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## An Elegy for Emphyteusis

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### ABSTRACT

This article summarizes emphyteusis, a contract whereby a landowner leases a tract of land to another for a long time in return for a very low rent. It outlines the history of the institution at Roman, French, and Louisiana law. It then analyzes the small body of Louisiana case law concerning emphyteusis and extracts the lessons to be learned therefrom. While not a widely used device today, emphyteusis still exists in the Louisiana Civil Code, and rent of lands still remains a legitimate way of transacting business. Currently a committee of the Louisiana State Law Institute is revising the Civil Code articles relating to rent of lands and annuity; depending on their revisions and modernizations, the concept of emphyteusis may prove itself a useful tool in Louisiana law.

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I. ROMAN LAW

A. *Emphyteusis*

¶1 Emphyteusis was a contract whereby a landowner leased a tract of land to another, the *emphyteuta*, in perpetuity or for a long time, in return for a very low rent.<sup>1</sup> The *emphyteuta* was forbidden from wasting the land and was obligated to ameliorate it.<sup>2</sup> Agricultural lands were the usual subjects of emphyteutic leases, so the duty to ameliorate often included cultivation of the property and might include the raising of farm buildings or other works.<sup>3</sup> The duty was normally spelled out with great precision in the contract, which might, for example, dictate exactly how many and what sorts of crops were to be grown.<sup>4</sup>

¶2 Emphyteusis created a *sui generis* right bearing similarities to, and differences from, full ownership, usufruct, and lease.<sup>5</sup> Emphyteusis, like ownership and usufruct, gave rise to a real right.<sup>6</sup> The *emphyteuta* enjoyed nearly full control of the land and had legal rights in it like an owner.<sup>7</sup> He could bequeath, sell, or donate his rights in the land.<sup>8</sup> He could pledge or mortgage his rights in the land or grant servitudes over the land for as long as his lease

<sup>1</sup> See CHARLES P. SHERMAN, ROMAN LAW IN THE MODERN WORLD, § 601-608; See also A.N. YIANNOPOULOS, LA. CIV. L. TREATISE, *Property* § 225 (4th ed. 2001); William R. Johnston, *Emphyteusis: A Roman “Perpetual” Tenure*, 3 U. TORONTO L.J. 323, 323 (1940).

<sup>2</sup> Johnston, *supra* note 1, at 337-38.

<sup>3</sup> *Id.* at 324.

<sup>4</sup> *Id.*

<sup>5</sup> Yiannopoulos, *supra* note 1, at 433.

<sup>6</sup> See Johnston, *supra* note 1, at 342-44.

<sup>7</sup> Sherman, *supra* note 1, § 604.

<sup>8</sup> *Id.*

endured.<sup>9</sup> Finally, the *emphyteuta* had recourse to the full armory of actions to defend his possessory rights.<sup>10</sup>

¶3 On the other hand, however, the rights created by emphyteusis were simultaneously unlike ownership. For example, the *emphyteuta* may have had to secure the *dominus*'s permission before transferring the right to a third party.<sup>11</sup> In addition, the *emphyteuta* was not at liberty to waste the land as an owner could.<sup>12</sup> Finally, the *emphyteuta* paid rent, unlike any owner in history.<sup>13</sup>

¶4 Because of the rent charge, the emphyteutic lease bears some superficial resemblance to the more common leases familiar to daily life. However, the rights and duties of an *emphyteuta* were very different than those of a common lessee. An emphyteuta was required to pay all taxes on the land and to make all necessary repairs at his own expense.<sup>14</sup> Emphyteusis created a real right that traveled with the land, unlike the personal right created by a standard lease.<sup>15</sup> As a result, the obligation to pay the rent charge and the right to collect it persisted despite transfers of the land or of the right to its rent charge.<sup>16</sup>

¶5 The emphyteusis was erected for perpetuity or, at the very least, for a long time.<sup>17</sup> It could be created by contract, by will, or by prescription.<sup>18</sup> However, the right could be revoked on several grounds: first, an *emphyteuta* who failed to pay the rent could be stripped of his rights; second, the *emphyteuta* forfeited his rights by deteriorating the substance of the land; and third, the right could be extinguished by confusion, prescription, the occurrence of a resolutive condition,

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<sup>9</sup> *Johnston, supra* note 1, at 342.

<sup>10</sup> *Id.*

<sup>11</sup> The authorities differ on this point. Sherman states that “the emphyteuticary could sell his right, subject however to the prior right of the naked owner to be informed of the price offered to the tenant and to buy it for this amount – called the owner’s right of pre-emption. But if the naked owner declined to purchase, the emphyteuticary could sell out to whom he saw fit without the naked owner’s consent.” *Sherman, supra* note 1, § 604 (footnotes omitted). Johnston, on the other hand, maintains that the emphyteuta “was bound to give notice to the *dominus* of intention to assign, and to obtain his assent and approval of the person of the alienee,” at which time the *dominus* might refuse consent for good reason. *Johnston, supra* note 1, at 342.

<sup>12</sup> *Sherman, supra* note 1, § 605.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Yiannopoulos, supra* note 1, at 433.

