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SALES

*Alain A. Levasseur**

AN ABOUT TURN

The title of this essay might be fittingly substituted for the official cite of the case of *Cotton States Chemical Co., Inc. v. Larrison Enterprises, Inc.*,¹ in which legal issues were thrown at sixes and sevens with little restraint, if any at all.

The plaintiff had sold a liquid herbicide to the defendant rice farmer, Larrison Inc. Larrison had been informed by employees of the distributor of the liquid herbicide, Tide Products Inc., and apparently by employees of Cotton States, that the herbicide could be aeriually sprayed, rather than applied in pellet form, with similar results. As it turned out, the rice field, over which the liquid herbicide had been aeriually sprayed, failed to yield the expected crop. The court noted that "[t]he sale of the herbicide and the alleged failure of the result of its application occurred more than one year before this litigation arose,"² implying that the farmer suspended his payments which prompted Cotton States Chemical, the seller, to sue on the open account. Thereupon, the defendant-farmer filed a reconventional demand and third partied the manufacturer of the liquid herbicide, Stauffer Chemical Company. In defense of his position Larrison attempted to raise the issue of "misrepresentation" on the part of Cotton States, Tide Products and Stauffer so as to be able to plead the advantages of "fraud." The court of appeal was not convinced, however, and correctly concluded that "[e]ven in cases where the seller (and the manufacturer, by presumption) had knowledge of the redhibitory defect but failed to declare it, the consumer must bring his action within one year following his discovery of the defect."³ The court went on to hold, therefore, that "[t]he exception

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1. 342 So. 2d 1212 (La. App. 2d Cir. 1977).

2. *Id.* at 1213.

3. *Id.* at 1215, citing *Rey v. Cuccia*, 298 So. 2d 840, 845 (La. 1974), where the court held: "The one year limitation on redhibitory actions does not apply where the seller (manufacturer) had knowledge of the defect but failed to declare it at the time of the sale. Article 2534. In such instance, the consumer may institute the action to recover for the redhibitory defect within the year following his discovery of it. Article 2546."

of one year liberative prescription to Larrison's reconventional demand for its damage of loss as against Stauffer was correctly sustained below."⁴ Yet the court, making a one hundred and eighty degree turn, proceeded to state that "Larrison's third party (indemnity) demand for judgment over and against Stauffer (its warrantor) has not prescribed. Judgment sustaining the exception of prescription and dismissing the third party (indemnity) demand against Stauffer is reversed."⁵

Pretermitted here all issues of procedure,⁶ this case appears somewhat troublesome and disturbing in at least two respects: first, because of improper legal qualification of the facts, the court placed itself in a bind; second, the court paid little heed to the essential prerequisites of the direct action in allowing it in a lapidary and offhand manner.

The Issue of Legal Construction

The line of demarcation between the determination of "error as to the cause or as to the object of a contract" and the acknowledgement of the existence of a vice or defect which "renders the thing sold useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it, had he known of the vice,"⁷ is often a very thin one to tread, and yet the legal consequences flowing from the decision the trier of the facts has to make can be of such paramount importance that that decision should be made only after a careful and thorough analysis of the purposes and foundations of the legal institutions involved. The sale of any product, in a consumer protection-oriented society such as ours, immediately triggers in one's mind the issue of warranty to such an extent that one may be led to forget that a sale is first and foremost a convention or contract and that, as such, it must meet the requirements of article 1819 of the Louisiana Civil Code.⁸

4. 342 So. 2d at 1216-17.

5. *Id.* at 1217.

6. The relevance and importance of these procedural issues should not be underestimated but they are beyond the narrow scope of this essay.

7. LA. CIV. CODE art. 2520: "Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."

8. *Id.* art. 1819: "Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by—Error; Fraud; Violence; Threats."

In the case under consideration it is not conclusively established that the liquid herbicide was defective—that there was an inherent defect in its chemical composition which rendered it “useless or so inconvenient and imperfect”⁹ Rather, it is reported that “when aerially sprayed” or when “aerially applied” the herbicide was not effective. These expressions convey quite a different implication from that attached to the statement that the herbicide was defective as a result of a latent defect. The “defect,” so to speak, was in the *use* that the farmer made of an otherwise sound product. This factual determination leads one to consider the following two alternatives:

First, if the farmer had informed the seller that he intended to make an aerial application of the herbicide or had the seller been in a position where he could easily have been presumed to know the manner in which the farmer was going to use the herbicide,¹⁰ it then fell on the seller to instruct the farmer-buyer as to the proper way to spray the herbicide aerially. The failure by the seller to fulfill this obligation going to the very reason why the farmer switched from one method of use of the herbicide to another would inevitably lead the buyer-farmer to make an error as to the cause of the contract under the provision of article 1826 of the Louisiana Civil Code.¹¹ The facts of the case clearly show that Larrison switched from the pellet form of the herbicide to its liquid form because it could be sprayed aerially, a rather common technique in these days when economy of time and money are important motivating factors. Under this alternative the action available to Larrison would have been one for rescission of the contract on the ground of error in the cause of the contract and the prescriptive period of this action would have been five years.¹²

9. See note 7, *supra*, for text of article 2520.

10. LA. CIV. CODE art. 1931: “A contract may be violated, either actively by doing something inconsistent with the obligation it has proposed or passively by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated or implied from the nature of the contract.” *Id.* art. 1958: “But if the doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee.”

