesion beyond moiety was the basis of plaintiff's suit in *Blaize v. Cazezu.*[14] The court took the practical view that personal knowledge of a witness based on other sales in the locality is not indispensable, and that the lack of such knowledge or absence of proof of other sales affects only the weight of the evidence. It held that all that is required is that the opinion of the witness be based upon acquaintance either with the property in question or with other property of like character and location. In order to enable the proper disposition of the defendant's request for an opportunity to elect between paying the difference in value of the interest purchased or returning the property, the case was remanded for additional evidence covering such value.

In *Glassell, Taylor and Robinson v. John W. Harris Associates, Incorporated*[15] the court ruled that when a general contractor arbitrarily terminates a sub-contract the sub-contractor is entitled to recover as for a breach or on the basis of a quantum meruit for the work or materials furnished. It was found that the timely recordation of liens by the sub-contractor gave him a personal cause of action in solido against the general contractor and the owner, since the general contract was not recorded, and a right in rem with respect to subsequent purchasers of the project. The Chief Justice concurred in the decree but questioned the advisability of the court's committing itself by certain dicta concerning the application of Section 12 of Act 298 of 1926.

In *Colgin v. Security Storage and Van Company, Incorporated,*[16] the court refused to hold a bailor bound by a provision of the warehouse receipt limiting the liability of the bailee. Cases dealing with parking tickets, baggage checks, and the like were cited in support of its conclusion. It distinguished an Ohio case where there was printed across the face of a warehouse receipt

14. 210 La. 176, 26 So.(2d) 689 (1946).
15. 209 La. 957, 26 So.(2d) 1 (1946).
16. 208 La. 173, 23 So.(2d) 36 (1945).

in red ink an admonition to read the "contract" carefully, and a New York case where a long course of dealing, plus possession of a book of bills of lading, was held sufficient to charge the bailor with knowledge that the document contained terms of a contract. The question to be decided in all such cases is whether or not acceptance of the document indicates assent to its terms. This depends in turn upon whether the acceptor has reason to know that it contains the terms of a contract. Courts of common law jurisdictions have split in answering this question with reference to warehouse receipts and bills of lading. The Louisiana court split here, with Chief Justice O'Niell and Judge Rogers dissenting. The weight of authority is with the dissenters.[17]

In *Pennington v. Drews*[18] the court overruled an exception of no right and no cause of action in a suit to restrain violation of a contract concerning the use of an atomiscope, a device developed for mineral exploration, and the personal services of the inventor. The court refused, with reason, to find that the contract was subject to a potestative condition. A provision of the contract imposing a penalty was not considered a sufficient basis for disallowing the relief sought, on the ground that the aggrieved party had an adequate remedy at law, since the penalty was not provided for non-performance of the principal obligation. The relief granted by the court was in the form of restraining the defendant from doing acts prohibited by the contract. A showing of irreparable injury was its basis.

An attempt to recover against the father of a purchaser of furniture for resale failed in *Perfection Mattress and Spring Company v. Sliman*[19] the evidence showing that the son alone was the buyer and debtor. An offer on the part of the father to assume the indebtedness was abortive through lack of agreement by the creditors.

The plaintiffs in the case of *Guarisco v. Pennsylvania Casualty Company*[20] accepted a payment by a railroad company in settlement of claims asserted against it growing out of a collision between a train and an automobile in which plaintiffs' sons, riding as guests in the automobile, were killed. Thereafter plaintiffs brought two suits against the insurer of the operator of the automobile. The suits were consolidated for trial. By way of

17. See Williston and Thompson, Selections from Williston on Contracts (1938) §90 B.
18. 209 La. 1, 24 So.(2d) 156 (1945).
19. 209 La. 153, 24 So.(2d) 295 (1945).
20. 209 La. 435, 24 So.(2d) 678 (1945).

defense the insurer filed an exception of no right of action and pleaded in bar the release given to the railroad without a reservation of rights. The exceptions and pleas in bar were overruled on the ground that there had been no showing that the railroad was a joint wrongdoer. The earlier case of *Reid v. Lowden*[21] was distinguished on the ground it was conceded in that case that the party released was a co-tortfeasor. The court indicated in its opinion a possibility that a showing might still be made that the accident occurred through the joint negligence of the railroad and the operator of the automobile but the method by which this might be done was not indicated. This and other aspects of the case will be covered in a later issue of this review.

SECURITY DEVICES

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Judicial Sureties

Article 3066 of the Civil Code provides that "a judicial surety cannot demand the discussion of the property of the principal debtor.

"But no suit shall be instituted against any surety on appeal bond, nor on the bond of any administrator, tutor, curator, executor, or syndic until the necessary steps have been taken to enforce payment against the principal."[1]

The question of what constitute the requisite "necessary steps . . . to enforce payment" was presented to the court in *Posey v. Hamner*.[2] That case was an action on a tutor's bond, by his children, after the death of the tutor. The defendants, sureties on the tutorship bond, urged successfully an exception of prematurity on the ground that judicial proceedings were necessary against the principal debtor or his representative prior to the institution of suit against his sureties. This even though the tutor may have died without leaving any property whatever, and judicial proceedings against his succession would be "a vain and useless effort."[3]

It is well established that "the necessary steps" required by Article 3066 do not include the issuance of writs of execution against the estates of deceased principal debtors prior to suit

21. 192 La. 811, 189 So. 286 (1939).

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1. Art. 3066, La. Civil Code of 1870.
2. 27 So.(2d) 158 (La. 1946).
3. 27 So.(2d) 158, 159.