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Sales - Lesion Beyond Moiety - Action Against First Vendee After Resale to Third Party

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modern business and commercial transactions, Louisiana should make inducing breach of contract actionable under article 2315. This tort can be introduced without equating this article to all common law tort doctrines or impairing any civilian concepts. In accord with the Civil Code's emphasis on performance, a cause of action for inducing breach of contract will result in greater security of contract in Louisiana.

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SALES—LESION BEYOND MOIETY—ACTION AGAINST FIRST VENDEE AFTER RESALE TO THIRD PARTY

Plaintiff sold the timber on his property to defendant for $12,800. Defendant resold the timber for $30,000 to a third party. Plaintiff then filed suit against defendant for rescission of the sale, subsequently amending his petition to include the third party purchaser as a defendant. On a motion for summary judgment, the suit against the third party purchaser was dismissed. The first vendee and remaining defendant filed an exception urging no cause of action which was primarily based on the ground that since the ownership of the timber had passed into the hands of a third party, the plea of lesion was no longer available to the vendor. The district court sustained the exception and the court of appeal affirmed.[1] The Supreme Court of Louisiana reversed the judgment of the court of appeal, overruled the exception of no cause of action, and remanded the case to the district court for a trial on the merits. The court concluded that where immovable property is sold for a lesionary consideration and the purchaser subsequently resells the property, the original seller can recover from the original purchaser the proceeds from the original purchaser's sale to the third party. Or, in other words, the first vendor can recover the difference between the price at which he sold and the price which the vendee received when he subsequently resold. *O'Brien v. LeGette*, 254 La. 252, 223 So.2d 165 (1969).

The Louisiana Civil Code defines lesion as "the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract."[2] It further specifies that when a vendor of an immovable has received less than one-half the value of the estate sold by him, lesion beyond moiety has occurred and the

1. O'Brien v. LeGette, 211 So.2d 427 (La. App. 1st Cir. 1968).
2. LA. CIV. CODE art. 1860.

vendor has the right to demand the rescission of the sale.[3] It is important to note, however, that the action of lesion beyond moiety can only be asserted by a vendor,[4] and is only granted against sales or exchanges of immovables, and in some cases partitions.[5]

The purchaser against whom lesion beyond moiety has been alleged and proved has the choice of either returning the property or paying the supplement of the just price,[6] thereby keeping the property. If the purchaser elects to pay the supplement of the just price, it is of course necessary to determine what "the just price" is. Civil Code article 2590 indicates that the just price is that true value which the immovable had at the time of the sale. The standards to use in determining this value, however, have apparently been a source of confusion and inconsistency for our courts. Since this subject is not within the scope of this Note, suffice it to say that Louisiana courts are divided between the following two standards in determining the value of the immovable for purposes of ascertaining the just price: the "highest and best use" rule as used in expropriation cases,[7] or the "actual use" rule which is indicative of the value of the land as it was actually being used at the time of the sale.[8]

Where the purchaser still has possession of the property, the Civil Code very clearly provides him with the option either of paying the supplement of the just price or returning the immovable. However, it is necessary to determine which provisions of the Civil Code provide for the case where the purchaser no longer has possession of the property which he bought for a lesionary price. There are actually four instances in which the purchaser would no longer have possession of the property, or at least possession of *all* of it. These instances occur when the following events take place:

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3. *Id.* art. 2589. See also *id.* art. 2590.

4. *Id.* art. 2593.

5. *See id.* arts. 1862, 2594 (sales); arts. 2664-2667 (exchanges); art. 1861(1) (partitions).

6. *Id.* art. 2591 "If it should appear that the immovable estate has been sold for less than one-half its just value, the purchaser may either restore the thing and take back the price which he has paid, or make up the just price and keep the thing."

7. Fletcher v. Smith, 216 So.2d 663 (La. App. 3d Cir. 1968); Martin v. Mays, 127 So.2d 77 (La. App. 1st Cir. 1961).

8. Armwood v. Kennedy, 231 La. 102, 90 So.2d 793 (1956); Foos v. Creaghan, 226 La. 619, 76 So.2d 907 (1954); Crow v. Monsell, 200 So.2d 700 (La. App. 2d Cir. 1967); Weber v. Coppola, 176 So.2d 154 (La. App. 4th Cir. 1965).