11. *Id.* art. 1826: “No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it.” The concept of cause is to be understood in its modern rather than classical sense. See S. LITVINOFF, OBLIGATIONS in 6 LA. CIVIL LAW TREATISE 554 nn.308-313 (1969).

12. LA. CIV. CODE art. 3542: “The following actions are prescribed by five years: That for the nullity or rescission of contracts, testaments or other acts. That

The second alternative, which the writer prefers over the previous one, would hold that the seller's breach of his obligation to do,¹³ that is to say the breach of his obligation to instruct the buyer of the most efficient way to make use of the principal object of the contract, the liquid herbicide, was tantamount to the non-performance of the object of a secondary obligation of the contract of sale. Such a violation of "one of the *incidents* of his obligations"¹⁴ by the seller would render him liable to the payment of damages. Under this alternative the prescriptive period governing an action for breach of contract would have been ten years under article 3544 of the Louisiana Civil Code.¹⁵

Under either alternative, therefore, the court of appeal would not have had to tangle with the one year prescriptive period of an action on warranty.

The Availability Vel Non of the Direct Action

In the opinion of the court of appeal, the prescriptive period of the redhibitory action that would have been available to the buyer, Larrison, against his seller, Cotton States, and the manufacturer, Stauffer Chemical,

for the reduction of excessive donations. That for the rescission of partitions and guarantee of the portions. This prescription only commences against minors after their majority." *See Williams v. Collier*, 249 So. 2d 298 (La. App. 1st Cir. 1971); S. LITVINOFF, *supra* note 10, at 605 n.66.

13. LA. CIV. CODE art. 1926: "On the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the following section."

14. LA. CIV. CODE art. 1930 (emphasis added). The complete article provides: "The obligations of contract [contracts] extending to whatsoever is incident to such contracts, the party who violates them, is liable, as one of the incidents of his obligations, to the payment of the damages, which the party has sustained by his default." Additional codal support for such secondary obligations can be found in articles 1901 and 2315.

15. *Id.* art. 3544: "In general, all personal actions, except those before enumerated, are prescribed by ten years." *See Crowley Grain Drier, Inc. v. Fontenot*, 132 So. 2d 573, 577 (La. App. 3d Cir. 1961) ("Ordinarily, as the defendants contend, the prescription applicable for damages caused by a breach of contract is not a one year prescription, but is rather the ten year prescription provided by LSA-Civil Code Article 3544 However, unlike damages for other contractual breaches, damages caused by a breach of the warranty in a contract of sale are regarded as founded upon redhibition and subject instead to the cited codal prescription of one year applicable to redhibitory actions.").

had prescribed¹⁶ and so had the reconventional demand.¹⁷ However, the court must have resorted to "equity" to remedy the "harshness of the law" in holding that Larrison's indemnity over and against Stauffer "based upon Stauffer's manufacturer's warranty"¹⁸ had not prescribed.

16. 342 So. 2d at 1216, 1217.

17. *Quae temporalia sunt ad agendum, perpetua sunt ad excipiendum*. See *Lastrapes v. Rocquet*, 23 La. Ann. 68 (1871): "The rule [*quae temporalia* . . .] is intended as a shield, and not as a weapon of attack; as, when a purchaser is sued for the price of property, he may set up a redhibitory defect, deficiency in quantity, and the like, although the right of a direct action, arising from such cause may be prescribed."

See also *Crown Cork & Seal Co. v. Grapico Bottling Works*, 1 La. App. 638, 639 (1925):

The redhibitory action is prescribed by one year. C.C. 2534. It is therefore obvious that he [defendant] could not have instituted an action in redhibition at the time that he filed his demand in reconvention in this suit, on December 6, 1923, for such demand had then already prescribed. But under the doctrine of "*quae temporalia sunt ad agendum, etc.*," defendant had the right to use as a defense, when sued for the price, that which he could not have used as a weapon of attack.

By reason of the same rule, while it is true that defendant may use, even after prescription has accrued, the redhibitory vice of the thing as a shield against plaintiff's attack for recovery of its purchase price, he cannot use such vice as a weapon against plaintiff to recover after accrual of prescription money already paid as part of such purchase price.

