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A sale is a contract that purports a transfer of ownership.[1] The accomplishment of this object is, therefore, the seller's primary obligation. To render it effective, the seller is further obligated to cause the buyer to be placed in possession of the thing sold, that is, to deliver it, and to warrant the buyer's peaceable possession.[2] A recent decision of the Supreme Court has brought into focus the question of the nature and extent of the buyer's claim against the seller who fails, without fraud or bad faith, to fulfill these obligations. This problem may arise in three principal ways: (1) the seller may fail to tender delivery; (2) the buyer may refuse to accept delivery because of the seller's inability to tender to him a good and merchantable title; (3) the buyer or one who acquires through him may suffer eviction from the thing sold. The recent case of *Ducuy v. Falgoust*[3] falls into the second classification.

Falgoust, who had agreed to purchase two lots from Ducuy, deposited $780.00 with the seller under a stipulation reading, "In the event . . . the vendor does not comply with this agreement to sell within the times specified, purchaser shall have the right to demand the return of double the deposit, or specific performance." Defendant's refusal to take title, on the ground that it was not merchantable, was sustained by the court and his prayer for a return of double the amount deposited was granted. Confronted with certain prior cases seemingly standing for the proposition that a vendor who is unable to convey valid title although he has endeavored to do so in good faith is not obliged to return double the amount of earnest money deposited,[4] the court questioned their soundness, but found them inapplicable to

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1. LA. CIVIL CODE arts. 1904, 1968 (1870).
2. *Id.* art. 2475.
3. 228 La. 533, 83 So.2d 118 (1955).
4. Johnson v. Johnson, 213 La. 1092, 36 So.2d 396 (1948); Williams v. Meyers, 29 So.2d 599 (La. App. 1947). *Cf.* Baton Rouge Investment & Realty Co. v. Bailey, 157 La. 838, 103 So. 184 (1925); Morgan & Lindsey v. Ellis Variety Stores, 176 La. 198, 145 So. 514 (1932). *But see* Lyons v. Women's League of New Orleans, 124 La. 222, 50 So. 18 (1909).

the case before it. This finding was based on the proposition that, since the right to specific performance was reserved, the amount deposited did not secure a privilege of withdrawal and was, therefore, not earnest money. In consequence, the cases dealing with the forfeiture of earnest money were declared not apposite, and the court proceeded to hold that, by virtue of the contract, the buyer was entitled to a return of double the deposit notwithstanding the seller's good faith effort to perform.

A deposit of earnest money gives the obligor the choice of performing or forfeiting the amount of the deposit, whereas, in the case before the court, the obligee was given the choice of claiming specific performance or declaring a forfeiture. In either case, however, the amount of the deposit constitutes a liquidation of the damages that otherwise would be recoverable for nonperformance. Hence, even if only the party as against whom a breach may be committed may have the choice of treating a deposit as earnest money, its basic character as a substitute for a determination of actual damages would not seem to be changed. Presumably, any defense that would be adequate against a claim for liquidated damages would also be adequate against a simple claim for damages. From this point of view, the court was called upon to determine whether damages may be recovered against a seller who is unable, for lack of merchantable title, to perform although he has undertaken in good faith to do so. An examination of this question involves, inevitably, a consideration of the extent of any permissible recovery.

Pretermitting any further consideration of the technical aspects of the opinion, the question may be raised as to whether the decision is a just one and in accord with the general principles of the law covering the recovery of damages by a buyer for nonperformance of the seller's obligation to deliver or, on the other hand, to warrant the buyer against eviction. At first blush, it may be believed that the principles which control the recovery of damages for non-delivery would apply also in the case of eviction resulting from the seller's lack of title. But this calls for some investigation.

Damages Recoverable for Non-Delivery

There are no detailed provisions in the Louisiana Civil Code covering the award of damages for nonperformance of the seller's obligation to deliver. Article 2486 provides simply that

the seller is liable in damages if there results any detriment to the buyer occasioned by the non-delivery at the time agreed upon. Article 2516, reflecting the general provision appearing in Article 2438, provides further, that, "Other questions arising from a claim for damages, resulting from the non-execution of the contract of sale, shall be decided by the general rules established under the title: Of Conventional Obligations." These provisions make it clear that, when a problem of non-delivery is presented, recourse must be had to the general rules covering the recovery of damages for nonperformance of a contractual obligation. This means that Articles 1934 and 1943 are of primary importance. They show that the creditor aggrieved by a breach of the debtor's obligation is entitled to recover the amount of the loss he has sustained and the profit of which he has been deprived. In the absence of fraud or bad faith, this recovery is limited to damages that were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the contract.

When, therefore, a seller guilty of no fraud or bad faith fails to make delivery, the buyer is entitled to recover the loss sustained and the profit of which he has been deprived, limited to what may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. In the ordinary case, the award to the buyer will be based on the difference between the contract price and the actual value of the thing, determined by the market price, whether or not he repurchases on the market.[5] This difference is frequently considered a loss sustained by the buyer, but it is actually a gain of which he is deprived by the breach.[6] It represents what the thing is worth over and above the contract price, and therefore constitutes a profit the buyer would have made on the transaction. Since such an award represents the value of the promised performance, its extent is to be determined as of the time the performance was to be rendered. Hence it is that a buyer may not increase the amount recoverable against a defaulting seller by postponing his demand for performance until the price has

5. E. B. Williams & Co. v. Bienvenue, 109 La. 1023, 34 So. 63 (1903); Gallaspy v. A. J. Ingersoll & Co., 147 La. 102, 84 So. 510 (1920); Burglass v. J. C. Healy Co., 159 La. 393, 105 So. 384 (1925); Pepper v. Katz, 77 So.2d 891 (La. App. 1955). See also 3 POTHIER, OEURVES n. 7 (2d ed. 1861).