(a) The immovable is *partially* destroyed by a force of nature while in the hands of the purchaser. For example, using the same immovable which was the subject of the noted case, if only half of the timber *A* sold to *B* for a lesionary price were destroyed by fire.

(b) The immovable is *completely* destroyed by a force of nature. For example, *A* sells to *B* the timber on his land for a lesionary price. One year later, and before the action in lesion is brought, the whole stand of timber is totally destroyed by fire.

(c) The immovable *partially* ceases to exist in the possession of the purchaser because of a *partial* legal alienation. As an example, *B*, the first purchaser for a lesionary price sells only one-half of the timber he acquired from *A* to a third party.

(d) The immovable completely ceases to exist in the possession of the purchaser because the immovable has been legally alienated. For example, *B* sells the timber which he acquired from *A* to a third party. This is exactly the situation in the noted case and will be discussed below.

In each of these cases it is important to note that *B*, the purchaser of the timber from *A* for a lesionary consideration, obviously cannot return the property to *A* when *A* brings the action in lesion. The immovable has ceased to exist in the hands of the purchaser, and therefore the two choices provided in Civil Code article 2591, that is either to return the property or to pay the supplement of the just price, are no longer available. It has been elsewhere contended that, in this case, since the purchaser no longer can return the immovable, he must therefore comply with the one choice remaining, that is, to pay the supplement of the just price.[9] Such reasoning seems faulty in light of the underlying theory of the action in lesion, and of a reference to the sources of our Civil Code articles on the subject. Article 2591 actually seems to impose only *one* legal obligation upon the purchaser of an immovable for a lesionary consideration. This obligation is to restore the immovable. Paying the supplement of the just price is not an alternative legal obligation which the vendor may enforce when it is impossible for the vendee to return the immovable. Paying this supplement is only a gratuity which the law provides to the vendee, should the vendee elect

9. Note, 43 TUL. L. REV. 435 (1969).

not to restore the immovable, when in fact it is possible for him to do so.

The principle that the purchaser of an immovable for a lesionary price actually owes only one legal obligation to his vendor—restoration of the immovable—rests upon an authoritative foundation when one considers the sources of Civil Code article 2591. The correlative article of the Civil Code of 1808 is article 111. The now well-known de la Vergne digest contains the articles of the 1808 Civil Code with the source notes for each of these articles as written by L. Moreau Lislet, one of the authors of the Civil Code of 1808.[10] Moreau Lislet cites a provision of *Las Siete Partidas*[11] and also the French legal writer Pothier, in his *Contrat de Vente*,[12] as two of his sources for article 111 of the Code of 1808, now Civil Code article 2591.

Pothier was very explicit in his contention that the buyer only has the one legal obligation of restoring the immovable.[13] He wrote that the action which the law gives the seller is a rescissory action. When the seller brings the action in lesion, he is bringing a rescissory action in which he is demanding that he be placed in the same situation that he was in before he sold the immovable for a lesionary price.[14] It follows, therefore, that he is demanding a restoration of the immovable whereupon he would refund the lesionary price paid to him by the purchaser. He is *not* demanding either a restoration of the immovable *or* a paying of the supplement of the just price, because this is not the purpose or function of a rescissory action. Pothier, in expanding upon this principle, further submitted:

> "The question has been discussed, whether there is ground for this action, when the thing sold ceases entirely to exist . . . [At this point Pothier reveals that some writers

10. *See* Pascal, *A Recent Discovery: A Copy of the "Digest of the Civil Laws" of 1808 with marginal source references in Moreau Lislet's Hand*, 26 LA. L. REV. 25 (1966); Pascal, *Book Review*, 30 LA. L. REV. 746 (1970).

11. LAS SIETE PARTIDAS bk. 5, tit. 5, L. 56 (Moreau Lislet & Carleton transl. 1820).

12. POTHIER, TRAITÉ DU CONTRAT DE VENTE nº 331, 333 (1806).

13. POTHIER, CONTRACT OF SALE nºs 332, 334 (Cushing transl. 1839). Actually numbers 332 and 334 are translations of numbers 331 and 333 respectively from the original French in *Pothier's Contrat de Vente*.

14. *See* LA. CIV. CODE art. 2589: "If the vendor has been aggrieved for more than half the value of an immovable estate by him sold, he has the right to demand the rescission of the sale, even in case he had expressly abandoned the right of claiming such rescission, and declared that he gave to the purchaser the surplus of the thing's value."

contend that there is an alternative obligation imposed on the buyer. If the buyer cannot return the immovable, he must pay the supplement of the just price.]