See also *Rapides Grocery Co. v. Clopton*, 171 La. 632, 635, 131 So. 734, 735 (1930):

We agree with the district judge that Clopton's reconventional demand for damages is barred by the prescription of one year. The demand is founded upon redhibition—the annulling of a sale because of a defect in the thing sold. Rev. Civ. Code, art. 2520 As the defendant, Clopton, did not sue for damages within the year after he discovered that the soy beans were worthless—if in fact they were worthless—his demand for damages is barred by the prescription of one year, even if it should be assumed that the seller knew that the beans were worthless

In a suit for the price of a thing sold, redhibition may be urged as a defense, or want of consideration, even though the action for redhibition would be otherwise barred by the prescription of one year

See LA. CODE CIV. P. art. 424 ("cause of action as a defense"), as amended by 1977 La. Acts, No. 254. See *Christy-Ann-Lea, Inc. v. Charter Homes of La., Inc.*, 327 So. 2d 569 (La. App. 4th Cir. 1976).

18. 342 So. 2d at 1216. The Court's indirect reliance on the case of *Edward Levy Metals, Inc. v. New Orleans Pub. Belt R.R.*, 243 La. 860, 148 So. 2d 580 (1963) is inopportune. *Edward Levy Metals* was a true case of unjust enrichment or quasi-contract and ought not to have been relied upon by the *Cotton States* court in the context of the facts before it. In *Edward Levy Metals*, the supreme court held:

The theory of the argument is that the scrap steel in question was loaded on board ship for the account of Southern Scrap Material Company, Ltd. The effect of this was to unjustly enrich Southern Scrap Material Company, Ltd.,

The strange and worrisome outcome of this holding is that Larrison's direct action against Stauffer, although prescribed between these parties, manages somehow, by way of the third party demand, to be resuscitated when the contract between the manufacturer and the retailer-seller is thrown into the debate. The court relies on article 1111 of the Code of Civil Procedure¹⁹ as support for its decision and finds in the statement that "the defendant . . . may bring in any person, including a codefendant, who is his warrantor" sufficient justification for holding Stauffer liable to Larrison.

It is now a well established jurisprudential rule that the buyer of a "thing" has a direct action against the manufacturer as "a warrantor." However, the direct action ought not to be allowed when its exercise would defeat its *raison d'être*.

The so-called "direct action" affords a creditor (Larrison in the case

at the expense of New Orleans Public Belt Railroad which is charged by its contract of affreightment with the responsibility for the safekeeping and proper delivery of the scrap steel according to the instructions of the shipper. The violation of its contract with the shipper that occurs by permitting the erroneous delivery to Southern Scrap Material Company, Ltd., impoverishes the railroad and enriches Southern Scrap Material Company, Ltd. Thus, we understand the argument to be that Southern Scrap Material Company, Ltd., under Articles 2292, 2293, 2294 and 2301 of the LSA-Civil Code, having received what was not due it through error, is obliged to restore it to the owner, Edward Levy Metals, Inc., or to New Orleans Public Railroad from which it has unduly received it; and this obligation is a quasi contractual one that is enforceable by New Orleans Public Belt Railroad against Southern Scrap Material Company, Ltd. Such an obligation gives rise to a personal action and is prescribed in ten years under Article 3544 of the LSA—Civil Code Rather, we think the claim is one in indemnity, which is quasi contractual and governed by the prescription of Article 3544 of the LSA—Civil Code. The obligation that the third party plaintiff is seeking to enforce here is one for unjust enrichment to be enforced in the future

Id. at 581-83.

19. LA. CODE CIV. P. art. 1111 provides:

The defendant in a principal action by petition may bring in any person, including a codefendant, who is his warrantor, or who is or may be liable to him for all or part of the principal demand.

In such cases the plaintiff in the principal action may assert any demand against the third party defendant arising out of or connected with the principal demand. The third party defendant thereupon shall plead his objections and defenses in the manner prescribed in Articles 921 through 969, 1003 through 1006, and 1035. He may reconvene against the plaintiff in the principal action or the third party plaintiff, on any demand arising out of or connected with the principal demand, in the manner prescribed in Articles 1061 through 1066.

See Motors Sec. Co. v. Hines, 85 So. 2d 321 (La. App. 2d Cir. 1956).

on the issue of warranty) the right to bring an action against its debtor's (Cotton States) debtor (Stauffer) because of the existence of a legal relationship between the latter two debtors.²⁰ This "direct action" is, therefore, not so direct since there must exist, between the creditor-plaintiff and the third party debtor-defendant, an intermediate debtor whose rights against that third party debtor are exercised by the creditor.²¹ There are, thus, two sets of rights co-existing: first, those rights that the creditor holds against the debtor with whom he has privity; and second, those rights that this debtor holds against his own debtor. These two sets of rights are inseparable one from the other; they are the two indispensable cornerstones of the whole edifice of the direct action. It ensues logically that should the intermediate debtor (Cotton States) have no right of action against his own debtor (Stauffer) there can be no direct action available to the creditor since the latter is actually attempting to exercise a non-existent right. Indeed, a creditor can "direct action" a third party debtor only to the extent and within the confines of the rights that his immediate debtor holds against that third party debtor. Accordingly, should this third party debtor (Stauffer) have exceptions or defenses that he could have raised against his own creditor (Cotton States), he (the third party debtor) can raise the same exceptions and defenses against the original creditor (Larrison).²² Likewise, should the original creditor (Larrison) have no right of

20. Several theories have been put forward to justify the availability of the direct action: 1) Stipulation pour autrui; 2) Transmission theory; 3) Subrogation theory. See Barham, *Redhibition: A Comparative Comment*, 49 TUL. L. REV. 376, 389 (1975).