<sup>16</sup> *Johnston, supra* note 1, at 339.

<sup>17</sup> *Property, supra* note 1, at 432.

<sup>18</sup> *Sherman, supra* note 1, § 603.

the end of its term, or complete destruction of the land.<sup>19</sup> No reduction in rent could be had for a less-than-total destruction of the land, however.<sup>20</sup>

### B. *Reception and Usage*

¶6 The institution of emphyteusis came to the Roman people from the Greeks. The name itself comes from the Greek verb that means to cultivate.<sup>21</sup> The institution was fully formed in Greece by the fourth century B.C.E. and appeared in the Roman city of Thisbe no later than the third century A.C.E.<sup>22</sup>

The [Thisbe] inscription prescribes the mode in which the public domain of the city . . . was to be leased: (i) those desiring to lease a portion of such land were to address a request to the municipal administration, in which was to be indicated the desired extent of the land and the rent to be paid; (ii) for the first five years no rent need be paid, but during this time the land was to be cultivated . . .; (iii) the right of hereditary use was to be enjoyed over the land so leased; (iv) the lessee could transfer *inter vivos*; (v) such land might be made the subject of a devise, provided a citizen of Thisbe was the recipient; (vi) forfeiture to the city of Thisbe would ensue were the conditions imposed not fulfilled.<sup>23</sup>

These terms form the prototypical Roman emphyteusis that would serve the people of Rome until the fall of the empire.

¶7 In early usage, only lands belonging to the state, municipalities, or other public entities were subject to lease by emphyteusis.<sup>24</sup> As time went on, however, the institution grew to encompass even privately held lands. By Justinian's time, emphyteusis had become the ubiquitous perpetual tenure.<sup>25</sup> Emphyteusis was used extensively in the late empire to prop up Roman agriculture and laid the groundwork for the Roman Colonate and medieval feudalism.<sup>26</sup> The state gained some revenue from the arrangement and placed some of the vast tracts of fallow land into agricultural production indefinitely, satisfying the expanding populace's unending hunger for bread.

¶8 On the other hand, emphyteusis strips a landowner of nearly all his power over the land, "reduc[ing] his ownership to a mere shadow."<sup>27</sup> An "owner would

<sup>19</sup> *Id.*; see also, Johnston, *supra* note 1, at 343.

<sup>20</sup> Yiannopoulos, *supra* note 1, at 433.

<sup>21</sup> *Id.*

<sup>22</sup> Johnston, *supra* note 1, at 324-25.

<sup>23</sup> *Id.* at 325.

<sup>24</sup> Yiannopoulos, *supra* note 1, at 432.

<sup>25</sup> Johnston, *supra* note 1, at 326.

<sup>26</sup> *Id.* at 329; Roth Clausing, *The Roman Colonate: The Theories of its Origin*, 117 COLUMBIA UNIVERSITY STUDIES IN HISTORY, ECONOMICS, & PUBLIC LAW 1 at 198-201 (1925).

<sup>27</sup> Johnston, *supra* note 1, at 338.

have recourse to [emphyteusis] only in the event of lack of capital, subjecting the land to [the arrangement] better to preserve and ameliorate its condition and productivity and to derive a small income by way of rent.”<sup>28</sup> As a result, emphyteusis would have been used by landowners with vast estates who could not otherwise farm the land at all.

## II. FRENCH LAW

¶9 Emphyteusis survived the fall of Rome and was adopted and adapted by continental Europe during the Medieval era. In France, for example, emphyteusis and related arrangements were greatly changed by the revolutionary government.<sup>29</sup> The result was a tendency to place tenants into full, unqualified ownership of the rented lands – sometimes with, and sometimes without indemnity.<sup>30</sup> In modern times, Emphyteusis is governed by the Law of 25 June 1902, which has been incorporated into the Rural Code.<sup>31</sup> In return for his rent, an “emphyteutic lessee receives a real interest susceptible of mortgaging, assignment, and attachment. . . . [The lease] must be concluded for at least 18, but not more than 99 years.”<sup>32</sup> A lessee must not waste the land and has no claim to indemnity for any improvements made to the land.<sup>33</sup> Finally, the lessee has the rights of a usufructuary with regard to mines and quarries and may grant servitudes over the leased land for the duration of his lease.<sup>34</sup>

## III. LOUISIANA LAW

### A. Introduction

¶10 Louisiana law has little to say about emphyteusis. The entire body of legislation, doctrine, and jurisprudence regarding the institution is comprised of fifteen code articles, a dozen-odd cases, and a light sprinkling of treatise references. The 1808 Digest of Laws had nothing to say about emphyteusis; the Civil Code articles came with the 1825 revision. Despite its absence from the 1808 Digest, emphyteusis may have been known to Louisiana law at the time.<sup>35</sup> The institution is mentioned in *City of New Orleans v. Duplessis* before the

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<sup>28</sup> *Id.*

<sup>29</sup> See generally PAUL ESMEIN, *AUBRY & RAU’S COURS DE DROIT CIVIL FRANCAIS, PROPERTY*, § 224 (Jaro Mayda, trans. Louisiana State Law Institute 1961).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> “The Civil Code of 1808 did not repeal all prior laws. . . . [It] could only be used as an incomplete digest of existing laws, which still retained their original force.” A.N. YIANNOPOULOS, *CIVIL LAW SYSTEM, LOUISIANA AND COMPARATIVE LAW*, § 60 (1999).

promulgation of the 1825 Code.<sup>36</sup> Regardless, by the time of the revision “the redactors ‘thought it necessary to supply the omission’ since ‘the contract . . . [was] pretty common among [them].’”<sup>37</sup> Considering the dearth of material on the subject, the contract must either have been intuitively understood and uncontroversial or not as common as reported.