"The principle, which serves for the foundation of the opinion entertained by these doctors, seems to me to be false. The obligation of the buyer is only of a single thing, namely, a restitution of the estate; he is not in any manner the debtor of the supplement of the just price, being obliged only to the price, which his contract imports, and to nothing more. The choice, which the law gives him to make up the just price, is only a power granted him, to redeem himself from the obligation to restore the estate, by the payment of the supplement."[15]

The provision in *Las Siete Partidas* would seem to announce the same principle. It provides that if the buyer is unwilling to pay the supplement of the just price, then he *must* restore the property.[16] If the buyer actually has possession of the immovable and refuses either to pay the supplement of the just price or to restore the immovable, the law, in accordance with the nature of a rescissory action, can only compel him to restore the immovable. It may not, in the alternative, compel him to pay the supplement of the just price. Again, this is because the buyer is under only the one legal obligation of restoring the immovable, stemming from the nature of the rescissory action of which the action in lesion is an example.

It is pleasing to note that this principle has at least one precedent in Louisiana jurisprudence. In the early case of *Copley v. Flint & Cox*,[17] the court incorporated with approval a part of that portion of Pothier's writings previously quoted. Applying this principle to the four situations in which the immovable has either totally or partially ceased to exist in the possession of the purchaser, the results, as contemplated by the underlying theory of the lesion articles, logically follow.

In the first example given earlier, since the purchaser only has the legal obligation of restoring the immovable, and since it is obviously impossible for him to do so since the immovable

15. POTHIER, CONTRACT OF SALE nº 349 (Cushing transl. 1839). Actually this reference is to number 348 in the original French.

16. LAS SIETE PARTIDAS bk. 5, tit. 5, L. 56 (Moreau Lislet & Carleton transl. 1820).

17. Copley v. Flint & Cox, 16 La. 380 (1840).

has ceased to exist, it follows that the seller has no cause of action against the buyer. One at first blush might question the equities of such a rule as applied to this situation. However, as Pothier stated, the seller actually should congratulate himself because if he had not made the sale, it would have been he who would have lost the immovable, and consequently he would not have had the price which he received.[18]

The second situation is clearly provided for by Civil Code article 2597, an article in perfect harmony with the principle that the buyer only owes the legal obligation of restoration of the immovable and *not* an alternative obligation of paying the supplement of the just price.[19] The article provides that the seller must resume possession of the thing in its state at the time of the demand. The buyer is not bound for an injury sustained through his fault or otherwise before the demand is made. Therefore, in the example given above, the purchaser would only be obligated to return the possession of the timber that was remaining. As clearly indicated by the article, there can be no demand for a supplement of the just price for that timber which has burned. On the contrary, there can only be a demand for the possession of the timber as it stands.

In the third example, it is true that the seller must resume possession of the immovable in the state in which it is at the time of the demand. However, the article further provides that the purchaser is bound to make a reimbursement for the injuries that he has turned to his own profit.[20] Therefore, since the pur-

18. POTHIER, CONTRACT OF SALE nº 349 (Cushing transl. 1839). Actually this reference is to number 348 in the original French.

19. LA. CIV. CODE Art. 2597: "The seller who demands the rescission on account of lesion beyond moiety, must resume the possession of the thing, in the state in which it is.

"The buyer, in this case, is not bound for the injury sustained through his fault before the demand. He is only bound to make reimbursement for such injuries as he has turned to his own profit."

20. It is interesting to note that there is no *Code Napoleon* or *Louisiana Civil Code of 1808* counterpart to *Civil Code* article 2597 (1870). What is now our Civil Code article 2597 was added in the *Civil Code of 1825*. Unfortunately *the Projet of the Civil Code of 1825* lists no sources for the present article 2597. However, due to the surprising similarity between Civil Code article 2597 and a portion of *Pothier's Contrat de Vente*, it is very possible that Pothier's writings were a major source for this article. Pothier wrote: "In regard to degradations of the estate, there is no doubt, that the buyer, against whom the rescissory action is prosecuted, ought to account for those of which he makes a profit. For example, if he cuts down a wood of large trees . . . which he sells, or if he takes down a house and sells the materials, there is no doubt, that he ought to account for the proceeds of such sales. As to degradations, from which he derives no benefit . . . he is not liable to account,

chaser has degraded the value of the whole estate of the timber by selling one-half of it, and since this injury or degradation was turned to his own profit, he must reimburse the seller by giving him the gains realized on such a resale. And, of course, the seller must resume only half of the estate of timber because it is impossible for the purchaser to return the other half. This is not to say, however, that the buyer is being compelled to pay the supplement of the just price for that portion of the timber which he resold. On the contrary, the standard by which to measure what the purchaser must reimburse is the profit which he made when he resold the timber.