21. It is impossible to give here a legal analysis of the direct action, but see H. MAZEAUD, L. MAZEAUD & J. MAZEAUD, 1 *LECONS DE DROIT CIVIL, OBLIGATIONS* ¶¶ 802, 806 (5th ed. 1973); B. STARCK, *DROIT CIVIL, OBLIGATIONS* ¶¶ 2576, 2580 (1972); A. WEILL & F. TERRE, *DROIT CIVIL, LES OBLIGATIONS* ¶ 859 (2d ed. 1975); Comment, *Direct Actions—Insurance Contracts*, 13 LA. L. REV. 495 (1953).

22. With the exception of the defenses strictly personal to the defendant, the third party defendant can raise against the plaintiff all other defenses which would have been available to the defendant. Prescription is one such defense available to the third party defendant. *Rey v. Cuccia*, 298 So. 2d 840, 845 (La. 1974) ("The consumer's action is enforceable against the manufacturer at the same time and at least within the same year following the sale to the consumer, Article 2534, as it is enforceable against the seller.") (emphasis added). See *Stelly v. Gerber Prod. Co.*, 299 So. 2d 529, 532 (La. App. 4th Cir. 1974) ("The purchase brought certain contractual obligations including subrogation of contractual obligations. The consumption brought damage and an obligation upon defendant to repair that damage, which defendant's 'unlawful' or wrongful act caused. But both the latter delictual action and the former contractual action have been prescribed by the passage of more than one year.").

action against his immediate debtor (Cotton States) or should he have lost his right of action through his own fault, he would fail to possess the key that would give him access to the direct action, and he would find no bridge linking him to the third party debtor. In other words, the direct action ought to be denied because there exists a *cause* to the original creditor's legal predicament. Since the court considered that the issue was one of "warranty" and opined that the one year prescriptive period of the redhibitory action had run between Larrison and Cotton States, the court had thereby acknowledged that the loss of the action was justified because Larrison's predicament had a valid legal cause. In making an about turn and granting Larrison the right to third party Stauffer as warrantor, the court failed to give a sound legal basis to its decision and may have circumvented the regime of the direct action.

RÉMÉRÉ, OPTION, SECURITY CONTRACT OR WHAT?

The Court of Appeal for the Second Circuit was confronted with a difficult problem of legal construction in the case of *Potts v. Spatafora*.²³ The court was of the opinion that the contract entered into between the parties constituted "a sale from Potts to defendant with Potts retaining a right of redemption"²⁴ and that Potts had lost his right of redemption after he had delivered actual possession of the property to the defendant. The facts, however, could have been read in such a manner as to give them a legal construction more in accordance with the provisions of the contract and with the intent of the parties.

The facts reported in the decision were as follows: by an act of sale dated January 6, 1961, Larkin Potts conveyed ninety-three and one-half acres of land to the defendant, Thomas Spatafora, for a cash payment of \$4,281.49. The purchase price was paid to Henry Stevenson, to whom Larkin Potts was indebted on account of a loan secured by a mortgage. On January 30, 1961, Potts and Spatafora signed an agreement whereby "the land would be reconveyed to Potts if he paid \$4,200 with eight per cent interest within four years."²⁵ In the spring of the year 1965, therefore more than four years after the January 30, 1961 agreement, Larkin Potts offered to pay Spatafora the sum owed so that he could obtain the reconveyance of the property. Spatafora refused to reconvey the property on the ground that "the period of redemption had expired." Larkin Potts

23. *Potts v. Spatafora*, 340 So. 2d 414 (La. App. 2d Cir. 1976).

24. *Id.* at 415, 416.

25. *Id.* at 415.

having died in 1974, his surviving spouse and heirs brought an action against Spatafora for redemption of the property on the theory that the January 30, 1961 contract was only a security device which afforded plaintiffs the right to reimburse the amount still owed this defendant who would, in turn, reconvey the property. The court adopted the defendant's position and held that "Potts' right of redemption was preserved as long as he remained in possession of the property. The right was lost, however, and defendant's title was perfected and became absolute when actual possession was delivered to defendant."²⁶

After a review of the relevant distinctive features of a sale with the power of redemption the writer will analyze the decision of the court against its doctrinal background.

