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Contracts - Lack of Knowledge of Existing Zoning Ordinance as Grounds for Rescission of Option

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altogether different from their permitting the operation of a complete American judicial process on their sovereign soil.[36] It would be possible to surrender the offender to the host country for trial, but his offense might not be considered criminal in the host country. If the host country had notions of justice contrary to those of the United States, a *release* of the accused to it for trial might encounter "due process" difficulties.[37] It is evident, then, that the instant case in effect has furnished a challenge to both Congress and the Executive to find some manner of trying the offenses of civilians connected with the military overseas.

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CONTRACTS — LACK OF KNOWLEDGE OF EXISTING ZONING ORDINANCE AS GROUNDS FOR RESCISSION OF OPTION

Plaintiff agency brought suit to recover a sum paid for an option to purchase a certain city lot. The neighborhood in which the property was located was apparently industrial. The lot itself contained a filling station and across the street was an iron works establishment. At the time the option was purchased plaintiff intended a particular commercial use for the property which was in keeping with the appearance of the neighborhood, but later learned that this use was prohibited by a zoning ordinance.[1] The lower court dismissed the plaintiff's suit. On appeal, *held,* reversed. In view of the character of the neighborhood and the fact that the vendor was aware of the use to which the plain-

36. The receiving state has retained its primary right to try offenses committed against its nationals by United States servicemen and their dependents. See 4 U.S.T. & O.I.A. 1792, art. IV, para. 3(b), T.I.A.S. No. 2846, June 19, 1951 (effective August 23, 1953). To say the least, it would be a considerable strain upon national pride to allow American judges, lawyers, and juries the power to function on foreign soil. Moreover, provision would have to be made for a criminal code, and it would not be possible to issue compulsory process against witnesses and documents. The difficult task of impaneling a jury would be ever present. If it were composed of foreign nationals, this would be little better than releasing the accused to the host country for prosecution. If civilian dependents compose the jury, might not the *possibility* of "command influence" be as prevalent as in courts-martial? See Reid v. Covert, 354 U.S. 1, 36 (1957).

37. "In Saudi Arabia the King has absolute power of life or death over the people. If an American soldier were 'tried' in that country, it would be doubtful that a treaty authorizing the application of those standards of justice would find favor with an American. . . . In view of the fact that Article 12 of the French *Code Penal* requires the use of the guillotine, it is interesting to speculate as to whether that instrument would meet due process requirements." Note, 18 LOUISIANA LAW REVIEW 173, n. 20 (1957).

1. The area was zoned as "industrial non-conforming." The building could not be substantially changed for commercial purposes and after six months non-use would become a location for residential structures only.

tiff intended to put the property, rescission of the contract can be had either because of the defendant's failure to disclose the restrictions, or because of the vendee's error of fact. *Boehmer Sales Agency v. Russo*, 99 So.2d 475 (La. App. 1958)

In the common law jurisdictions of other states, restrictions imposed on property by deed or covenant entitle the prospective vendee who has entered an executory contract for the purchase of real estate to reject the title and recover his deposit when it appears that such restrictions were unknown to the vendee.[2] The rule is based on the principle that a vendor is obligated to deliver a good and marketable title free of encumbrances.[3] However, restrictions imposed by municipal authority will not support a rejection of title.[4] This different treatment seems to be based on the idea that zoning restrictions, like state housing acts and laws as to sanitation and quarantine, are but a part of the large volume of legislation restricting and affecting property,[5] and as such, are presumably within the scope of public knowledge. The Louisiana jurisprudence is in harmony with the common law in allowing rejection of title where the property is burdened with restrictions imposed by deed or covenant.[6] The result has been reached by holding that such a title is suggestive of litigation (and presumably unmarketable),[7] or that title restrictions are analogous to a nonapparent servitude[8] and, as such, must be disclosed by the vendor.[9] Only two Louisiana cases have been found that deal with the subject of zoning ordinances as affecting title,

2. Kittinger v. Rossman, 12 Del. Ch. 228, 110 Atl. 677 (1920); Bertola v. Allred, 46 Cal. App. 593, 189 Pac. 489 (1920); Shea & McGuire v. Evans, 109 Md. 299, 72 Atl. 600 (1909); Ray v. Adams, 44 App. Div. 173, 59 N.Y. Supp. 1047 (1899); Batley v. Foerderer, 162 Pa. 460, 29 Atl. 868 (1894); McDERMOTT, LAND TITLES AND LAND LAW 27 (1954); MAUPIN, MARKETABLE TITLE TO REAL ESTATE 300 (2d ed. 1907); Annot., 57 A.L.R. 1414 (1928). *See* PATTON, TITLES 560 (2d ed. 1957).