*B. The Code Provisions*

¶11 The Louisiana Civil Code styles emphyteusis “rent of lands” and outlines it in articles 2778-2792. The party ceding the immovable property is called the rentor, and the party paying rent is the rentee.<sup>38</sup>

The contract of rent of lands is a contract by which one of the parties conveys and cedes to the other a [tract] of land, or any other immovable property, and stipulates that the latter shall hold it as owner, but reserving to the former an annual rent of a certain sum of money, or of a certain quantity of fruits, which the other party binds himself to pay.<sup>39</sup>

There are a few important implications contained in this provision. First, only immovable property may be the subject of a contract of rent of lands. Contracts involving immovable property must be recorded to be effective against third parties.<sup>40</sup> Thus, in practice, a contract of emphyteusis will normally be reduced to writing and recorded.<sup>41</sup> In addition, the contract is not limited only to land, as the name implies, but can affect any immovable. The contract, then, may have as its object the rent of a house but not the land on which it stands if someone other than the landowner owns the building.<sup>42</sup> Finally, the rights created by the rent of lands are themselves incorporeal immovables.<sup>43</sup>

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<sup>36</sup> *City of New Orleans v. Duplessis*, 5 Mart.(O.S.) 309 (La. 1818).

<sup>37</sup> *Yiannopoulos*, *supra* note 1, at 434 (citing 1 LA. LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 326 (1937)).

<sup>38</sup> In the title regulating rent of lands, the terms used to describe the parties to the contract vary wildly from one article to the next and include lessor-lessee, rentor-rentee, possessor, and seller. Because the Code styles the contract as one of rent, I will use rentor-rentee throughout our discussion of Louisiana law, although we do so at the peril of confusing the parties to this contract with those to a lease, who also give and receive rent.

<sup>39</sup> LA. CIV. CODE ANN. art. 2779.

<sup>40</sup> *See id.* art. 1839.

<sup>41</sup> Presumably, LOUISIANA. CIVIL CODE ANNOTATED articles 1839’s and 2440’s requirement that a sale or transfer of an immovable be made in writing applies to the contract of rent by virtue of LOUISIANA CIVIL CODE ANNOTATED article 2783, which subjects all rent contracts to the sale rules unless otherwise stated.

<sup>42</sup> *See id.* art. 464; *Yiannopoulos*, *supra* note 1, § 116.

<sup>43</sup> *See* LA. CIV. CODE ANN. art. 470.

¶12 The conveyance granted by a rent of lands contract is perpetual.<sup>44</sup> A contract of this type made for limited duration is a lease.<sup>45</sup> The contract, even when made in perpetuity bears some resemblance to a predial lease, if only because the rentee is obliged to pay a rent to the rentor.<sup>46</sup> However, shortly after analogizing the two, the Code distinguishes the contract of rent from lease by stating that the rent charge is “imposed on the property”<sup>47</sup> and that the land “remains perpetually subject to the rent, into whatsoever hands it may pass.”<sup>48</sup> The rent charge, then, is a real obligation that runs with the land, whereas the obligation to pay rent under a lease is a personal obligation between lessor and lessee.

¶13 Likewise, the contract resembles a sale in that it transfers a significant portion of the ownership to the rentee perpetually.<sup>49</sup> Furthering the resemblance, most of the rules applicable to sales apply to rent contracts.<sup>50</sup> The analogy of rent to sale on the basis of transferring ownership is slightly misleading, as rent does not confer on the rentee the “direct, immediate, and exclusive authority over a thing” conferred by perfect ownership.<sup>51</sup> “The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.”<sup>52</sup> However, the transferee under a contract of rent “is bound to preserve the thing in good condition that it may continue capable of producing wherewith to pay the rent.”<sup>53</sup> Further, the rent charge forms a real obligation running with the land.<sup>54</sup> The rentee certainly may sell his interest in the land, but it is beyond his power to sell the land free from the rent charge. With these limitations in mind, it is safe to say that the rent contract confers most of the elements of ownership to the rentee, but not perfect ownership.

¶14 In Louisiana doctrine, there are two categories of real rights: perfect ownership and *iura in re aliena*.<sup>55</sup> The latter category includes “predial and personal servitudes (i.e., usufruct, habitation, and rights of use), rights of real

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<sup>44</sup> *Id.* art. 2780.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* art. 2782.

<sup>47</sup> *Id.* art. 2787.

<sup>48</sup> *Id.* art. 2786.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* art. 2783.