6. Kohlman v. Witherell & Dobbins Co., 155 La. 57, 98 So. 756 (1924).

risen.[7] To permit him to do so would be contrary to the principle that permits recovery of only those damages that were within the contemplation of the parties at the time of contracting.[8] For the same reason, damages are not to be measured as of the time suit is filed or the case is tried.[9] Although it is often said that the difference between actual value and contract price is measured as of the time of the breach, this is true only if the breach occurs at the time performance is due.[10] The fact that this is usually the case undoubtedly accounts for the great number of times this statement is encountered in court opinions.

Under some circumstances, resale price may supplant actual value as the proper measure of the buyer's damages. If it appears that, as the seller knew, the buyer had a contract for the resale of the property at a higher figure, then the buyer is entitled to recover the difference between the contract price and the resale price.[11] To succeed he must show that he could not otherwise obtain the thing and that, in consequence, the resale at a figure higher than the contract price could not be consummated.[12] The gain of which the buyer is then deprived by the breach is measured, not by market value, but by the price at which the resale was to be made. If the buyer can repurchase on the market and does not do so, he cannot claim damages based

7. Burrus Mill & Elevator Co. v. Eunice Grain Co., 182 La. 475, 162 So. 48 (1935).

8. "It is presumed, in the sale of personal property, that the parties contemplate the difference between the contract price of the thing sold and the market value at the time and place at which it was to be delivered when they entered into the contract. . . . This rule of law is based on solid grounds because neither a plaintiff nor a defendant should be permitted to select the market value of a date different from that on which the contract was breached . . . . If such were to be used as a criterion the rights of the parties would depend on conditions arising at an uncertain future date." Friedman Iron & Supply Co. v. J. B. Beaird Co., Inc., 222 La. 627, 642, 63 So.2d 144, 149 (1953).

9. *Ibid.*; Kory v. Layman, 108 La. 247, 32 So. 441 (1902).

10. Palmer v. Smith Co., 165 La. 788, 116 So. 186 (1928); Lexington Candy Mfg. Co. v. Prejean, 168 La. 1078, 123 So. 719 (1929). This would be true at common law even for an anticipatory repudiation. There are no controlling Louisiana decisions on the point.

11. Hafner Mfg. Co. v. Lieber Lumber & Shingle Co., 127 La. 348, 53 So. 646 (1900); Usrey Lumber Co. v. Huie-Hodge Lumber Co., 146 La. 296, 83 So. 578 (1920); C. F. Bonsor & Co. v. Simon Rice Milling Co., 151 La. 1094, 92 So. 711 (1922); Alexander Cooperage & Lumber Co. v. E. S. Duck Lumber Co., 153 La. 438, 96 So. 24 (1923); Lady Ester Lingerie Corp. v. Goldstein, 21 So.2d 398 (La. App. 1945). See also, 5 CORBIN, CONTRACTS § 1015 (1951). If the seller does not know at what price the resale is to be made, an extraordinary resale price would not be counted as contemplated and an average figure would be used. 3 WILLISTON, CONTRACTS § 599 d (rev. ed. 1948).

12. C. W. Robinson Lumber Co. v. Burton, 128 La. 120, 54 So. 582 (1911); Interstate Electric Co. v. Frank Adam Electric Co., 173 La. 103, 136 So. 283 (1931).

on the resale rather than market price, because he will not be able to show that the breach caused him to lose the resale. To the contrary, his failure to repurchase would be the cause of his failure to realize the profit to be derived from the resale. This result is sometimes explained, although inaccurately, by saying that the buyer is under a duty to minimize his damages. The true reason is that the damages claimed are not the direct consequence of the breach.[13]

Since the Code does not make any distinction in this regard between movables and immovables, the foregoing propositions should apply to both kinds of property. Indeed, the Supreme Court has specifically so held.[14] Consistently with this view, the buyer of an immovable that the seller fails to deliver is entitled to recover its market value,[15] or, where the facts permit, the profit he would have made on a contract for its resale.[16]

One further observation should be made with respect to the seller's failure to discharge his obligation to make delivery: his inability to do so because he discovers that he does not have a merchantable title, for which reason the buyer cannot be compelled to take delivery, is no excuse. Of this kind of situation, it has been said that delivery of a valid title is not impossible in fact, although it may be so for the particular vendor.[17] This kind of impossibility is subjective, not objective, and does not constitute legal justification for nonperformance.[18] It may be further observed that the possibility of the vendor's title being defective is entirely foreseeable and can hardly be counted as a fortuitous event.[19] Likewise the seller may be considered as voluntarily assuming the risk of being unable to deliver a valid title when he fails to exclude warranty against eviction. If so, this would justify application of the principle that a debtor is

13. The recovery of damages based on earnings to be derived from the use to be made by the buyer of the subject matter of the sale is beyond the scope of the present discussion. The requirement of foreseeability is satisfied where the seller knows of the intended use but the claim may be too uncertain and speculative to justify recovery. Sheeks v. McCain-Richards, Inc., 226 La. 578, 76 So.2d 892 (1954).