Relevant Distinctive Features of a Sale with the Power of Redemption

A sale with the power of redemption, or *vente à réméré*, has for its primary purpose²⁷ to enable an owner in dire need of money to satisfy that need by selling his thing, whether movable or immovable, with the hope, however, of being able to resume its ownership sometime in the future by paying back to the purchaser the price the latter had paid in the original transaction. By this legal and financial device the owner-vendor of the thing can expect to receive in money the true market value of his property which he might not have been able to obtain had he mortgaged or pledged the same property assuming, even, he could have done so. This device, however, is subject to some legal requirements which ensure its originality vis a vis other devices but at the same time cast it in a strict legal mould. The following three requirements²⁸ are particularly relevant to the case under discussion and deserve some comment here: a) price, b) intent of the parties, and c) delay.

The Requirement of Price

Article 2567 of the Louisiana Civil Code stipulates that the vendor can take his thing back "by returning the price paid for it."²⁹ Since the exercise of the right of redemption carries with it the rescission of the sale

26. *Id.* at 416.

27. *See* Delcambre v. Dubois, 263 So. 2d 96 (La. App. 3d Cir. 1972).

28. These three requirements are in addition to the requirements of object, capacity and publicity.

29. LA. CIV. CODE art. 2567 provides: "The right of redemption is an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it."

and aims at placing the parties back in the status quo ante, operating like a resolutive condition, the vendor must pay back to the purchaser the exact price he had received—"the price paid for it." One must ask, however, whether the return of the price paid for it is a rule of public order³⁰ or only a suppletory rule of law to be applied in the absence of an agreement to the contrary? In other words, can the price of redemption be superior or inferior to the original price and the sale still qualify as a sale with the right of redemption?

Should the price to return be inferior to the price paid there is, a priori, no objective reason to be suspicious of such a stipulation since the buyer-owner may have made such use of the thing or drawn so many benefits from it as to be considered as having been compensated for the difference in the prices. Yet, if the price to return is "out of proportion"³¹ with the price paid, it might be possible to establish that the true cause of the transaction was a gratuitous one rather than an onerous one, a simulated donation from the purchaser to the vendor for instance. On the other hand, should the price to return be superior to the price paid,³² it becomes very important to ascertain whether or not the difference in the prices is "out of proportion." If the price to return is so inflated as to be out of proportion with the price paid, there arises a strong suspicion that the so-called sale was actually meant to be an usurious loan or a pignorative contract with a prohibited *commissoria lex*.³³ The parties might also

30. *Id.* arts. 11, 12.

31. *Id.* art. 2464. The first and fourth paragraphs of this article read as follows: paragraph one: "The price of the sale must be certain, that is to say, fixed and determined by the parties"; paragraph four: "It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised."

32. Several commentators recognize that the price to return can be superior to the price paid. *See* 5 C. AUBRY ET C. RAU, *DROIT CIVIL FRANCAIS* ¶ 357 n.3 (1936); 17 G. BAUDRY-LANCANTINERIE ET L. SAIGNAT, *DE LA VENTE ET DE L'ECHANGE* ¶ 648 (2d ed. 1900); 3 H. MAZEAUD, L. MAZEAUD ET J. MAZEAUD, *supra* note 21, ¶ 919 (4th ed. 1974); 10 M. PLANIOL ET G. RIPERT, *TRAITÉ DE DROIT CIVIL* ¶ 201 (2d ed. 1956); R. POTHIER, *VENTE* ¶ 414 (1806).

33. LA. CIV. CODE art. 3165.

"Article 3165 of the Revised Civil Code provides for the procedure to be taken by the creditor when his debtor defaults. At the present time, we do not find that its provisions have been so extended as to permit a creditor to appropriate to himself the debtor's pledge. The jurisprudence and law review treatises indicate that such would be incompatible with the pledgee's fiduciary character." *D'Amico v. Canizaro*, 256 La. 801, 239 So. 2d 339, 342 (1970) (citations omitted).

"Under the settled law of this state, the pledgee has no authority to dispose of or declare himself to be the owner of the object in pledge absent the express

agree that the price to return shall be superior to the price paid but without creating such a difference in the amounts as to arouse any legitimate suspicion. The parties could agree, for instance, that the seller would pay an interest on the price such that when the right of redemption is exercised the original purchaser will have actually made a profit in the amount of the interest he received on the price. This profit could have been realized by the purchaser over and above the "fruits" he gathered as owner under the sale³⁴ which fruits the purchaser keeps upon rescission of the sale as per article 2586 of the Civil Code.³⁵

There is no codal provision, however, dealing with the right of the purchaser to keep also the interest on the price. One must therefore conclude that, since the parties have to be returned to the status quo ante when redemption is exercised, the purchaser ought to return to the seller the amount of the interest he received in order not to be remunerated twice for the same act or to be unjustly enriched at the expense of the seller. Some commentators have suggested the following approach to this issue: the original purchaser is entitled to keep the fruits because they are the compensation both for his efforts and for the interest on the price; consequently, if the thing is productive of fruits the purchaser is not entitled to the payment of interest besides, the fruits being kept by him in lieu of interests; on the other hand, if the thing is not productive of fruits, the purchaser is entitled to claim the payment of interest as a substitute for the lack of fruits.³⁶ To sum up, although there can exist a valid sale with the power of redemption when the price to return is superior to the price paid, the trier of the facts ought to deny this legal qualification to a sale wherein the purchaser would keep both the fruits and the interest.

