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Obligations - Recovery of Profits Lost - Certainty of Proof

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relieve the land of the burden of the servitude; the landowner is restored to full ownership.[10] If the mineral interest is to be transferred after prescription to a person other than the landowner, the transfer must be by act of the landowner.

Neither in the instant case nor in any of the previous cases discussing the reversionary interest was the transferor of the interest the landowner at the time when the servitude prescribed. Disposing of such a problem in accordance with the rule of the instant case would mean that a landowner might be allowed to retain possession of valuable mineral rights after he purported to transfer them by sale of a reversionary interest. In view of the sweeping language used in the instant decision, it is an open question whether the doctrine of after-acquired title will be applied to a sale of mineral interests not owned by the vendor. The doctrine was invoked in the past when the court found a bona fide sale of mineral interests not designed to avoid the running of prescription;[11] this seems appropriate even in light of the instant decision.

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OBLIGATIONS—RECOVERY OF PROFITS LOST—CERTAINTY OF PROOF

Plaintiff contractor sued defendant telegraph company to recover profits lost as a result of defendant's failure to transmit and deliver promptly a telegram filed by plaintiff to reduce the amount of his previously submitted bid on a repair work contract. The importance of the message was not made known to defendant and delivery was delayed until after the bids were opened. Plaintiff lost the contract to a competitor. The reduction would have placed his bid lower than that of his nearest competitor, but his contract would have required a longer time for completion. *Held*, plaintiff, even had he proved that his bid would have been accepted, did not prove the amount of his

10. See Arts. 625, 425, LA. CIVIL CODE of 1870. See also note 8 *supra*.

11. White v. Hodges, 201 La. 1, 9 So.2d 433 (1942); *cf.* Arkansas Louisiana Gas Co. v. Thompson, 222 La. 868, 64 So.2d 202 (1953); McDonald v. Richard, 203 La. 155, 13 So.2d 712 (1943); Lum Chow v. Board of Com'rs for Lafourche B.L. Dist., 203 La. 268, 13 So.2d 857 (1943); Hodges v. Norton, 200 La. 614, 8 So.2d 618 (1942); St. Landry Oil & Gas Co. v. Neal, 166 La. 799, 118 So. 24 (1928). See the discussion of oversale in Bates v. Monzingo, 221 La. 479, 59 So.2d 693 (1952).

alleged loss with the required certainty. *Western Union Telegraph Co. v. R. J. Jones & Sons*, 211 F.2d 479 (5th Cir. 1954).

The Louisiana Civil Code provides that the party who violates his contractual obligation is liable in damages[1] and that the obligee may recover the "loss he has sustained, and the profit of which he has been deprived"[2] by the breach. It further provides that "the debtor is liable only to such damages as were foreseen, or might have been foreseen at the time of contracting."[3] Article 2765, which allows such damages "as the nature of the case may require,"[4] has often been applied in building contract cases involving recovery of future profits lost.[5] Pothier says such recovery should be limited to damages that were "contemplated in the contract,"[6] but adds: "The debtor however is not to be subjected to indemnify the creditor indiscriminately for all the loss which may have been occasioned by the non-performance of the obligation, and still less is he answerable for all the gain which the creditor might have acquired, if the obligation had been satisfied."[7] The Louisiana courts have held that to recover profits lost, plaintiff must prove he has sustained a loss[8] susceptible of proof with reasonable certainty.[9] The loss must not be vague,[10] conjectural,[11] speculative[12] or remote,[13] but must have been within the contemplation of the parties at the time