14. Franton v. Rusca, 187 La. 578, 175 So. 66 (1937). See also DuBell v. Union Central Life Ins. Co., 211 La. 167, 29 So.2d 709 (1947); Derbonne v. Burton, 189 So. 473 (La. App. 1939).

15. Doriocourt v. Lacroix, 29 La. Ann. 286 (1877).

16. Rosenberg v. Derbes, 165 La. 407, 115 So. 637 (1928); Bland v. Bullis, 16 So.2d 573 (La. App. 1944).

17. 10 PLANIOL ET RIPERT, DROIT CIVIL FRANCAIS n. 48 (1932).

18. LA. CIVIL CODE art. 1891 (1870); 3 POTHIER, OEUVRES n. 60 (2d ed. 1861).

19. LA. CIVIL CODE art. 3556 (14) (15) (1870).

not entitled to relief when he has "expressly or impliedly undertaken the risk."[20] This principle applies, indeed, even when a debtor is hindered from giving or doing what he has contracted to give or do by a fortuitous event or irresistible force. By the same token it is now established that a seller's error as to the validity of his title is not the kind of error that will constitute a defense.[21] French authority is to the same effect.[22] In sum, the good faith of the seller, like the good faith of any contracting party, is not alone an answer to a suit for damages for breach of contract.

DAMAGES RECOVERABLE FOR BREACH OF WARRANTY AGAINST EVICTION

The foregoing discussion has dealt with the legal position of the vendor who fails to fulfill his obligation to deliver, insofar as the recovery of damages by the buyer is concerned. The next inquiry concerns the buyer's right of recovery against the seller when, delivery having been made, he suffers eviction from the thing sold. As suggested above, the immediate reaction may be that his rights should be no greater and no less than in a case of non-delivery or inability to make a valid tender of delivery. When a seller delivers something to which he has no title, he fails to fulfill his obligation to transfer ownership. In the final analysis, therefore, the seller is guilty of nonperformance of his basic undertaking whether he fails simply to make delivery or fails to transfer ownership in the thing delivered.

Although the sales articles of the Code do not deal in detail with the buyer's claim for non-delivery, they do particularize the claim of the evicted buyer. In the first place, it is said that the sale of property belonging to another may give rise to damages when the buyer knew not that the thing belonged to another person.[23] In addition, Article 2506 provides that the evicted buyer is entitled to recover, beyond the restitution of the price, the fruits that he has collected but has been obliged to

20. *Id.* art. 1933.

21. Jefferson Sawmill Co. v. Iowa & Louisiana Land Co., 122 La. 983, 48 So. 428 (1909); Nelson v. Holden, 219 La. 37, 52 So.2d 240 (1951). See also Mathews Bros. v. Bernius, 169 La. 1069, 126 So. 556 (1930). *Cf.* Williams v. Hunter, 13 La. Ann. 476 (1858); Wilberding v. Maher, 35 La. Ann. 1182 (1883); Godchaux v. Dodt, 11 Orl. App. 252 (La. App. 1914).

22. 10 PLANIOL ET RIPERT, DROIT CIVIL FRANCAIS n. 48 (1932); 2 COLIN ET CAPITANT, TRAITÉ DE DROIT CIVIL 442 (1953).

23. LA. CIVIL CODE art. 2452 (1870). See 5 AUBRY ET RAU, DROIT CIVIL FRANCAIS n. 355 (1946).

return to the true owner, the costs of his suit in warranty, or of the owner's suit against him, and finally, "the damages, when he has suffered any, besides the price that he has paid." Article 2509 adds that the seller must reimburse him for all useful improvements made by him on the premises, or, if the seller has been guilty of fraud, even embellishments of luxury. Finally, Article 2516 concludes, "Other questions arising from a claim for damages, resulting from the non-execution of the contract of sale, shall be decided by the general rules established under the title: *Of Conventional Obligations.*"

If there were nothing else to go on, the conclusion would seem irresistibly to follow that the evicted buyer would be entitled to recover, over and above the mentioned items, damages measured by the general rules established in Article 1934 of the Civil Code. It is to be noticed that Article 2452 leaves the seller exposed to a suit for damages whether he knew or did not know that the thing belonged to another, that is, whether he was or was not in good faith. The only difference is that, where he knows, he is guilty of fraud, which would permit the innocent buyer to recover all damages directly flowing from the sale, without being limited to those within the contemplation of the parties at the time of the sale.[24] It would further appear that, under the general rules, the vendor would be entitled to recover not only the loss sustained represented by the cost incurred by him in the completion of the sale, but also the profit of which he may have been deprived, limited, in the case of the good faith seller, to that within the contemplation of the parties at the time of the sale or of which the buyer would naturally be deprived in the usual course of events in such a transaction. As in the case of the failure to deliver, this profit would constitute the difference between the contract price and the market value of the thing at the time of performance. Likewise, if the buyer has contracted for the resale of the property, he should be entitled to the profit of which he is deprived by the subsequent eviction, provided, of course, that the seller was advised of the facts. It should be noticed again that the gain represented by the amount by which the actual value of the thing exceeds the contract price is determined as of the time of performance. If a seller does not perform when required to do so, he must necessarily know that the buyer will lose what the performance is