Intent of the Parties

Since the Civil Code defines, in part, a sale with the right of redemption as one where the price to be returned is the price paid, it is of

agreement of the pledgor." *Steiner v. Zammit*, 279 So. 2d 728, 729 (La. App. 1st Cir. 1973) (citations omitted).

34. LA. CIV. CODE art. 2575: "The fruits are his until the vendor exercises his right of redemption."

35. LA. CIV. CODE art. 2586: "When a vendor exercises the right of redemption, he becomes entitled to all the fruits not yet gathered, from the day in which he has either reimbursed or consigned the money paid by the purchaser, unless the contrary has been stipulated."

36. C. AUBRY ET C. RAU, *supra* note 32, 357 n.19; G. BAUDRY-LANCANTINERIE ET L. SAIGNAT, *supra* note 32, ¶ 651; H. MAZEAUD, L. MAZEAUD ET J. MAZEAUD, *supra* note 21, ¶ 919; M. PLANIOL ET G. RIPERT, *supra* note 10, ¶¶ 201, 204.

the utmost importance to determine exactly the intent of the parties whenever they have deviated from the suppletive law of the Code. The principle of the autonomy of the will governing the law of obligations, it is within the power of parties to a contract to set out their rights and obligations as they please within the confines of the rules of public order. It is conceivable, therefore, for parties to enter into a contract of sale which borrows many of the legal characteristics of a sale with the right of redemption but which, nevertheless, was not meant to be so qualified. It is very easy indeed, for instance, to confuse a unilateral promise to sell or a bilateral promise to sell with a *vente à réméré*.

The concept of unilateral promise of sale is best described by Professor Litvinoff, in his typically precise and incisive analysis, in these words:

The expression "promise of sale" is here used as having a wider meaning than "promise to sell". It comprises not only the latter, but also a promise to buy, which is subject to the same rules³⁷

The promise of sale is dealt with in article 2462 of the Louisiana Civil Code³⁸

The unilateral promise of sale under the second paragraph of article 2462, is now a commutative contract—one party gives a promise, the other, a consideration³⁹

A promise, or a legal relation is, precisely, something intangible that may serve the function of consideration. If the anatomy of an option is carefully scrutinized, it is easy to see that the giver of an option always receives from the promisee an intangible something of this kind, even when he also receives something tangible besides.⁴⁰

37. Litvinoff, *Of the Promise of Sale and Contract to Sell*, 34 LA. L. REV. 1017, 1026 n.59 (1974). See generally 2 S. LITVINOFF, *supra* note 11, at 170.

38. Litvinoff, *supra* note 37, at 1038. LA. CIV. CODE art. 2462, as amended by 1920 La. Acts, No. 27, provides:

A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same.

One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise can not be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party.

39. Litvinoff, *supra* note 37, at 1039.

40. *Id.* at 1041.

To distinguish, therefore, between a promise to sell or purchase (or re-purchase for that matter) and a right of redemption, one will have to weigh carefully the words used in their contract by the parties and resort to the codal articles on interpretation of agreements in case of ambiguity.⁴¹ Furthermore, one will have to "endeavor to ascertain what was the common intention of the parties,"⁴² a task which is greatly facilitated by the existence vel non of an express "reservation" clause in the contract,⁴³ by the nature of the previous transactions entered into by or between the parties, or by the sequence of the juridical acts binding the parties.⁴⁴ Therefore, in the absence of a provision in the very contract of sale whereby the vendor has "reserved" the right to redeem, it is highly possible that the parties never intended to have entered into a sale with the power of redemption, a rather sophisticated legal institution.

Delay

The right of redemption must be exercised within a maximum legal delay of ten years or within whatever shorter time the parties have agreed to.⁴⁵ These delays, whether legal or conventional, are of public order in the sense, first, that they cannot be extended by the judge and, second, that they operate as a matter of right.⁴⁶ This feature of the delay within which the right of redemption may be exercised is in contrast with the rules governing the effects of an obligation subject to a term.⁴⁷

41. LA. CIV. CODE arts. 1945-1962.

42. *Id.* art. 1950 provides: "When there is anything doubtful in agreements, we must endeavor to ascertain what was the common intention of the parties, rather than to adhere to the literal sense of the terms."