<sup>51</sup> *Id.* art. 477.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* art. 2784.

<sup>54</sup> *Id.* art. 2786.

<sup>55</sup> *Yiannopoulos, supra* note 1, § 237.

security (i.e., pawn, antichresis, and mortgage), superficies, emphyteusis, and real charges.”<sup>56</sup> This limitation to two categories of real rights means that either a person has perfect ownership in a thing, or he does not. For example, the naked owner of a thing subject to usufruct has ownership of that thing, but it is imperfect. Ownership has been dismembered, and some of the severed rights belong to the usufructuary. Emphyteusis – rent of lands – is likewise a dismemberment of ownership in which the rentee possesses nearly all the ownership rights in the subject immovable, leaving only the real right to collect a rent in the rentor.

¶15 Thus, the comparison of rent to sale and lease is not altogether satisfying; lease does not confer real rights, and sale does not dismember ownership. A rent contract might better be described using familiar concepts as the sale of an immovable subject to two personal servitudes, one obligating the buyer to pay a rent and another prohibiting the waste of the estate. Of course, this description is itself fraught with problems. The most glaring is that neither suggested servitude creates a usufruct, right of habitation, or right of use. Therefore, neither falls within the Code’s definition of permissible personal servitudes.<sup>57</sup> Further impeding this line of description is that no one may establish a servitude *in faciendo*,<sup>58</sup> so a personal servitude to pay rent is dually impossible. On the other hand, positive duties established by servitude-like rights are not alien to Louisiana law.

¶16 Building restrictions are “incorporeal immovables and real rights likened to predial servitudes”<sup>59</sup> that may impose affirmative duties on the owner of the servient estate.<sup>60</sup> With the proliferation of building restrictions, neighborhood agreements, and restrictive covenants, many people are familiar with the idea of buying property subject to certain obligations that travel with the land. In a certain sense, a rent contract is very much like a sale subject to a building restriction: instead of a buyer purchasing a home subject to the obligations to pay neighborhood association dues and not to paint one’s house certain colors, the rentee purchases land subject to the obligations to pay “dues” to the former owner and not to waste the land’s resources. The redactors of the rent of lands articles

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* art. 534. However, the jurisprudence has recognized certain conventional personal servitudes created by contracting parties outside of the three listed in article 534. See 3 A.N. YIANNOPOULOS, LA. CIV. L. TREATISE, PERSONAL SERVITUDES § 225.

<sup>58</sup> “One should agree with Justice Provosty that servitudes *in faciendo* sometimes referred to as ‘personal servitudes’ by French writers of the *ancien régime*, are reprobated feudal tenures that have no place under the Louisiana Civil Code.” 3 A.N. YIANNOPOULOS, LA. CIV. L. TREATISE, PERSONAL SERVITUDES § 225..

<sup>59</sup> LA. CIV. CODE ANN. art. 777.

<sup>60</sup> *Id.* art. 778.



can hardly be faulted for not drawing this analogy; the building restriction articles did not appear in the code until the 1970s. However, now that the articles are in the Code, they provide a solid, commonly understood comparison for rent of lands.

¶17 Rent of lands is also different from sale where loss is concerned. In a sale, the risk of loss of the thing sold falls entirely on the buyer when delivery is made.<sup>61</sup> Rent, on the other hand, places the risk on both the rentor, and the rentee.<sup>62</sup> If the immovable is completely destroyed, the rentee bears the loss of the thing, and the rentor loses his right to collect the rent charge.<sup>63</sup> In case of a partial destruction, the rent charge may be reduced accordingly.<sup>64</sup> A buyer cannot demand a partial refund based on the partial destruction of the item, but a rentee can.

¶18 Perpetuity of a contract to rent does not necessarily last forever. “The rent charge, although stipulated to be perpetual, is essentially redeemable.”<sup>65</sup> The rentor dictates the price of the redemption and may not be redeemed for a period up to thirty years.<sup>66</sup> If the immovable’s value is recited in the contract, the rentee cannot be made to pay any more than that amount in redemption.<sup>67</sup> The Code provides some default terms for rent contracts. If the rentor does not stipulate otherwise, the annual rent is set at 6% of the value of the property, and the rentee may redeem the rent charge by paying the rentor the value of the land. The rentee may purchase the remaining elements of ownership from the rentor by buying the property outright. Finally, rent debts are subject to the liberative prescription of three years.<sup>68</sup>

¶19 Lastly, rent of lands gives mortgage rights to the rentor. If the rentee owes more than one year of rent, the rentor may have the property seized and sold for the payment of the debt.<sup>69</sup> The land is sold subject to the rent charge, which probably reduces the effectiveness of this mortgage for securing substantial sums and still retaining the rent charge. A rentor who is owed a great deal of back rent, in order to entice potential buyers, might be forced to cede his right to rent in order to sell the land at all. If the sale price does not cover the entire rent

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<sup>61</sup> *Id.* art. 2467.

<sup>62</sup> *Id.* art. 2785.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* art. 2788.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* art. 2789.

<sup>68</sup> *Id.* art. 3494(2).