24. See LA. CIVIL CODE art. 2510 (1870).

then worth. The difference between contract price and actual value at that time is what enters into his contemplation, not some difference that may be derived from comparing the contract price with the market value at some indefinite time in the future. Put another way, the value of the thing at the time of performance is a substitute for the thing itself, that is, the monetary equivalent of specific performance. Beyond the reason of the matter, there is ample judicial authority for this proposition in cases involving movables.[25] The result should be the same whether it is the buyer who is evicted or his vendee. At the same time, it is not believed that the buyer's recovery should include any amount recovered against him by his vendee under the heading of profits of which the latter was deprived, because such a loss to him would not be the immediate and direct result of the initial sale.[26]

But, there is something else to be considered. Strangely enough, it is not something we have, but something we do not have — an article in the Code Napoleon that the redactors of our Code intentionally omitted. It is Article 1633 of the French Code, and reads, "If the thing sold has increased in price at the time of the eviction, even independently of any act of the acquirer, the vendor is bound to pay to him what it is worth above the price of the sale." In omitting this article from our Code, the redactors said in explanation that it was "evidently dangerous, and might cause the ruin of a vendor selling in good faith, in a country where fluctuations in value are so great."[27]

The effect of this omission was first brought under the court's scrutiny in 1836, in the case of *Morris v. Abat.*[28] There

25. Kory v. Layman, 108 La. 247, 32 So. 441 (1902); C. F. Bonsor & Co. v. Simon Rice Milling Co., 151 La. 1094, 92 So. 711 (1922); National Wholesale Grocery Co. v. Simon Rice Milling Co., 152 La. 1, 92 So. 713 (1922); Monumental Brewing Co. v. Southern Rice Milling Co., 155 La. 454, 99 So. 401 (1924); Louisiana State Rice Milling Co. v. McCowan, 180 La. 174, 156 So. 213 (1934).

26. But see 3 POTHIER, OEUVRES n. 146 (2d ed. 1861): "For example, if I have bought a home for 8,000 pounds and have resold it to Pierre for 10,000 pounds, and Pierre has been evicted, and I have been condemned to return to Pierre 10,000 pounds and pay his damages amounting to 2,000 pounds, my vendor will be condemned to pay me the 12,000 pounds that I have been obliged to pay to Pierre, that is, 4,000 pounds in excess of the 8,000 pounds for which I sold him the home." See also 10 PLANIOL ET RIPERT, DROIT CIVIL FRANCAIS n. 120 (1932). It seems questionable whether this view is consistent with the general principles controlling the recovery of damages.

27. See 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 307 (1937).

28. 9 La. 552 (1836).

a vendee who three years after his purchase of certain land for $1500.00 entered into an exchange of the property with a third person at an agreed valuation of twice the purchase price, or $3000.00, claimed this latter amount from his warrantor when the true owner recovered the property and evicted his transferee. The court, in permitting recovery by the vendee of only the amount he paid for the property, relied on the omission in question and the reasons therefor as given by the redactors. Referring to what is now Article 2506, Justice Martin said, "To say that the word damages, means the loss of profits not made, or to be responsible for the augmentation of the value of the thing sold at the time of the eviction, beyond the price of the original sale, would be to restore and carry into effect the entire provisions of the article in the Civil Code which the legislature intended to suppress and repeal." This, Judge Martin felt, could not be done.

It is to be noted that the claim of the vendee was not for the difference between the contract price and the market value *at the time delivery was made,* but for the profit he claimed he would have made on a retransfer of the property *three years after the sale.* His claim was based, therefore, on the value of the property *at the time of the eviction,* not at the time of performance. It is to be noticed also that the quotation from Judge Martin refers to the augmentation of the value of the thing sold at the time of the eviction. The report of the case does not indicate that there was any claim based on a supposed difference between contract price and market value at the time of the sale. At the same time, there is nothing to indicate that the court may have had in mind that a distinction based on a difference in value at the time of the sale as opposed to such a difference at the time of eviction should be drawn.

Three years later the court's position on the question was considerably obscured by the decision in *Bissell v. Erwin's Heirs.*[29] There an evicted vendee of a plantation and slaves claimed from his vendor recovery for the slaves born subsequent to the sale and before the eviction. In holding that evidence as to such value should have been admitted at the trial, the court said, "The District Court erred in rejecting the evidence offered by the plaintiffs, to prove the increase in value of the property at the time of the eviction. In doing so, it assumed that no part

29. 13 La. 143 (1839).

of that increase could be taken into consideration, in assessing damages on a warranty. This is an error into which many members of the bar have fallen, and it arises from some inaccuracies in the printing of the opinion of this court in the case of Morris vs. Abat et al., 9 Louisiana Reports, 552. The court there held that a bona fide vendor is not bound to indemnify his vendee for profits not made, and that to make him answerable for profits not made and for the augmentation of the value of the thing sold, at the time of the eviction, beyond the price of the original sale, would be to restore and carry into effect the entire provisions of that article of the code of 1808 which the legislature intended to suppress and repeal. But the court never had a doubt that the damages intended by the law, in cases of eviction, are something over and above the original price, nor did it mean to say that such increase in the value as the parties could reasonably have anticipated at the time of the contract, was a profit not made, when the eviction took place."