43. *Id.* art. 2567: "The right of redemption is an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it." *Id.* art. 2568: "The right of redemption can not be reserved for a time exceeding ten years. If a term, exceeding that, has been stipulated in the agreement, it shall be reduced to the term of ten years."

44. Some French commentators consider that "if a provision for redemption is added *ex intervallo*, to a pure and simple sale, it would amount to a promise to resell." 5 C. AUBRY ET C. RAU, *supra* note 32, ¶ 357 n.2. See also R. POTHIER, *supra* note 32, ¶ 432; 2 R. TROPLONG, DE LA VENTE 694 (1836); Agen. 1 Juillet 1929, S. 1929, 1, 172.

45. LA. CIV. CODE art. 2568. See note 43, *supra*; see LA. CIV. CODE art. 2569: "The time fixed for the redemption must be rigorously adhered to; it can not be prolonged by the judge."

46. "As a matter of right": this expression refers to those situations where the court is denied any discretionary power and must simply recognize the law applicable. This is contrasted with the discretionary power given to a court by article 2047 of the Louisiana Civil Code, for instance.

47. For the definition and concept of "term" see LA. CIV. CODE arts. 2048-2061.

A term is a modality, whether implied from the nature of the contract or agreed to by the parties,⁴⁸ affecting the timing of the performance of an obligation,⁴⁹ and where the term is consensual the presumption is that it has been stipulated in favor of the debtor.⁵⁰ In a sale with the right of redemption, there is no doubt that the extinctive term⁵¹ is stipulated in favor of the vendor since he is that party to the contract who has reserved the exclusive power to redeem at any time up to the expiration date of the term.⁵²

In an option contract, on the other hand, the trier of the fact will have to determine whether the extinctive term was stipulated in favor of one party or the other, or both, although it can be presumed that the term has been stipulated in favor of the beneficiary of the option. Moreover, upon expiration of the term, the judge, guided by the codal provisions on interpretation of contracts, will have to rule on whether the term was of the essence of the contract so that the obligation cannot henceforth be enforced or whether it is plausible, on account of the circumstances of the case or the behavior of the parties since the expiration of the term, to draw the inference that the term was not such an essential element of the contract as to bar the parties from performing their obligations beyond the expiration date of the term.⁵³ Thus, an option contract or a unilateral promise to sell subject to a term should not automatically, as a matter of right, become unenforceable as the power of redemption would under the specific and mandatory language of the law.

The Decision of the Court and Its Doctrinal Background

In *Potts* the plaintiff had argued that the contract he had entered into with the defendant was a security device which afforded him the possibility to obtain "the reconveyance of the property upon repayment of the amount owed."⁵⁴ Since both parties relied mostly on the document of January 30, 1961, it is appropriate to recite its contents:

48. *Id.* art. 2050.

49. *Id.* art. 2051.

50. *Id.* art. 2053.

51. The "term" is called extinctive because it extinguishes the legal relationship between the parties and operates only prospectively.

52. LA. CIV. CODE art. 2567; for text, see note 43, *supra*. LA. CIV. CODE art. 2570 provides: "If that right has not been exercised within the time agreed on by the vendor, he can not exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold."

53. *See id.* art. 1956.

54. 340 So. 2d at 415.

To Whom It May Concern

This is to verify that on the 6th day of January 1961, Thomas D. Spatafora a resident of Ouachita Parish Louisiana did pay off all indebtedness on land owned by Larkin Potts in Richland Parish in the amount of approximately \$4,200.00 and deeded to said Thomas D. Spatafora.

Mr. Spatafora in turn advanced Larkin Potts \$400.00 to make this year's crop and also they agreed that Larkin Potts would repay the \$4,200.00 plus 8 per cent interest within (4) four years from date and if the above agreement was carried out, that with the money in hand Thomas D. Spatafora would redeed the above land back to the said Larkin Potts.⁵⁵

Sometime in the spring of 1965, Larkin Potts "offered to pay defendant the money owed" but "defendant refused to reconvey the property because the period of redemption had expired."⁵⁶ The question was thus squarely put to the court: was this agreement between Potts and Spatafora a sale with the right of redemption?

Let us examine the stipulations of this sale as well as the surrounding circumstances against the background of the doctrinal analysis of the requirements of a sale with the right of redemption presented above.

With respect to the price to be repaid by Potts to Spatafora, there does not seem to be any reliable and safe ground for an argument that it could not possibly be a valid "redeeming" price. It appears from the records of the case that Spatafora allowed Potts to farm the land free of charge, which leads to the conclusion that Spatafora did not receive the fruits of the property as he would have been entitled to as owner under a sale with the right of redemption. Consequently, it could be said that Spatafora received the interest on the price in lieu of the fruits of the property and that, thereby, the requirement of price in the sale with the right of redemption was preserved in its integrity.⁵⁷

As far as the requirement of intent of the parties is concerned, it is difficult to find in the four corners of the contract any clue to their motivating intent. If the January 6, 1961 agreement was unquestionably a sale from Potts to Spatafora and contained not "a speck of redemption,"

55. Record No. 13085 (La. App. 2d Cir.).

56. 340 So. 2d at 415.