<sup>69</sup> *Id.* art. 2791.

arrears, the rentor only has personal recourse against the previous, delinquent rentee. A rentee, past or present, “is only answerable for the arrears which become due while he [is] in possession.”<sup>70</sup> In addition, the *in rem* nature of the contract of rent gives the rentor a right to proceed against the land itself for current arrearages independent of the mortgage granted by the Code.<sup>71</sup>

### C. *Jurisprudence*

¶20 The rent charge must be for a certain, fixed sum of money or quantity of fruits.<sup>72</sup> In *Vincent v. Bullock*, a landowner sold a parcel of ground, reserving to himself a portion of any mineral royalties realized from exploration on it.<sup>73</sup> The ancestors-in-title of the vendee eventually sold the mineral royalty rights claimed by the vendor to a third party.<sup>74</sup> Vincent, the original vendor, sued to annul the transfer of his rights to a third party by Bullock.<sup>75</sup> The defendants plead the ten-year prescription of nonuse, and plaintiffs answered that royalty reservations are not subject to nonuse and that the reservation was in the nature of a rent charge as governed by the Code articles regarding rent of land.<sup>76</sup> The Louisiana Supreme Court held that the reservation of a portion of any mineral royalties does not constitute rent as contemplated by Civil Code articles 2778 *et seq.*<sup>77</sup>

[T]he codifiers of our basic law, in providing that in order to create a rent charge in conveying a tract of land there must be a reservation by the vendor of an annual rent of *a certain quantity of fruits*, had in mind a definite and fixed quantity, such as a certain number of bushels, if the fruit be grain. To hold otherwise would render meaningless the other articles of the Code on the subject matter, and particularly Articles 2788, 2789, and 2790[, which describe the redeemable nature of the rent charge]. . . . [A] portion of the fruits yielded by the thing . . . does not comprise a *certain quantity*, nor has it a fixed or determinate value whereby an accurate estimate can be made of its capital value for the redemption thereof.<sup>78</sup>

In a later case, the court relied principally on *Vincent* to hold that a sale for cash, 80% of all money derived from timber sales, and 50% of the net revenue of the

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<sup>70</sup> *Id.* art. 2787.

<sup>71</sup> Succession of Canonge, 1 La. Ann. 209 (La. 1846).

<sup>72</sup> *Id.* art. 2779.

<sup>73</sup> *Vincent v. Bullock*, 192 La. 1 (La. 1939).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* at 11-12 (emphasis in original, internal quotation marks omitted).

property is not a contract of rent because the transaction lacked the “reservation of an annual rent of any sum of money or quantity of fruits.”<sup>79</sup>

¶21 In keeping with this strict interpretation, the court later decided that a continuing obligation to care for a person did not constitute rent. In *Chenevert v. Lemoine*,<sup>80</sup> an older couple sold their house to their son-in-law in return for six hundred dollars and the latter binding himself, his heirs, and assigns to support the vendors until their death.<sup>81</sup> The couple also reserved to themselves the right to use the premises and to object to a sale of the property and secured a mortgage over the property for the fulfillment of their vendee’s obligations.<sup>82</sup> The son-in-law went bankrupt, and a third party purchased the property subject to the obligations to the couple and eventually resold the property to the son-in-law on credit.<sup>83</sup> At no time did the son-in-law fulfill his obligations to support his in-laws, but the latter never pressed the issue.<sup>84</sup> Nearly twenty years after the first sale to the son-in-law, the couple sued him and his second vendor – the bankruptcy vendee – alleging a number of complaints, including nonpayment of support, the failure of any party to secure their approval before selling the property, and the son-in-law’s placement of a mortgage on the property to their detriment.<sup>85</sup> The court held that the contract was a plain sale, not a contract of rent; that the obligation to support the old couple was personal to their son-in-law; and that the contract evinced a real right of habitation in the couple.<sup>86</sup>

¶22 The classification of a contract as one of rent instead of sale or some other type is not always straightforward. The Code recognizes this by distinguishing sale and rent in the following way:

A contract of sale, in which it is stipulated that the price shall be paid at a future time, but that it bears interest from the day of the sale, is not a contract of rent. On the contrary, a contract made bearing the name of a sale in which the seller does not stipulate the payment of the price, but at a capital bearing interest forever, is a contract of rent.<sup>87</sup>

¶23 *Sainet v. Duchamp* involved one such questionable contract. The plaintiff’s father conveyed to the defendants a house and lot for \$5,500 payable in one year, which period might be extended indefinitely at the buyer’s option by

<sup>79</sup> *Everett v. Clayton*, 211 La. 211, 222-3 (La. 1947).

<sup>80</sup> *Chenevert v. Lemoine*, 52 La. Ann. 586, 587 (La. 1900).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 587-88.

<sup>83</sup> *Id.* at 588-89.

<sup>84</sup> *Id.* at 589.

<sup>85</sup> *Id.* at 590.

<sup>86</sup> *Id.* at 592.

