

# The Action of Resolution as an Accessory of the Credit in Contracts of Sale

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# Comments

## THE ACTION OF RESOLUTION AS AN ACCESSORY OF THE CREDIT IN CONTRACTS OF SALE

### LOUISIANA CIVIL CODE OF 1870:

ART. 2561. If the buyer does not pay the price the seller may sue for the dissolution of the sale. *This right of dissolution shall be an accessory of the credit representing the price, and if it be held by more than one person all must join in the demand for dissolution; but if any refuse, the others by paying the amount due the parties who refuse shall become subrogated to their rights.*<sup>1</sup>

The most important obligation which the civil law of Louisiana imposes upon the purchaser of movable or immovable property under the contract of sale is the payment of the purchase price.<sup>2</sup> The seller is vested with two security interests<sup>3</sup> either of which may be exercised in the event this obligation is not performed. (1) He may enforce the sale and exercise his vendor's privilege which gives him a preference over other creditors on the proceeds of a judicial sale of the property.<sup>4</sup> (2) He may effect a resolution<sup>5</sup> of the sale and a return of the property by taking advantage of the resolutive condition<sup>6</sup> which is implied by law in all commutative contracts.<sup>7</sup>

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1. Italics indicate the portion of the article added by La. Act 108 of 1924.

2. Arts. 2439, 2549, La. Civil Code of 1870.

3. The seller is also given the right to retain the property if the sale be for cash and the price is not paid at the time and place of delivery. Arts. 2475, 2487, La. Civil Code of 1870. In the case of a credit sale, the seller may refuse to deliver to an insolvent or bankrupt buyer where there is danger of losing the purchase price unless security therefor is furnished. Art. 2488, La. Civil Code of 1870. Where the buyer is insolvent the seller is also given the right of stoppage *in transitu* and of recovery of the property even though it has been attached by a creditor of the buyer. *Blum & Co. v. Marks*, 21 La. Ann. 268, 99 Am. Dec. 725 (1869). Cf. Uniform Sales Act, § § 57-59, 61, 62; 5 Williston, Contracts (rev. ed. 1937) § 1458.

4. Arts. 3182-3189, 3227 (movables), 3249, 3271-3274 (immovables), La. Civil Code of 1870.

5. Art. 2561, La. Civil Code of 1870. This article applies to movables and immovables. Cf. Arts. 2562, 2563, 2564, La. Civil Code of 1870; *Johnson v. Bloodworth*, 12 La. Ann. 699, 705 (1857).

6. The "resolutive condition" is a condition subsequent. *Ballentine, Law Dictionary* (1930).

7. Arts. 2045, 2046, 2047, La. Civil Code of 1870. Article 2561 is an application of the principles embodied in these codal articles. *Thompson v. Kilcrease*, 14 La. Ann. 340 (1859); *Heirs of Castle v. Floyd*, 38 La. Ann. 583 (1886); *Yeager Milling Co. v. Lawler*, 39 La. Ann. 572, 2 So. 398 (1887); *Watson v. Feibel*, 139 La. 375, 71 So. 585 (1916). At common law the right of

For the exercise of the vendor's privilege on movable property, there is no requirement of recordation,<sup>8</sup> but the privilege may be enforced only so long as the property remains in the possession of the vendee.<sup>9</sup> In the case of a sale of immovable property, the privilege may be enforced to the prejudice of third parties only if the sale has been properly recorded.<sup>10</sup> This is not true of the resolatory condition. Nowhere in the Civil Code can there be found any requirement of recordation of the sale in order that the action of resolution may be enforced with respect to either movable or immovable property. However, it has been held that as to the sale of movables, by analogy to the codal articles relative to the vendor's privilege,<sup>11</sup> the right of resolution for non-payment of the purchase price may be exercised only as long as the property remains in the possession of the original vendee.<sup>12</sup> In sales of immovable property, the resolatory action

resolution for non-payment of the purchase price is not implied and cannot be exercised unless it had been expressly made a condition in the contract. *Watson v. Feibel*, 139 La. at 391, 71 So. at 591; *Benjamin, Sales* (7 Am. ed. 1899) 791; 5 *Williston*, op. cit. supra note 3, §§ 1456, 1458; *Uniform Sales Act*, § 61.