If there had been in this case a failure to deliver the slaves that had been sold, the purchaser, under the general rules covering the recovery of damages, would have been entitled to recover only the difference between the contract price of the slaves and their market value at the time of performance. If his recovery, as an evicted vendee, be measured by the same principle, he could not recover for the value of the children since they were not yet born at the time of performance. Of course, the omission from our Code of the provision found in Article 1633 of the French Code precludes recovery of the enhanced value at the time of the eviction. The quotation shows that the court counted itself as measuring the damages on the basis of what the parties contemplated at the time of the contract, but it seems very clear that the redactors intended to preclude any award reflecting the enhanced value of the property at the time of eviction. Furthermore, it is believed to be very questionable to assume that the parties could have contemplated any award of damages, based on a fortuitous increase in value subsequent to the sale, or to say that the gain of which the vendee was deprived resulted immediately or directly from the failure to convey ownership of the slaves included in the sale.[30]

30. See Underwood v. Lacapere, 14 La. Ann. 276 (1859). There was no consideration of the possibility of counting the children born of the slaves as fruits.

The court had an opportunity to clarify its position twelve years later in the case of *Burrows v. Peirce*.[31] There four lots were acquired by a married woman in a partition of property with her husband. One of the lots had been sold some years before by the husband but this conveyance was overlooked when the lots were transferred to the wife in the notarial partition. Two years later, unaware of this fact, and also unaware of the fact that the purchasers of the lot had made improvements upon it worth approximately four thousand dollars, the wife transferred this lot, together with the other three, to the plaintiff for a total price of $250.00. Thereafter the plaintiff sued to establish his ownership of the property and made the heirs of the vendor parties, she having died in the meantime. The plaintiff's claim in warranty was for $4000.00, the value of the property. In a lengthy opinion which reviewed the history of the rule permitting recovery by the evicted vendee of the enhanced value of the property at the time of the eviction, and examined the common law on the subject, Judge Preston, writing for the majority, held that the omission of Article 1633 of the Code Napoleon from our own Code precluded an award of damages based on the increased value of the property.[32] The court could see no difference between allowing a vendee to recover the actual value of the property at the time of performance and allowing him to recover based on an increase in the value of the property at the time of eviction. It was said, "No reason can be given for the restoration of a dollar more than she received, which would not equally require the restoration of the whole value then and all the increase since." But the accuracy of this reasoning may be questioned in view of the general principle that the value of a performance promised is to be determined as of the time it is to be rendered and that a buyer is entitled to recover as the equivalent in money of the promised performance any difference then existing between contract and

31. 6 La. Ann. 297 (1851).

32. The word "increased" is used here because this is the way the proposition is put in the case. Actually, the case did not involve a claim for the increased value of the property. The court's statement of the facts shows that, because of improvements, the lot was worth $4000 at the time of the sale. This being true, the vendee's claim was actually for the value of his bargain, measured by the difference between the contract price and the market value at the time of performance. It also appears that if both parties believed the lot was not an improved lot, relief could have been granted, if sought, on the basis of error. If the plaintiff knew the lot was improved then he should have known also that the defendant was in ignorance of the fact and he would not have been privileged to withhold the information he had. See LA. CIVIL CODE arts. 1832, 1844 (1870).

actual values. The court also seemed to think that damages may be recovered in such a case only when there is fraud. It said, "The sale of the property of another is null; it may give rise to damages, but only when there is fraud or negligence, as in all other acts of man." And again, "The damages referred to in Article 2506 are those suffered by the buyer when the vendor has knowingly and wilfully sold the property of another to a vendee ignorant of the outstanding title." But there is nothing in Article 2506 to justify such a construction and it is in derogation of the language of Article 2452. Neither of these articles says anything about good or bad faith, and if they cannot be construed to cover an award of damages against a good faith vendor, no justification is apparent for finding them authority for allowing damages against a vendor guilty of fraud or bad faith. The court also said, "The increased value, as a rule of indemnification, is subject to every possible fluctuation of property and money, and therefore in no two cases of sales could be the same. The seller could never know the extent of his obligations; at one time they might be thousands, at another hundreds, and vice versa." This reasoning, of course, can have no application to a simple difference between contract price and market or actual value at the time of performance. It applies only to an increase in value subsequent to the time of performance. As so applied, its force seems apparent. It is surely true that nobody can know what increase in value there may be at any given time and surely, also, the parties, unaware of any defect in the title that may work a subsequent eviction, cannot possibly foresee when such an eviction may occur, granting they might contemplate that it might occur. And this suggests that they can hardly contemplate the payment of damages based on the possible value of the property at some unknown future time when an unforeseen eviction may take place.

The Chief Justice, Eustis, was careful in his concurring opinion. He cautioned, "I wish my opinion to be understood as confined to cases similar to the present, which may present the fact of a naked increase in the saleable value of the property sold." Taking this language alone it might well be believed that he was thinking of a case involving an increase in the value of the property subsequent to the time of delivery, because, if this property was simply worth more at the time it was bought than the price paid for it, there would have been no "naked increase