<sup>87</sup> LA. CIV. CODE ANN. art. 2781.

paying the annual interest on the price.<sup>88</sup> Eventually, the defendant defaulted, and the plaintiff sued for the purchase price.<sup>89</sup> The court found that the contract was one of neither sale nor rent, but of annuity.<sup>90</sup> Justice Cole offered a lengthy and erudite dissent arguing that the contract was, in fact, rent of lands.<sup>91</sup> The majority adopted Justice Cole's conclusion after rehearing.<sup>92</sup> They reasoned that La. Civ. Code Ann. art. 2781 embraced this contract, as it created a capital bearing interest forever, and that the stipulation to pay the principal instead of the perpetual interest operated merely as a method of redemption as also described in the code.<sup>93</sup> They also espoused the view that "parties, by . . . changing the features of their contract, on immaterial points, from those of the contract of rent in the Civil Code, [do] not destroy[] the material characteristics of the contract of rent which are impressed upon their act."<sup>94</sup> In the judgment adopting Justice Cole's opinion, Justice Land and Chief Justice Merrick both wrote lengthy dissents.<sup>95</sup>

¶24 A similar bargain was struck in *Bourgeois' Heirs v. Thibodeaux*, but the results were very different.<sup>96</sup> Therein, Mr. Bourgeois conveyed a tract of land to Mr. Aubert for the price of \$12,000 payable in six annual installments.<sup>97</sup> However, Mr. Aubert had the right, after paying the first installment, to postpone the payment of the remainder indefinitely by paying 10% interest on the sum.<sup>98</sup> Default on a postponement payment would render the entire debt exigible.<sup>99</sup> Mr. Aubert exercised the postponement option a number of times and paid half the purchase price before Mr. Thibodeaux purchased the property in a judgment sale against Mr. Aubert.<sup>100</sup> Mr. Bourgeois's heirs then sued Mr. Thibodeaux, alleging that the agreement between their father and Mr. Aubert burdened the land with a perpetual charge to pay 10% rent, which had gone unpaid for six years, and that Mr. Thibodeaux owed them the rent arrearages.<sup>101</sup> The court held the following:

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<sup>88</sup> *Sainet v. Duchamp*, 14 La. Ann. 539 (La. 1859).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 540.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 550.

<sup>93</sup> *Id.* at 548-9.

<sup>94</sup> *Id.* at 542.

<sup>95</sup> *Id.*

<sup>96</sup> *Bourgeois' Heirs v. Thibodeaux*, 23 La. Ann. 19 (La. 1871).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 20.

An examination of the deed satisfied us that it is not a contract of rent[, but] simply a sale with a potestative condition, whereby the purchaser acquired the right . . . to defer the payments. . . . The purchaser was bound to pay the first installment before he could postpone the others. . . . The moment . . . there was a failure to pay the interest, the whole debt became due – the deed stood as though there had been no stipulation for the delay.<sup>102</sup>

¶25 One can describe the contract in *Sainet* similarly, except that the *Sainet* contract did not call for six installments.<sup>103</sup> Also potentially relevant, the *Bourgeois* contract had the debt come due in annual installments, whereas the *Sainet* price was described and came due as a single sum.<sup>104</sup> The *Sainet* decision was not unanimous, and some of the dissenting justices words are echoed in the *Bourgeois* decision.<sup>105</sup> For example, Justice Land dissents, arguing that the

agreement to pay interest [to delay the payment of the purchase price] was . . . contracted on a potestative condition, and gave to the vendor no right of action for its recovery, and was itself void. . . . If, therefore the contract in this case is one of rent, we have before us a rentee in possession of the land conveyed, who has contracted no legal obligation to pay the rent, and against who no action lies for its recovery.<sup>106</sup>

Note the similarity in the description between this and the *Bourgeois* contract, which was “simply a sale with a potestative condition” not “made subject perpetually to the payment of [rent].”<sup>107</sup>

¶26 The *Bourgeois* court also thought it significant that the vendors had already received half the purchase price and had a viable action for the remainder when they wished to have the contract declared one of rent.<sup>108</sup> This is probably the crucial distinction between the two cases; the court observed *Bourgeois* and his heirs acting like vendors on credit who changed their tune when it became beneficial to them to claim to be rentors.<sup>109</sup> Conversely, the rentee in *Sainet* never

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Sainet v. Duchamp*, 14 La. Ann. 539 at 551 (La. 1859) (emphasis removed).

<sup>107</sup> *Bourgeois’ Heirs v. Thiboudeaux*, 23 La. Ann. 19 at 20 (La. 1871) (Land, J., dissenting).

<sup>108</sup> In fact, the language of the court seems to indicate they were somewhat indignant that *Bourgeois*’s heirs would dare ask for such a remedy: “Can It be said of a party who has already received half the price of the sale of his land, and who had a cause of action to recover the other half . . . when the condition for extension of payments was violated, that he stands before the court on the deed which gave him these rights, not as a vendor, but simply as a renter of ground? The proposition is too plain for argument.” *Id.* at 21.