1. Art. 1930, LA. CIVIL CODE of 1870.
2. Art. 1934, LA. CIVIL CODE of 1870.
3. Art. 1943, LA. CIVIL CODE of 1870.
4. Art. 2765, LA. CIVIL CODE of 1870.
5. Gowan v. Stone & Webster Engineering Corp., 217 La. 1085, 48 So.2d 95 (1950); Guidry & Swayne v. Miller, 217 La. 935, 47 So.2d 721 (1950); Cusachs & Co. v. Sewerage & Water Board of New Orleans, 116 La. 510, 40 So. 855 (1906); Dugue v. Levy, 114 La. 21, 37 So. 995 (1904); Moore v. Howard, 18 La. Ann. 635 (1866); Joublanc v. Daunoy, 6 La. 656 (1834) (Art. 2736, LA. CIVIL CODE of 1825); Villalobos v. Mooney, 2 La. 331 (1831) (Art. 2736, LA. CIVIL CODE of 1825).
6. 1 POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS 182 (3d Am. ed., Evans transl. 1853).
7. *Id.* at 181.
8. Murff v. Louisiana Highway Commission, 146 So. 328 (La. App. 1933).
9. Chamberlain v. Norwood, 148 La. 378, 86 So. 920 (1921); Maddox v. International Paper Co., 47 F. Supp. 829 (W.D. La. 1942).
10. Bergen v. New Orleans, 35 La. Ann. 523 (1883).
11. Tidwell v. Meyer Bros., 160 La. 778, 107 So. 571 (1926).
12. McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383 (1932); Bush v. Bolton, 156 La. 491, 100 So. 692 (1924); Brown v. Producers Oil Co., 134 La. 672, 64 So. 674 (1914); Meyer v. Succession of McClellan, 30 So.2d 788 (La. App. 1947); Messina v. Bomicino, 27 So.2d 397 (La. App. 1946).
13. Cust v. Item Co., 200 La. 515, 8 So.2d 361 (1942); Spencer v. Luckenbach Gulf S.S. Co., 197 La. 652, 2 So.2d 53 (1941); Morse v. Oates, 11 La. App. 462, 123 So. 439 (1929); Cusachs & Co. v. Sewerage & Water Board of New Orleans, 116 La. 510, 40 So. 855 (1906); Bourdette v. Sieward, 107 La. 258, 31 So. 630 (1902); Dwyer v. Adm'rs of Tulane Educational Fund, 47 La. Ann. 1232, 17 So. 796 (1895).

of making the contract.[14] If circumstances are present which could cause unusual or special damages, plaintiff must warn defendant of their existence.[15] Damages allowed under Article 2765[16] have been the profits a contractor shows he would have made had he been allowed to finish the contract.[17] To prove profits lost plaintiff can show the profit he made on similar past transactions,[18] or that customarily made by others in like enterprises;[19] profits lost have also been figured at a certain percentage of the total cost.[20] The Louisiana courts, though requiring a high degree of proof, have allowed recovery in some suits to recover profits lost,[21] holding that an approximate estimate will suffice for proof[22] and that plaintiff need not prove the damages "exactly."[23] Usually, however, they have found that plaintiff's proof of profits lost was insufficient to justify his recovery of damages.[24] The common law rules concerning the recovery of future profits lost are on the whole in accord with the Louisiana rules.[25] In dealing with a factual situation similar to that of the

14. This rule, laid down in Hadley v. Baxendale, 9 Ex. 341 (1854) is followed by the Louisiana courts: Friedman Iron & Supply Co. v. J. B. Beaird Co., 222 La. 627, 63 So.2d 144 (1952); Lee Lumber Co. v. Union Naval Stores Co., 142 La. 502, 77 So. 131 (1917); Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 145 La. 460, 82 So. 413 (1919); Vidalat v. New Orleans, 43 La. Ann. 1121, 10 So. 175 (1891); Goodloe v. Rogers, 9 La. Ann. 273 (1854); Stewart Carnal Co. v. Postal Telegraph & Cable Co., 4 Orl. App. 194 (La. App. 1907); Cau v. Postal Telegraph & Cable Co., 3 Orl. App. 12 (La. App. 1905).

15. Miller Engineering Co. v. Louisiana Ry. & Nav. Co., 145 La. 460, 82 So. 413 (1919).

16. Art. 2765, LA. CIVIL CODE OF 1870.

17. Gowan v. Stone & Webster Engineering Corp., 217 La. 1085, 48 So.2d 95 (1950); Guidry & Swayne v. Miller, 217 La. 935, 47 So.2d 721 (1950); Dugue v. Levy, 114 La. 21, 37 So. 995 (1904).

18. Maddox v. International Paper Co., 47 F. Supp. 829 (W.D. La. 1942).

19. Long v. Kaufman, 128 La. 767, 55 So. 348 (1911).

20. Delarosa v. Misuruca, 172 La. 190, 133 So. 441 (1931).

21. O'Meara v. Cockburn, 155 F.2d 340 (5th Cir. 1946); Maddox v. International Paper Co., 47 F. Supp. 829 (W.D. La. 1942); Chamberlain v. Norwood, 148 La. 378, 86 So. 920 (1921); Delarosa v. Misuruca, 172 La. 190, 133 So. 441 (1931); Hart v. Tremont Lumber Co., 131 La. 847, 60 So. 368 (1913); Dugue v. Levy, 120 La. 369, 45 So. 280 (1907).