in the saleable value of the property sold." Judge Rost, the author of the opinion in *Bissell's* case,[33] dissented. The majority opinion had found Judge Martin's opinion in *Morris v. Abat*[34] directly in conflict with the decision in *Bissell's* case, and, feeling compelled to choose between them, reaffirmed *Morris v. Abat*. In dissenting, Judge Rost stated that when, in the course of deciding *Bissell's* case, Judge Martin's opinion in *Morris v. Abat* was read, "he protested that he never had made such a decision, and that the case was incorrectly reported, his opinion having always been in accordance with the decision in Bissell's case," He relied, also, on the general rules of conventional obligations, and said, "If then it can be reasonably presumed that at the time of the sale in this case, an augmentation of the value of the property sold entered into the contemplation of the parties, the defendant is bound to make indemnity to the amount of the augmentation contemplated." His opinion was, in short, that although, under our Code, the purchaser is not entitled as a matter of law to recover the enhanced value of the property at the time of eviction, he is, under the provisions of Article 2506, entitled to recover whatever damages may reasonably be supposed to have entered into the contemplation of the parties at the time of the sale, and that a reasonable resolution of this problem would be to allow a maximum of double the price paid, as in Roman law. Pothier also held this view,[35] but the French writers point out that the redactors of the Code Civil did not see fit to follow Pothier's solution. Instead, they provided that the purchaser evicted was entitled to recover the enhanced value of the property at the time of eviction without regard to what may have been contemplated at the time of the sale. This measure, they correctly point out, is in derogation of the common rule in that it ignores what may have been contemplated.[36] All of these authorities believe, of course, that the general rule permitting the recovery of contemplated damages authorizes an award based on an increase in value subsequent to the time of performance. Their only difficulty is in applying it. But this very difficulty is believed to be a demonstration of the unsoundness of such an application of the rule. It is obviously true that

33. See note 29 *supra*.

34. See note 28 *supra*.

35. 3 POTHIER, OEUVRES n. 132 (2d ed. 1861). See Comment, *Warranty Against Eviction in the Civil Law: Extent of the Vendee's Recovery*, 23 TUL. L. REV. 140 (1948).

36. 5 AUBRY ET RAU, DROIT CIVIL FRANCAIS n. 355 (1946); 2 COLIN ET CAPITANT, TRAITÉ DE DROIT CIVIL n. 911 (2d ed. 1953).

limiting the recovery for enhanced value to double the price paid is purely arbitrary. But if any increase in value subsequent to the time of performance is to be held recoverable then the only alternative is to go the whole way. Yet it hardly seems reasonable to say that the parties contemplate, at the time of the sale, that the seller will stand good for any subsequent increase in value, no matter how great and no matter what period of time may elapse between the transfer of the property and the day the seller is called upon to make good his warranty against eviction. And it is just as unreasonable, where the value decreases after the sale, to permit the buyer to recover only on the basis of the decreased value instead of proportionally to the total price of the sale. Yet this is just what the French Code provides in the case of a partial eviction,[37] although, remarkably enough, it permits recovery of the whole purchase price for a total eviction despite any diminution in value.[38]

RECOVERY OF DAMAGES FOR NON-DELIVERY AND FOR BREACH OF A COVENANT OF TITLE UNDER THE ENGLISH COMMON LAW

In the course of his opinion in the *Burrows* case, Judge Preston observed that under the common law of conveyancing, a vendee who sues his vendor for breach of a covenant of title may recover only the price that he paid. He also observed that Livingston, trained in the common law, was aware of this limitation, and that it was his purpose to make it the law of Louisiana instead of adopting the rule of the French Code.

There is respectable authority to the effect that the so-called common law rule which, as applied in this country, restricts recovery to a return of the price paid for breach of a covenant of title, is not, indeed, the common law rule, but represents a misconception of the early English case of *Flureau v. Thornhill*,[39] that dealt, in fact, with a vendor's failure to deliver stock issuing out of a leasehold.[40] The decision was actually based on a finding that transactions of that particular kind were subject to an implied condition reflecting the common understanding of the

37. CODE CIVIL art. 1637. When this article was carried into the Louisiana Civil Code it was changed so as to provide for recovery of a proportionate part of the price. See LA. CIVIL CODE art. 2514 (1870). See also Hendrickson v. Back, 74 Minn. 90, 76 N.W. 1019 (1898), where the buyer had had the use of the thing, a harvester, for three years. 3 WILLISTON, SALES § 615 a (rev. ed. 1948).

38. CODE CIVIL art. 1631.

39. 2 W. Bl. 1078, 96 Eng. Rep. 635 (1776).

40. See Annot., 48 A.L.R. 12 (1927).

parties that the seller's responsibility would be limited to a return of the amount received in the event of his inability to deliver valid title. The Exchequer Chamber later pointed this out in a case holding that for breach of a covenant of title prospective in operation the buyer is entitled to damages measured as of the time of its breach.[41] Nevertheless the so-called common law rule has become firmly fixed in this country despite criticism of the *Flureau* case both here and in England. And despite the mentioned criticism, the House of Lords has held that the rule of the *Flureau* case applies to all contracts to convey real estate involving a failure of the seller to make delivery. That is, the purchaser's recovery is restricted to a return of the price and the expenses he has incurred.[42]

RECOVERY OF DAMAGES FOR NON-DELIVERY IN COMMON LAW JURISDICTIONS OF THE UNITED STATES

Although there is a very confusing diversity of opinion in the American cases, the most generally applied rule, contrary to the English rule, gives to the vendee, for nonperformance of the seller's obligation to deliver, the benefit of his bargain by permitting him to recover the difference between the contract price and the actual value of the property to be conveyed at the time performance was due.[43] That is, no distinction is made between executory contracts to convey land or any other thing. A few cases have denied recovery against a good faith seller who erroneously believed that he would be able to perform, and some have adopted the English view because of the belief that, since under the so-called common law rule applying to covenants of seizin an evicted vendee may recover only the price he paid, plus interest and expenses, the same measure should be applied to breach of a contract to convey.[44] One eminent authority in commenting on this view has said, "The argument has been made that, if the rule applied is not the same as in actions for breach of covenant of warranty, 'the vendor could easily avoid its effect by delivering to the purchaser a warranty deed and accepting the purchase money.'[45] An obvious answer to this is that such

41. Lock v. Furze, L.R. 1 C.P. 441, 15 Eng. Rul. Cas. 723 (1866).

42. *Ibid.*; Bain v. Fothergill, L.R. 7 H.L. Cas. 158 (1874). It is a curious fact that this rule apparently does not apply to the breach of a prospective covenant of title.