<sup>109</sup> *Id.*

paid any amount for the property; he only paid interest.<sup>110</sup> At no point does the rentee appear to actually be a vendee.<sup>111</sup> The parties did, however, use questionable language in their contract.<sup>112</sup> Under the terms of article 2781, a contract of rent can be clothed as “a sale in which the seller does not stipulate the payment of the price.”<sup>113</sup> This requirement was seemingly violated by the terms of the *Sainet* agreement, which set the price at \$5,500, payable or postponable on the whim of the obligor.<sup>114</sup> The court reasoned that this arrangement was nothing more than the parties setting the value of the principal to bear interest and that the stipulation to pay the capital instead of the interest was “merely a mode adopted by the parties to redeem the rent charge,” which is allowed by the Code.<sup>115</sup> The final dissent in the opinion also raises an unanswered argument against finding the contract to be one of rent.<sup>116</sup> The contract stated “the purchaser binds himself to pay to the vendor in one year from this date”, and Chief Justice Merrick found that to be “unquestionably [sic] a personal obligation. . . . He does not undertake to bind the land. Nothing is reserved out of the land. There is no partial dismemberment of the property.”<sup>117</sup>

¶27 As a result of these inconsistencies, unanswered challenges to the majority, and the muddled intent of the contract itself, *Sainet*, while still good law, is likely not very valuable for guidance going forward.<sup>118</sup> *Bourgeois’ Heirs*, on the other hand, seems to give a fine real-world example of the contract lost somewhere between sale and rent as described in article 2781.<sup>119</sup>

#### D. *Learning from the Past*

¶28 In drafting future rent contracts, it would behoove a practitioner to stay very close to the language used in the Code. The first lesson to be learned from the two cases discussed above is to say what one means. If a contract is one of rent, it should be very clear on that point. While the title of a document is not binding on anyone, it certainly helps to alert all the parties involved – both parties to the contract and those later charged with interpreting it – exactly what they are

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<sup>110</sup> *Sainet*, 14 La. Ann. at 551.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> LA. CIV. CODE ANN. art. 2781.

<sup>114</sup> 14 La. Ann. at 551.

<sup>115</sup> *Id.* at 549.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 552 (Merrick, C.J., dissenting).

<sup>118</sup> *Id.*

<sup>119</sup> LA. CIV. CODE ANN. art. 2781.

dealing with. It's arguable whether the *Sainet* contract created a rentor-rentee relationship, an annuity funded by the purchase price, or a sale on credit.<sup>120</sup>

¶29 In the same vein, if the parties wish to set up a means of redemption, they should not call the redemption price a "sale price" or even "price," if it can be avoided. The Code lays out a framework in articles 2788 - 2790 with a very workable terminology.<sup>121</sup> The rent charge is "redeemable."<sup>122</sup> The rentor stipulates the terms of the redemption and after what length of time it may be exercised.<sup>123</sup> The amount the rentee must pay to redeem the property is normally the value, which may be determined by the rentor in the contract or may be determined by some other means at the time of redemption.<sup>124</sup> There is one caveat to be noted here; if the valuation is set in the contract, it functions as an upper limit on the amount to be charged for redemption, so if the redemption value and the property value are not the same in the contract, the former cannot exceed the latter.<sup>125</sup> Note, also, that there is neither a codal requirement that the redemption be a payment in money, nor a prohibition against the redemption being the performance of some obligation other than paying money.<sup>126</sup>

¶30 It is not impossible to imagine that a rentee will desire to redeem the land but will be unable to raise enough cash to pay it outright. It is possible that that was roughly the intent of the parties in the *Bourgeois* contract.<sup>127</sup> Perhaps the parties intended a contract of rent, and the rentor, out of kindness, allowed his rentee to pay the principal back in installments. The language of the court indicates that this is sufficient to doom the contract to being a sale because of the strong resemblance they bear.<sup>128</sup> Rentees, by definition, did not – and probably could not – come up with enough capital to purchase the property outright. There are cases where a payment plan on the redemption of a rent contract could benefit the rentor, the rentee, or both. For example, a rentor may be cash-strapped and benefit greatly from partial payments on the redemption price. This could be an uncomfortable situation for the rentor.

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<sup>120</sup> The first judgment of the court found an annuity. The sale price was "loaned" back to the vendee, who then paid interest on the principal to the vendee. On rehearing, they turned to the related contract of rent of lands to explain the transaction.

<sup>121</sup> LA. CIV. CODE ANN. arts. 2788-90.

<sup>122</sup> *Id.* art. 2788.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* art. 2789.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Bourgeois' Heirs v. Thiboudeaux*, 23 La. Ann. 19 at 20 (La. 1871).

<sup>128</sup> *Id.*

¶31 Take, for example, the case where a rentee has possessed Arpent Noir for several decades under a rent contract. Imagine, then, that there were hard times during those years in which the rentee did not pay the rent,<sup>129</sup> but things are better now and the rentee has great business prospects in the immediate future. The rentee wants to purchase Arpent Noir outright on credit. A rentor who agrees to let the rentee pay the redemption charge in installments runs the very real risk of having his contract called a sale in disguise, similar to what happened in *Bourgeois' Heirs*.<sup>130</sup> A better way to structure the deal would be for the rentor to convey his interest in the property (limited to the rent charge, more than likely) to the rentee in return for a note secured by a mortgage on the property. While the former method – partial payment on the redemption charge – may work, there is no sense in tempting a dissatisfied rentee to drag the matter into court, where a judge can meddle with the arrangement with unknown results.

