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Obligations - Merger of Prior Preliminary Negotiations

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OBLIGATIONS—MERGER OF PRIOR PRELIMINARY NEGOTIATIONS—The recognized heir of Mrs. Rainey brought suit against Reynold Thibault to establish judicially a servitude of passage over the latter's land, which adjoined that of the plaintiff. Plaintiff alleged, among other facts, that both Mrs. Rainey and Thibault acquired title from one Harris, and that a provision in the agreement to sell and purchase between Thibault and Harris[1] was a stipulation pour autrui under Articles 1890 and 1902 of the Code; that the stipulation, having been assented to, could not be revoked without her consent by a failure to include it in the authentic act of sale. The trial court sustained an exception of no cause of action from which ruling the plaintiff appealed. *Held,* that since plaintiff was not one of the "contracting parties and their heirs, or assigns,"[2] she was free to introduce evidence of the prior writing, although Harris might have been barred from doing so by the parol evidence rule.[3] *Maillet v. Thibault,* 212 La. 79, 31 So.(2d) 601 (1947).

Perhaps no rule of law has caused more general confusion than the so-called parol evidence rule. This is true with respect to Louisiana decisions despite what appears to be a basic dissimilarity between the parol evidence rule of French civilian law and that of the common law.[4] In France, and, presumably, in Louisiana as well,[5] the rule is designed to operate only against oral testimony, and even then the ban is lifted if a commencement of proof in writing can be made.[6] Consequently, the preliminary agreement herein being

1. "This property sold and purchased subject to vendor's previous agreement [with Rainey] to allow owner and tenant of house directly in rear use of driveway for entering and leaving their garage." Maillet v. Thibault, 31 So. (2d) 601, 602 (La. 1947).

2. Art. 2236, La. Civil Code of 1870.

3. Ibid.; Art. 2276, La. Civil Code of 1870.

4. At common law the best opinion has it that the rule is not one of evidence but of substance. The theory is simply that if the parties undo today what they did yesterday, evidence of the latter is completely immaterial. The only question is whether or not the parties intended the final writing to be a complete integration of their agreement. Evidence beyond the writing is always admissible on this point. Corbin, The Parol Evidence Rule (1943) 53 Yale L. J. 603.

5. Although the Louisiana decisions have never made the point clear, the French doctrine seems to have been incorporated into our Code without change. See Rubin, Parol Evidence to Vary a Recital of Consideration (1941) 3 LOUISIANA LAW REVIEW 427. Support for this view is found in the recognition of the admissibility as between the parties of written evidence in the form of a counter-letter directly contradicting a formal writing. No one has ever argued that proof of the counter-letter should not be admitted because it contradicts the formal writing. The existence of the counter-letter proves conclusively that the formal document was not intended by the parties to be their real agreement.

6. The underlying theory behind the French rule is the distrust of oral testimony because of frequent subornation and bribery of witnesses. 2 Pothier, Obligations (Martin and Ogden, 1802) 214.

in writing, it would seem that on the basis of traditional civilian theory, no question of parol evidence was involved.

The true issue of the case—namely merger—was hinted at in the dissent by reference to certain language from the first hearing of *Moriarty v. Weiss*.[7] Two principal inquiries are involved: first, did the execution of the authentic act of sale merge and supersede completely the provisions of the executory contract; and, second, if so, could such a merger operate herein to the prejudice of a third party beneficiary whose rights had become fixed by acceptance?[8]

Our courts have held that the doctrine of merger of prior negotiations is essentially the same in both the civil and the common law, and they have freely resorted to common law authorities on the subject.[9] The courts of our sister states, in applying the doctrine, have had no little difficulty with the rule, and have failed to achieve a standard of consistency in its application.[10] Louisiana cases indicate that the determination of the question rests solely in the intention of the parties, expressed or implied.[11] As between the parties, the precise question would be whether they intended the final act

7. 196 La. 34, 44, 198 So. 643, 647 (1939): "When the contract was executed it ceased to exist and was superseded by the notarial acts of sale."

8. Art. 1890, La. Civil Code of 1870:

"A person may also in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked."