43. 5 CORBIN, CONTRACTS § 1097 (1951); Annot., 48 A.L.R. 12 (1927).

44. 5 CORBIN, CONTRACTS § 1098 (1951).

45. Here Clifton v. Charles, 53 Tex. Civ. App. 448, 116 S.W. 120 (1909), is cited.

a possibility is in fact open to the bad faith contractor, the very sort of person who would be most likely to take advantage of it. The true remedy to avoid this possibility is to award full compensatory damages for breach of warranty, not to deny them for breach of contract."[46]

RECOVERY OF DAMAGES FOR BREACH OF A COVENANT OF TITLE IN COMMON LAW JURISDICTIONS OF THE UNITED STATES

With reference to the recovery permitted to an evicted vendee in this country, the greatest number of cases purport to limit it to a return of the purchase price, plus interest. However, it rather appears that the vendee is considered as being entitled to recover the difference between the contract price of the property and its market value at the time of performance, although not at the time of eviction, and the purchase price is taken simply as representing the then value of the property.[47] If this is true then the majority rule in this country is that the buyer is entitled to the difference between contract price and market value at the time of performance whether the seller is unable to make delivery or there is a breach of a covenant of title.[48]

COMMENTS ON THE LOUISIANA RULES

Returning to our own law, the holding in *Burrows v. Peirce*,[49] seems to have remained unshaken to the present day. It seems also to be taken as standing for the proposition that an evicted vendee may not recover any difference between the actual or market value at the time of performance and the contract price, but is limited to recovering only the price paid. Despite the fact that this view has been held for a very considerable period of time, there is reason to doubt its validity. In the first place, Article 1633 of the Code Napoleon refers only to an increase in value *at the time of the eviction.* Hence, perhaps no other conclusion is justified than that in leaving out this provision we withheld from the courts only the power to make an award to

46. Here Doherty v. Dolan, 65 Me. 87 (1876), is cited. See 5 CORBIN, CONTRACTS § 1099 (1951). See also 3 WILLISTON, SALES § 615 a (rev. ed. 1948).

47. See Annot., 61 A.L.R. 10 (1929).

48. A minority of courts permit recovery based on the enhanced value of the property at the time of eviction whether the covenant is broken at the time of performance, as would be the case of a breach of a covenant of seizin, or is broken by a failure to guarantee quiet enjoyment, as would be the case of a breach of a covenant prospective in operation, such as that of quiet enjoyment.

49. Note 31 *supra.*

the evicted vendee based on an increase in value *subsequent* to the time of performance. The reason given by the redactors for leaving it out shows that they were concerned with fluctuations in value, that is, a change in value subsequent to the sale, not with an existing difference between actual value and the contract price, or contract price and resale price. They knew that under the provisions of the French Code the courts were required to give the evicted vendee the value of the property at the time of the eviction. They chose not to impose such a requirement on our courts. There is, therefore, no necessity to conclude that because they did not choose, and perhaps with excellent reason, to treat an evicted vendee so favorably, they intended to deny to him the benefit of his bargain, that is, the gain represented by the difference between the market value of the thing and the contract price at the time of performance.[50] Nor is it likewise necessary for us to conclude that where the purchase is made with a view to resale at an increased figure to the seller's knowledge, the purchaser should not be entitled to recover his lost profit. In the second place, if such damages may be recovered for a good faith failure to deliver, it seems wholly inconsistent to say that if delivery of a defective title is made and results in the subsequent eviction of the purchaser, his recovery cannot include such damages.

Despite the fact that there is general agreement in both civilian and Anglo-American doctrine that some increase in value subsequent to a sale may enter into the contemplation of the parties as an element of damages, such a point of view is by no means free of doubt. There is an element of speculation that makes an award of damages based on the value the subject matter of a sale may attain at some undetermined future time of very questionable propriety. Any buyer may buy because he believes that which he buys may increase in value, but in most cases this possibility involves pure speculation. By the same token most sellers of immovable property must certainly believe that the sale is being made at a price as favorable as they can anticipate in the foreseeable future. The very fact that an effort has been made, in jurisdictions where recovery based on enhanced value has been allowed, to set a limit on its extent, demonstrates the difficulty of determining what may have been

50. But see LA. CIVIL CODE art. 2514 (1870). In taking this article from the French Civil Code the redactors changed its language so as to preclude recovery on the basis of enhanced value.

contemplated at the time of contracting and also discloses the dubiousness of allowing recovery on the basis of such an uncertain and fortuitous factor as when the eviction may occur. We have seen in our own time values of real estate increase enormously over a span of a few years. If when a speculating vendee is evicted he is not allowed to claim any increase in value that takes place after he acquired the property, he will have lost merely an opportunity existing at the time of the sale to make a speculative profit, not a certain one. In short, our rule, precluding any consideration of an increase in value in fixing damages resulting from an eviction, seems sound.