3. See note 2 *supra*.

4. Lohmeyer v. Bower, 170 Kan. 442, 227 P.2d 102 (1951); Hall v. Risley, 188 Ore. 69, 213 P.2d 818 (1950); Lasker v. Patrovsky, 264 Wis. 589, 60 N.W.2d 336 (1953); Miller v. Milwaukee Odd Fellows Temple, 206 Wis. 547, 240 N.W. 193 (1932); McDERMOTT, LAND TITLES AND LAND LAW 27 (1954); PATTON, TITLES 568 (2d ed. 1957). *But see* Kittinger v. Rossman, 12 Del. Ch. 276, 112 Atl. 388 (1921); Daniel v. Shaw, 166 Mass. 582, 44 N.E. 991 (1896).

5. PATTON, TITLES 1038 (1st ed. 1938).

6. Williams v. Meyer, 29 So.2d 599 (La. App. 1947); Bolian v. Porche, 149 So. 272 (La. App. 1933); Giacoma v. Yochim, 13 La. App. 94, 126 So. 84 (1930); Couret v. Hopkins-Rhodes and Co., 13 Orl. App. 161 (La. App. 1916).

7. Giacoma v. Yochim, 13 La. App. 94, 126 So. 84 (1930).

8. Couret v. Hopkins-Rhodes and Co., 13 Orl. App. 161 (1916).

9. LA. CIVIL CODE art. 2515 (1870): "[I]f the servitudes be of such importance that there is cause to presume that the buyer would not have contracted, if he had been aware of the incumbrance, he may claim the canceling of the contract, should he not prefer to have an indemnification." This article applies to executed

and then, only by way of dicta. In *Oatis v. Delcuze*[10] the court stated that the mere existence of zoning regulations does not create an encumbrance upon title to property, but the existing violation of restrictive ordinances does constitute an encumbrance which affects the merchantability of the title.[11] The other case discussing the subject is *Stauss v. Kober*.[12] There the plaintiff vendor contended that certain undisclosed restrictions in his title were less onerous than zoning ordinances involving the same property and hence, since the vendee would have been more limited in his use of the property by virtue of the ordinances, he should therefore be made to accept title even with such restrictions.[13] The plaintiff's entire argument was in keeping with the common law.[14] In its discussion of the case the court stated, without seeming authority, that it accepted as a "well settled principle" that where a person agrees to purchase real estate, he will be held to have made the agreement subject to any existing zoning laws or ordinances, even when he was unaware of their existence.[15] But then the court held for the defendant-vendee, allowing rejection of title, basing its decision on those cases which hold that undisclosed title restrictions justify rejection.[16]

It is interesting to note that none of the prior Louisiana cases allowing rejection of title for title restrictions used error or fraud as grounds for rejection.[17] This seems strange in view of the apparent applicability of the code articles dealing with error and fraud. Consent is a necessary element of a contract and consent is deemed in law to be nonexistent where it has been produced by error or fraud.[18] Error is of two kinds: fact and law.[19] To vitiate consent the error must affect a principal cause or motive of the contract.[20] The principal cause is defined as that without which the contract would not have been made.[21] Yet to

sales, but it is submitted that it would be used in cases of contracts to sell also in order to avoid circuity of action.