22. Prejean v. Delaware-Louisiana Fur-Trapping Co., 13 F.2d 71 (5th Cir. 1926).

23. Germann v. 557 Tire Co., 167 La. 578, 120 So. 13 (1928).

24. Ferguson v. Britt, 191 La. 371, 185 So. 287 (1938); Tidwell v. Meyer Bros., 160 La. 778, 107 So. 571 (1926); State v. Bell, 153 La. 823, 96 So. 669 (1923); Cusachs & Co. v. Sewerage & Water Board of New Orleans, 116 La. 510, 40 So. 855 (1906); Schleider v. Dielman, 44 La. Ann. 462, 10 So. 934 (1892); Bergen v. New Orleans, 35 La. Ann. 523 (1883); Reading, Peck & Co. v. Donovan, 6 La. Ann. 491 (1851); Dennery v. Bisa, 6 La. Ann. 365 (1851); Shreveport Laundries v. Red Iron Drilling Co., 192 So. 895 (La. App. 1939).

25. The common law rules are as follows. Profits which would have been made from the contract may be recovered as damages: Anvil Mining Co. v. Humble, 153 U.S. 540 (1894); Western Union Telegraph Co. v. Hall, 124 U.S. 444 (1888); Hinckley v. Pittsburg Bessemer Steel Co., 121 U.S. 264 (1887). Plaintiff must have suffered damages: Winston Cigarette Machine

instant case, a North Carolina court said that the rule of the leading English case *Hadley v. Baxendale*,[26] requiring that damages be those within the contemplation of the parties, "will not justify the imposition of remote and speculative damages upon a public service corporation."[27]

In the instant case plaintiff was attempting to prove that defendant, in breaching his obligation, had caused plaintiff to lose his contract, a consequence defendant should have foreseen; and further, that had he been awarded the contract he would have made a profit estimable with reasonable certainty. In denying recovery, the court laid primary stress on the fact that plaintiff had failed to prove the amount of his alleged loss with the required certainty. It found also that plaintiff had not proved that the contract would have been awarded to him even had the telegram been delivered promptly. By concluding that plaintiff had failed to prove he had sustained a loss, the court was able to give judgment for defendant without going deeply into the difficult matter of whether the damages sought were "foreseeable" in the contract with defendant. It is significant to note that plaintiff sued for profits he would have made from a contract collateral to the one breached. The court expressed its doubt that the defendant company had been given ample notice of the importance of the message, thus raising the issue of foreseeability. One common law jurisdiction has allowed recovery in such a case, although the notice defendant received there was seemingly clearer than that given here.[28]

Co. v. Wells-Whitehead Tobacco Co., 141 N.C. 284, 53 S.E. 885 (1906). Damages must be reasonably certain: Johnson v. Atlantic Coast Line R.R., 184 N.C. 101, 113 S.E. 606 (1922); Western Union Telegraph Co. v. Foy, 32 Okla. 801, 124 Pac. 305 (1912). The amount of damages must be proved by "certain" means: California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 221 Pac. 345 (1923); Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N.E. 294 (1905); Wakeman v. Wheeler, 101 N.Y. 205, 4 N.E. 264 (1886); Griffin v. Colver, 16 N.Y. 489 (1858). Damages must be within the contemplation of the parties: Hadley v. Baxendale, 9 Ex. 341 (1854); Primrose v. Western Union Telegraph Co., 154 U.S. 1 (1894). The plaintiff must have warned defendant of special circumstances: Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52 (1885); Fort Smith & W.R.R. v. Williams, 30 Okla. 726, 121 Pac. 275 (1912); Wentworth & Irwin v. Sears, 153 Ore. 201, 56 P.2d 324 (1936). Profits that "might" have been made may not be recovered: Western Union Telegraph Co. v. Hall, 124 U.S. 444 (1888); Western Union Telegraph Co. v. Lewis, 203 Fed. 832 (5th Cir. 1913); Western Union Telegraph Co. v. Caldwell, 133 Ark. 184, 202 S.W. 232 (1918).

26. 9 Ex. 341 (1854).

27. Newsome v. Western Union Telegraph Co., 153 N.C. 153, 69 S.E. 10 (1910).

28. Pflester v. Western Union Telegraph Co., 282 Ill. 69, 118 N.E. 407 (1917).

It is submitted that the instant case was correctly decided. Plaintiff did not prove that he had suffered a loss in consequence of the delay in the delivery of the telegram, nor did he show with certainty that he would have been awarded the contract had defendant not breached his obligation. The court's treatment of the issue of foreseeability is not equally clear. It may be that in the instant case the warning to the telegraph company of the importance of the message was not clear enough to justify the award of consequential damages arising from a collateral contract. Since there was a technical breach of the contract by defendant, in light of past decisions plaintiff could well have been awarded nominal damages.[29]

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29. Green v. Farmers Consolidated Dairy Co., 113 La. 869, 37 So. 858 (1905); Norman v. Radio Station KRMD, Inc., 187 So. 831 (La. App. 1939); Wilcox v. Central Louisiana Motor Car Co., 1 La. App. 461 (1925).