Art. 1902, La. Civil Code of 1870: "But a contract in which anything is stipulated for a third person, who has signified his assent to accept it, can not be revoked as to the advantage stipulated in his favor without his consent." See also Art. 35, La. Code of Prac. of 1870.

9. Daily States Pub. Co., Ltd. v. Uhalt, 169 La. 893, 126 So. 228 (1930); Talmadge v. West Orleans Beach Corp., 18 La. App. 417, 137 So. 368 (1931). It is of course a fundamental that the parties may mutually agree to undo that which they have embodied in a contract in the past, saving the intervening rights of third parties.

10. West v. Kelly, 19 Ala. 353, 54 Am. Dec. 192 (1851). Several interpretations of the rule are (a) Merger rests solely in the intention of the parties. Cohn v. Dunn, 111 Conn. 342, 149 Atl. 851, 70 A. L. R. 740 (1930); (b) Merger depends upon how closely the oral contract is bound to the writing. Roof v. Jerd, 102 Vt. 129, 146 Atl. 250, 68 A. L. R. 235, 70 A. L. R. 757 (1929); (c) To be admissible the agreement (1) must be collateral and (2) must not contradict the written contract, and (3) must be one that the parties would not ordinarily be expected to include. Mitchell v. Lath, 247 N. Y. 377, 160 N. E. 646, 68 A. L. R. 239 (1928).

11. Daily States Pub. Co., Ltd. v. Uhalt, 169 La. 893, 126 So. 228 (1930); Talmadge v. West Orleans Beach Corp., 18 La. App. 417, 137 So. 368 (1931); Brandin Slate Co. v. Fornea, 183 So. 572 (La. App. 1938).

There remains, of course, the unqualified statement of Moriarty v. Weiss, 196 La. 34, 44, 198 So. 643, 647 (1939), which may ultimately complicate this problem. In its unqualified form the statement is not consonant with other Louisiana jurisprudence on the same subject, and its application should be made to conform with the existing mold of intention.

of sale to be a complete integration of their entire agreement.[12] In the instant case, the very fact that the stipulation for the third party was not included in the formal act of sale suggests that the parties did not intend the act of sale to be a complete integration. Any evidence bearing on this point, including the preliminary contract itself, should be admissible.

Assuming, however, that the parties intended to supersede completely the prior contract, did they have the power to do so to the prejudice of a third party beneficiary who had consented to avail herself of the advantage provided in her favor? It is submitted that the court was correct in holding that the stipulation could not be thus revoked. The facts as a whole lend themselves to the conclusion[13] that a stipulation pour autri was intended as the court found. After the assent of the beneficiary, revocation was not possible without her consent.[14] Hence, the decision of the court to remand the case in order to determine the parties' intentions, though couched in misleading language, seems correct.[15]

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SALES—RECORDATION—SPECIFIC PERFORMANCE—Bartley Thompson sold land by authentic act to his son, Jesse, for a recited cash consideration. The act was a donation in disguise, but was duly recorded as a sale. It did not reveal the father and son relationship. After Bartley's death Jesse leased the land to plaintiff, giving the lessee an option to purchase. The option was recorded. Plaintiff complied with its terms and made tender to Jesse, who refused to convey title. The widow and other children of Bartley Thompson sued to have the deed from father to son declared null and the option cancelled. Plaintiff sued for specific performance. *Held,* that since the sale from father to son was a donation in disguise, title never vested in Jesse and upon the death of the father the land returned fictitiously to the succession by virtue of Article 1505.[1] The forced heirs then became owners of the portion neces-

12. There is strong common law authority to the effect that ordinarily a formal document such as a deed would not be so employed. "The purpose of a deed of conveyance is to 'convey' not to operate as a full memorial of the terms of the agreement." Corbin, supra note 5, at 638.

13. Or at least to the establishment of a probability sufficiently strong so as to justify the overruling of the exception of no cause of action.

14. Art. 1902, La. Civil Code of 1870, quoted supra note 9.

15. The writer expresses no other opinion on any other points which were raised in the case.

1. La. Civil Code of 1870, which provides: "To determine the reduction to which donations, either inter vivos or mortis causa are liable, an aggregate is