The fourth example tracks the events of the noted case. But before discussing what sort of action the vendor has against the purchaser in this situation, it should be noted that Louisiana courts have consistently held that the action in lesion does not lie against the third party purchaser in good faith.[21] The theoretical basis for such a position is that the redactors of the Louisiana Civil Code deleted that portion of the Code Napoleon which allowed the action against third party purchasers.[22] The fact that the Louisiana courts seem to allow the action against a third party purchaser in *bad* faith is, however, of little significance. It appears that the courts have never allowed the action

provided he is the possessor in good faith; for he may neglect an estate, which he believes to be his own, and which he does not know is subject to restitution." POTHIER, CONTRACT OF SALE nº 361 (Cushing transl. 1839). Actually the reference is number 360 in the original French.

In the above quotation Pothier was considering the situation where although the immovable had been degraded in value, still the immovable had enough value to be the subject of a rescissory action whereby the purchaser could be compelled to return the immovable in the state in which it was at the time of the demand.

Perhaps the argument that a source of Civil Code article 2597 is found in *Pothier's Contrat de Vente* is further strengthened when one considers the original French in which the forerunner of article 2597 was written. That article used the French word dégradations (*see* 1 LOUISIANA LEGAL ARCHIVES 314 (1937)), which has been translated into English as "injuries," which word can be found in the present article 2597. At any rate, Pothier also uses, in the original French, the word "dégradations." POTHIER, TRAITÉ DU CONTRAT DE VENTE nº 360 (1806) reads in part: *"A l'égard des dégradations de l'heritage, il n'est pas douteux que l'acheteur contre qui on exerce l'action rescisoire de celle dont il a profité . . . ."*

Perhaps the similar wording in the original French between Pothier and the forerunner of article 2597 is a doubtful ground upon which to partially base an argument that the source of article 2597 is in *Pothier's Contrat de Vente.* However, this wording, coupled with the striking conceptual similarities as demonstrated above, would seem to lend at least some credence to the view that the source of Article 2597 is in Pothier's writings.

21. See Morgan v. O'Bannon & Julien, 125 La. 367, 51 So.2d 293 (1910); Snoddy v. Brashear, 13 La. 469 (1858).

22. FRENCH CIV. CODE art. 1681, par. 2 (Wright's transl. 1908).

against a third party purchaser, even when that purchaser had thorough knowledge of the inadequacy of price in the lesionary sale to the first purchaser.[23]

Applying article 2597, the court in *O'Brien* concluded that the purchaser had worked an injury to the estate by reselling the estate, and that therefore he was bound to reimburse his vendor. The reimbursement was to consist of the profit which the purchaser derived from the resale.

The application of article 2597 in such a situation appears faulty. The court was correct in not contending that since the purchaser no longer has possession of the immovable, he must now pay the just price. The purchaser owes only one legal obligation—the restoration of the immovable. (Of course as intimated earlier, this principle is qualified to the extent that when article 2597 is theoretically applicable, then the purchaser may additionally owe the obligation of restoring the profits when the injury results in profits.) The general rule, as previously indicated, is that in a rescissory action the plaintiff is actually demanding that he be put back in the position that he was in before the sale. Therefore, in general, there can be no action in lesion to demand a rescission of the sale when the object of that demand has *totally* ceased to exist.[24] A close reading of article 2597 will indicate that this article is actually contemplative of the case in which the purchaser is actually able to return the immovable, injured though it may be.