57. One could ask the question: what difference is there, as far as the price is concerned, between this type of financial arrangement and a contract of loan on interest? See LA. CIV. CODE arts. 2923, 2924.

the subsequent agreement of January 30 requires careful scrutiny before one can venture an opinion.

This later agreement is divided into two paragraphs of unequal importance: in the first paragraph, the parties simply restated that the nature of the January 6, 1961 agreement was that of a sale from Potts to Spatafora; the second paragraph, on the other hand, purports to reflect a change of minds of the parties in such a way that, when the two documents of January are read together, they "constitute a sale from Potts to defendant with Potts retaining a right of redemption."⁵⁸ The weight of the evidence reported in the record of the case, as well as in the briefs, tilts the scale in favor of the plaintiff who thought that the January 30 agreement was but a security device somewhat similar to those he had negotiated on many occasions in the past. Furthermore, the language used in the second paragraph appears to be in support of the plaintiff's argument when read as follows: the first sentence of that paragraph indicates that Spatafora is "advancing" \$400.00 to Potts thereby introducing the idea of a "loan"; this idea of a loan is then carried over into the second sentence by the use of the verb "repay"⁵⁹—a verb which is often used in day to day language in formulas such as "repayment of a loan." An additional element which must have heavily contributed to the plaintiff's thinking that he was negotiating a loan, was his obligation to pay "interest" on the amount received, an obligation which, in the mind of someone who can neither write nor read,⁶⁰ must be closely associated with the well known business practice of making loans rather than with the highly technical and most sophisticated concept of sale with redemption. Finally, the fact that Potts was allowed to remain on the property must have convinced him even more so than "legal technicalities" that he was still the owner although he had "deeded" the land to Spatafora as a guarantee of his "repayment."

As for Spatafora's understanding of the nature of the agreement he had entered into, there is no doubt that he believed he had become the owner of the land and was not simply a money lender with a security. However, although it is undeniable that Spatafora considered himself the owner, we suspect that he did not look upon the January 30, 1961 agreement as a sale with the power of redemption but rather as "an agreement granting Potts the right to repurchase the land within four (4)

58. 340 So. 2d at 415-16.

59. Verbs synonymous with "repay" are: refund, reimburse, return, restore. BLACK'S LAW DICTIONARY 1463 (4th ed. 1951).

60. See Record No. 13085 (La. App. 2d Cir.) (page 2 of plaintiff's appellant brief).

years,"⁶¹ in other words, as a sale with an option to repurchase in four years.⁶² Option contracts, in comparison with sales with the power of redemption, are the more common practice and, accordingly, the trier of fact ought to approach this issue of legal qualification with the wisdom and prudence enshrined in the principle that *exceptio est strictissimae interpretationis*.

There was a misunderstanding between the parties, a lack of agreement as to the legal definition of their agreement, their minds failed to meet on the nature of the contract and so in the prophetic words of Civil Code article 1841,

Error as to the nature of the contract will render it void. The nature of the contract is that which characterizes the obligation which it creates. Thus, *if the party receives property, and from error or ambiguity in the words accompanying the delivery, believes that he has purchased, while he who delivers intends only to pledge there is not [no] contract.*⁶³

61. *Id.* (defendant-appellee's original brief at page 4).

62. It must be pointed out here that if the parties and the court had truly considered the sale to be one with the power of redemption, the perfection of title in the vendee would have occurred *automatically as a matter of right* on January 30, 1965 (or closely thereabout), and not later "when actual possession was delivered to defendant." 340 So. 2d at 416. The labeling of the principal contract entered into by the parties as a "security contract" is a misnomer since a security contract is an accessory contract which can have no legal existence unless it is attached to a valid principal contract. What the courts have done in fact is create a contract "sui generis" to serve the needs of business transactions and, if such is the case, let us "nominate" this contract rather than "regard it as . . . if . . . and if." *Id.* at 416. See esp. *Latiolais v. Breaux*, 154 La. 1006, 98 So. 620 (1923).

63. LA. CIV. CODE art. 1841. See 4 J. CARBONNIER, DROIT CIVIL, LES OBLIGATIONS 75 (1976) (L'erreur-obstacle 1° Erreur sur la nature du contrat); PH. MALINVAUD, LES MECANISMES JURIDIQUES DES RELATIONS ECONOMIQUES, DROIT DES OBLIGATIONS 33 (erreur-obstacle); B. STARCK, *supra* note 21, § 1334 at 418; A. WEIL ET F. TERRE, *supra* note 21, at 176 ("Cas où l'erreur détruit le consentement (erreur-obstacle)").