But, granting that an evicted vendee should not be allowed to recover on the basis of the enhanced value of the property at the time of eviction, to restrict his recovery to a return of the purchase price, where there is an established difference between purchase price and market value at the time performance is due, is out of harmony with the general principles established by the Code and recognized by the jurisprudence. When a seller fails to fulfill his obligation to make delivery of that which he has sold, whether movable or immovable, the vendee is entitled to, and is given, the benefit of his bargain. If he can prove that the market value was greater than the contract price, the difference constitutes a gain on the transaction of which he is deprived by the breach. If he can prove that the breach caused him to lose a resale, of which the seller had notice, at a higher price, he is entitled to the profit he would have made thereon. If an amount has been agreed upon as a forfeit, or liquidated damages, in the event of the seller's nonperformance, he is entitled to recover such amount. It merely takes the place of the loss sustained and the profit of which the buyer has been deprived. In addition, in evaluating an immovable for the purpose of resolving a question of lesion beyond moiety, the time of the completion of the contract to sell through the exercise of an option was taken, prior to a recent amendment, as the basis of measurement.[51] That is, the immovable was valued as of the time the option was exercised. This rule gave the seller the benefit of the increase between the granting of the option and its exercise as far as his right to set aside the sale for lesion was concerned. If, therefore, the actual value of the property at the time of the contract resulting from the exercise of the

51. Lakeside Dairies v. Gregersen, 221 La. 503, 59 So.2d 701 (1952).

option was considered in protecting the vendor, it should logically be considered also in determining the vendee's profit from the sale in the event of his eviction by paramount title. Of course, the Legislature has now changed this rule so as to give the buyer the benefit of any increase in value, however great it may be, between the granting of the option and the purchaser's acceptance.[52] This would seem further to confirm the view that, if such a purchaser is evicted following the completion of the sale, he should not be denied the benefit of the increase in value between the granting of the option and the transfer of the property, which the amendment recognizes properly belongs to him.

In the usual case, where a contract to sell is followed shortly by the delivery of an act of sale, the contract price will normally represent the actual or market value of the property, hence the buyer's recovery would be measured by the purchase price. But where the contract to sell results from the granting of an option, perhaps at a much earlier date as is frequently true of options contained in leases, there seems to be no justification for saying that the evicted purchaser's recovery must be measured by the contract price established at the time the option was given, without regard to the value of the property at the time of performance. Such a view would deny to the buyer an advantage the possibility of which may very well have constituted his inducement for entering into the lease, or for otherwise paying the price of the option, and would deprive him of a profit that must necessarily have been contemplated by the parties when the option was granted. To give him the benefit of his bargain by basing his recovery on the value of the property at the time of the sale would not be in conflict with the legislative determination to preclude recovery by an evicted vendee of the value that the property may have attained at the time of the eviction.

CONCLUSION

In conclusion, the court's action in permitting the purchaser in *Ducuy v. Falgoust*[53] to recover from the good faith seller the sum set up as a forfeit is entirely consistent with the protection afforded a purchaser under the general rules relating to the recovery of damages for a good faith breach of contract by the

52. LA. CIVIL CODE art. 2590 (1870), as amended, La. Acts 1950, No. 154, p. 318.

53. Note 3 *supra*.

seller. Although the court distinguished certain fairly late cases dealing with earnest money, where an inconsistent view was taken,[54] there was solid support for its position in an earlier case that involved a deposit made expressly as earnest money. In 1909 the case of *Lyons v. Women's League of New Orleans*[55] squarely presented the question of whether a vendor unable to tender to the vendee a merchantable title was nevertheless obligated to return double the deposit made as earnest money. The trial court had rejected the vendee's claim for a return of the double, saying, "Therefore, it is only when the vendor has arbitrarily receded from the promise that he can be made to return double the earnest. So far from receding from the promise to sell, plaintiffs are even now insisting upon its fulfillment. It would be strange justice indeed to enforce against them the penalty provided in article 2463 simply because, in the opinion of the court, their title to the property is not such as defendant can be compelled to accept." This position the Supreme Court rejected, after taking note of the authorities, both Louisiana and French, cited in support of the opposing positions. It said simply that after careful consideration its opinion was that the judgment of the district court was erroneous.

An evicted vendee is entitled to no less favorable treatment. The recovery of damages in the event of eviction as well as where the seller, although in good faith, fails to fulfill his obligation to deliver, would then be uniform. The value of the property would be taken as of the time of performance. As observed heretofore, this would not be in violation of the legislative determination to exclude enhanced value in fixing the evicted buyer's right of recovery. At the same time, it would not involve any dubious determination of what may have been contemplated with respect to a future increase in value and would limit the recovery to a loss of profit resulting directly from the breach without the concurrence of any uncertain, fortuitous, or speculative factors. The vendee would be given simply the benefit of his bargain and, so far as money can do it, would be placed in as good a position as if the contract had been performed, which is supposedly the controlling principle.[56]

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54. See note 4 *supra*.

55. 124 La. 222, 50 So. 18 (1909). See also Wendling v. Parnin, 170 La. 504, 128 So. 291 (1930).

56. 5 CORBIN, CONTRACTS § 1099 (1951). The recent case of Katz v. Katz Realty Co., 228 La. 1008, 84 So.2d 802 (1955), is in accord with this principle.