It would therefore appear that for whatever the reason, when the immovable ceases to exist in the possession of the purchaser, there is no longer any action in lesion, and therefore no longer a demand for rescission available to the vendor. Yet Pothier provides as an exception to this general rule the case in which the immovable is totally resold. In a portion of Pothier's *Contrat de Vente* specifically cited by Moreau Lislet as a source for the now Civil Code article 2591, Pothier contends that although the vendor of a lesionary sale actually passes ownership of the property to the purchaser, the effect of thereafter bringing the action in lesion is to rescind the contract and the alienation of

23. Morgan v. O'Bannon & Julien, 125 La. 367, 51 So. 293 (1910).

24. This was the situation given in the first example of this paper. Since the timber estate was totally destroyed, the purchaser, who only has the one legal obligation of restoring the immovable, no longer has an obligation which can be enforced by the vendor.

property made in consequence of it. Therefore the seller is, by a fiction of law, considered as having always remained the proprietor of the estate sold,[25] and is entitled to the profits on resale. Pothier further states that the buyer in such a case "puts himself in the situation of one who sells the property of another, who is not allowed to profit and enrich himself by the price for which he sells."[26]

It is clear that the *result* reached by the court in the noted case is the same as that suggested by Pothier. The difference lies in the respective foundations for that same result. Article 2597, used by the court in *O'Brien*, contemplates the case where there is actually a part of the immovable which can be returned. Where the immovable has been totally resold, article 2597 is not, therefore, theoretically applicable. However, by following Pothier's approach, one sees that the same equitable result is reached.

In conclusion, one can state the following rules:

(a) When the immovable has *totally* ceased to exist because of a force majeure or by some method other than by legal alienation, the vendor no longer has an action in lesion against the purchaser. Actually the equities are in favor of such a rule because had the vendor not sold at all, the immovable would likely have been destroyed while in his possession. He would not even have received the price which he did, inadequate though that price might have been.

(b) When the immovable has *partially* ceased to exist *either* by a force of nature *or* by legal alienation, the vendor must resume possession of the immovable in its present state, subject to the vendor's right to demand reimbursement for any profits which the purchaser might have derived through causing the injury to the estate. In such a case, article 2597 is clearly applicable.

(c) When the immovable has been *totally* resold, the purchaser must account for all the profits made by the resale. It is submitted that this last rule, the one which is applicable to the noted case, is not only a rule which is theoretically correct, but also an equitable one. If a good faith purchaser were made to

25. POTHIER, CONTRACT OF SALE nº 332 (Cushing transl. 1839). Actually the reference is to number 331 in the original French.

26. POTHIER, CONTRACT OF SALE nº 359 (Cushing transl. 1839). Actually the reference is to number 349 in the original French.

pay back the supplement of the just price, this might often be greater than any profit he might have received on resale.[27] For example, *A* sells to *B* an immovable for $4,000. *B* sells to a third party for $7,000. The just price of the the immovable is $10,000. If *B* were compelled to pay *A* the supplement of the just price, he would have to pay $6,000. Yet, by following the approach outlined above and used in *O'Brien,* if *B* only had to account for the profits, he would pay *A* $3,000.

Therefore, it is submitted that the *result* reached by the court is a just one. There is no reason, either on theoretical or equitable grounds, for holding a purchaser who has not practiced violence or fraud to the stringent requirement of paying the supplement of the just price when he cannot, in fact, return the immovable. The vendor is still protected in that he can demand the profits whenever the purchaser resells.

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TERMINATION OF A DECLARED UNIT

In current practice voluntary units for drilling for and producing oil and gas fall into either of two categories: "contractual" or "declared." "Contractual" units are formed by an agreement among all the parties who have an interest in the unit (lessors and lessees).[1] "Declared" units result from exercise by a mineral lessee of a pooling power, usually granted in the lease, and are normally effectuated by filing of a pooling declaration in the public records. Once a voluntary unit has been formed, there is uncertainty as to what events or occurrences will terminate the unit. It is within the power of contracting parties to provide expressly for conditions which will resolve any type of voluntary unit or vary the basis upon which production or costs are to be shared. For example, the unit agreement may contain a provision either limiting its duration to a fixed number of years or perpetuating it until a commissioner's unit might be formed or unit production might cease.[2] Also, the parties may simply

27. *See* Justice Summers' dissent in *O'Brien v. LeGette,* 254 La. 252, 260, 223 So.2d 165, 169 (1969).

1. Note, 24 LA. L. REV. 935, 937 (1964). *See* Texaco, Inc. v. Vermilion Parish School Bd., 145 So.2d 383, 394 (La. App. 3d Cir. 1962) (concurring opinion); Comment, 10 LOYOLA L. REV. 224 (1960).

2. *See* 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW—POOLING AND UNITIZATION § 931 (1964).