¶32 Above all, the appearance of sale should be avoided. This may be tricky in certain portions of the contract, because rent resembles sale very strongly. There is a transfer of ownership, and the rentor is subject to all the warranties imposed on a vendor.<sup>131</sup> As criticized by Chief Justice Merrick's dissent, the language of the two contracts should be markedly different in certain particulars.<sup>132</sup> First, clauses like “made for and in consideration of \$5,500, which the purchaser binds himself to pay to the vendor in one year from this date”<sup>133</sup> could very well be fatal to a rent contract – especially today; modern courts have likely never seen such a contract and probably will not work so hard to accommodate a poorly drafted agreement as the majority in *Sainet* did. The rent must be a certain sum of money or fruits,<sup>134</sup> and the duration must be perpetual. There is no wiggle room for the latter two items.

#### *E. Where to go From Here*

¶33 One might very well respond to this entire discussion with a resounding “So what?” By all appearances, emphyteusis is dead. One could ask one hundred practitioners in the city of New Orleans and not find a single soul who has ever heard the word “emphyteusis” or has considered that “rent” might be something other than the money their lessees deliver late each month. However, the articles

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<sup>129</sup> Assume that the rentee acknowledges the rent due so that the three-year prescription is timely interrupted each time it is about to run.

<sup>130</sup> *Bourgeois' Heirs*, 23 La. Ann. at 20.

<sup>131</sup> LA. CIV. CODE ANN. art. 2782.

<sup>132</sup> *Sainet v. Duchamp*, 14 La. Ann. 539 at 552 (La. 1859) (Merrick, C.J., dissenting).

<sup>133</sup> *Id.*

<sup>134</sup> See *Vincent v. Bullock*, 192 La. 1 (La. 1939) (holding that the reservation of a percentage of mineral royalties that may be gleaned from the land is not a certain quantity of money or fruits and does not, therefore, constitute rent).



are still in our Code, and rent of lands is still a legitimate way of transacting business.

¶34 Several recent events and modern factors may have set the stage for the return of contracts of rent to the practitioner's toolbox. On August 29, 2005, Louisiana was struck by Hurricane Katrina, which caused untold devastation to nearly the entire Southeastern portion of the state. In the aftermath, state and federal governments set up and funded the Louisiana Road Home program, which was mandated primarily to compensate homeowners for uninsured hurricane losses up to \$150,000 if they wished to keep their homes or, barring that, to purchase the storm-damaged homes for a similar amount. Under the program, the state has purchased a large number of homes and residential lots.

¶35 At the same time, the New Orleans area is desperate for residents. Like the Roman state, Louisiana has a great deal of dormant land and a pressing need to fill it with people. Ours is not farmland, but residential property. Louisiana can use rent of lands to fill those empty homes and lots with residents for very little money upfront. The contracts could be structured in such a way that the rent is very low, the property is mature for redemption immediately, and the redemption price is low compared to the future value of the rehabilitated home. If residents wish to leave the state after accepting one of the homes, they are not bound to stay; they may assign their rental rights to another. The state will benefit from having its properties occupied, from the increased cash inflow resulting from residents' tax payments, from lower crime rates and smaller police forces than those required to patrol vacant neighborhoods, and will get some of the money they paid in Road Home grants back. The residents will have access to very gutted houses and cheap lots on which to raise their new homes. Building certainly is not free, but there are other programs in place to help needy families (e.g., Habitat for Humanity).

¶36 Rent of lands may also provide an analog to the reverse mortgage. In a reverse mortgage, a homeowner (often an elderly person) places a mortgage on his house. He then borrows against the equity he has secured in the house over the years. When he dies or moves from the house permanently, the house is seized and sold to pay the debt. There are a number of ways the payments to the mortgagor can be made, ranging from a single lump sum to monthly payments for the remainder of the person's life. As people get older, they often need expensive medical care or additional income, and this device can meet both those goals while still allowing the person to remain in their own home until death.

¶37 If one were to grant his home to another, who then granted a usufruct over the property in favor of the rentor, the outcome would be nearly the same. The rentor would be able to stay in his home, and the rentee would be paying a rent to the rentor. In order to grant full ownership to the rentee at the rentor's death, the

latter would merely have to bequeath his rights in the rent charge to the rentee, and the rent contract would be extinguished by confusion. In the alternative, the rentor could stipulate that the rent charge is redeemable for \$1 after his death. It is beyond the scope of the author's abilities and this Article to delve into the potential tax consequences of using this hybrid civil law device instead of the more common reverse mortgage.

¶38 Emphyteusis and, as we know it, rent of lands are indeed practically dead. They do not have to stay that way. Currently, a committee of the Louisiana State Law Institute is revising the Civil Code articles relating to rent of lands and annuity. The committee has the opportunity to modernize emphyteusis and return it to the toolbox of Louisiana practitioners, should the institution prove to be useful for solving today's problems.