10. 226 La. 751, 77 So.2d 28 (1954).
11. 226 La. at 757, 77 So.2d at 30.
12. 51 So.2d 121 (La. App. 1951).
13. *Id.* at 122.
14. Bull v. Burton, 227 N.Y. 101, 124 N.E. 111 (1919); Utah v. Dickinson, 82 N.Y. Supp.2d 356 (1948); Annot., 57 A.L.R. 1424 (1928).
15. Stauss v. Kober, 51 So.2d 121, 122 (La. App. 1951).
16. See cases cited note 6 *supra*.
17. See cases cited note 6 *supra*.
18. LA. CIVIL CODE art. 1819 (1870).
19. *Id.* art. 1820.
20. *Id.* art. 1823.
21. *Id.* art. 1825.

give reasonable and just protection to the other party, the Code further provides that if the error is to be fatal he must have been apprised of the materiality of the motive, or, because of the nature of the transaction, it must be presumed that he knew it.[22]

In the instant case the same spokesman for the court which delivered the opinion in the *Stauss* case held that the zoning ordinance objected to constituted a defect of such import as to justify a rescission of the contract where the vendee was ignorant of the ordinance. In so holding, the court relied on the code provisions dealing with error as affecting the principal cause.[23] It was stated by the court that the principal cause for the making of the contract in the instant case was the desire of the purchaser to use it for a certain purpose and that if he had known that he could not so use it, he would not have purchased the option. The court then held that the vendee had been under an error of fact. It was pointed out that the vendor was aware of the use to which the purchaser wished to put the property, and that it was impossible to determine the existence of such a zoning ordinance from ordinary inspection. The court reasoned alternatively that though a vendee who buys a piece of property in an obviously residential neghborhood, intending to use it for commercial purposes, may be under a duty to ascertain whether he can so use it, in a case where the property and the surrounding area is presently being put to the use which the vendee intends, he is justified in believing that it is zoned unconditionally for such use. In the latter case the vendor is under a duty to make known the exact status of the property. The court relied on *Carpenter v. Skinner*,[24] which allowed the rescission of a contract to buy on the grounds that the vendee was under an error of fact as to the nature of the neighborhood which affected his principal motive. There the court similarly held that where an ordinary inspection does not reveal the nature of the neighborhood, the vendee is not under a duty to investigate official records to determine its character.

In thus basing its decision on *error of fact* the court reached a sound result.[25] The evidence indicated that the vendor was

22. *Id.* art. 1826.
23. *Id.* arts. 1819, 1820, 1823.
24. 224 La. 848, 71 So.2d 133 (1954).
25. It might be argued that the vendee's ignorance of the zoning ordinance was an error of law. The vendee was aware of the actual *facts* as to the nature of the neighborhood and former use to which the property had been put, but he erroneously concluded from these that the zoning laws would permit the property to be used as were the surrounding properties. The result, however, would be the

aware of the intended use of the property, but it did not disclose whether the defendant-vendor knew of the particular zoning ordinance which would have prevented its use. Had the vendor possessed such knowledge, the case would seem to have fallen under the provisions of the Code dealing with fraud,[26] and the contract would have been voidable. Even assuming that the defendant did not know of the ordinance and that both parties were merely in error, the result would be the same,[27] because the error was as to the principal cause. Thus, it would seem that realization of the vendee's belief that the property could be used as intended without the interference of zoning restrictions might be considered a tacit condition to the enforcement of the contract.[28]

In holding that a prospective vendee is not obliged to investigate zoning restrictions except where the appearance of the neighborhood should put him on notice of the possibility of restrictions which would preclude the intended use, the court adopted a realistic and desirable approach. It is often impractical and difficult for a prospective vendee to determine the existence of such ordinances, and, in addition, the vendor, by virtue of his possession and ownership, is more apt to have been informed of their existence.

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LABOR LAW — THE PERENNIAL PREEMPTION PROBLEM

Plaintiff brought an action for breach of contract in a state court for wrongful expulsion from the defendant union, and asked for restoration of membership and damages for loss of wages and for mental suffering. Defendant conceded the state court jurisdiction to order plaintiff's reinstatement, but contended that the Taft-Hartley Act left the state without power to fill out this remedy by an award of damages for loss of wages and mental suffering. The lower court gave judgment for the plaintiff on both issues. The court of appeals affirmed and the State Supreme Court denied a petition for hearing. On certiorari to the United States Supreme Court, *held,* affirmed. The state

same, for Article 1846, dealing with error of law, specifically provides a means of recovering what has been given or paid under error of law.

26. *See* LA. CIVIL CODE art. 1847(5), (6) (1870).

27. *See id.* art. 1819 *et seq.*

28. *See id.* arts. 1824, 1827.