The wisdom of the adoption by Louisiana of the civil law implied resolatory condition in all commutative contracts and of its enforcability without the necessity of recordation has been severely questioned. *Watson v. Feibel*, 139 La. 375, 71 So. 585 (1916); *Troplong, Le Droit Civil Expliqué, de la Vente*, II (5 ed. 1856) 92, n° 620.

8. La. Const. of 1921, Art. XIX, § 19; Art. 3227, La. Civil Code of 1870. Cf. *National Bank of Commerce v. Sullivan*, 117 La. 163, 41 So. 480 (1906).

9. Arts. 3227, 3228, 3230, La. Civil Code of 1870; *Dreyfous v. Cade*, 138 La. 297, 70 So. 231 (1915); *D. H. Holmes Co. v. Morris*, 188 La. 431, 177 So. 417 (1937). However, if the vendor has properly obtained and recorded a chattel mortgage, he may have a judicial seizure and sale of the property in order to be reimbursed the purchase price even though the property has passed from the possession of the immediate vendee into the hands of third persons. See La. Act 198 of 1918, as amended by Acts 81 of 1922, 232 of 1924, 157 of 1928, 166 of 1932, 189 of 1932 [*Dart's Stats.* (1932) §§ 5022-5036.1]; La. Act 67 of 1934 [*Dart's Stats.* (Supp. 1938) § 5036.2]; La. Act 178 of 1936 [*Dart's Stats.* (Supp. 1938) §§ 5023, 5025, 5026]; *Daggett, The Chattel Mortgage in Louisiana* (1938) 16 *Tex. L. Rev.* 162; (1938) 13 *Tulane L. Rev.* 19; (1939) 13 id. 234.

10. La. Const. of 1921, Art. XIX, § 19; Arts. 3271, 3273, 3274, La. Civil Code of 1870; *Perot v. Chambers*, 2 La. Ann. 800 (1847); *Morrison v. Citizens' Bank*, 27 La. Ann. 401 (1875); *State ex rel. Slocomb v. Rogillio*, 30 La. Ann. 833 (1878); *Allen-Wadley Lumber Co. v. Huddleston*, 123 La. 522, 49 So. 160 (1909).

11. Arts. 3227-3230, La. Civil Code of 1870. See note 9, supra.

12. *Lalancé Grosjean Mfg. Co. v. Wolff & Levi*, 28 La. Ann. 942 (1876). See *Johnson v. Bloodworth*, 12 La. Ann. 699, 702 (1857); *Allen, Nugent & Co. v. Buisson*, 35 La. Ann. 108, 109 (1883). Cf. *Daugherty v. Vance*, 30 La. Ann. 1246 (1878); *Morgan v. Tolle*, 168 La. 496, 122 So. 594 (1929). But see *Wilmot & Co. v. Steamer Ouachita Belle*, 32 La. Ann. 607, 612 (1880), in which the rule of the *Lalancé* case is criticized.

has been held to exist independently of recordation of the sale<sup>13</sup> and of the vendor's privilege and mortgage.<sup>14</sup>

The resolatory action has been brought successfully not only against the immediate vendee,<sup>15</sup> but also against a third party into whose possession the property has passed regardless of the good faith of such third persons.<sup>16</sup> However, this right cannot be exercised against a third person who, in good faith, has acquired rights to the property in reliance upon *affirmative* evidence in the public records showing that the entire purchase price had been paid.<sup>17</sup> If the record does not show this affirmatively, all persons are presumed to know that the law authorizes the vendor to exercise the resolatory action even to the prejudice of third parties.

From the foregoing it may be seen that the action of resolution has enjoyed a unique status among the remedies available to the unpaid vendor. In interpreting Article 2561 of the Civil Code prior to 1924,<sup>18</sup> the courts held that to maintain the action of dissolution successfully, a *restitutio in integrum*<sup>19</sup>—a restora-

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13. *Johnson v. Bloodworth*, 12 La. Ann. 699 (1857); *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906 (1901).

14. *Stevenson v. Brown*, 32 La. Ann. 461 (1880). See *Gonsoulin v. Adams & Co.*, 28 La. Ann. 598, 599 (1876).

15. *Templeman v. Pegues*, 24 La. Ann. 537 (1872); *School Directors v. Anderson*, 28 La. Ann. 739 (1876).

16. Such third parties have included: the judgment creditor of the vendee—*Le Bourgeois v. Le Bourgeois*, 23 La. Ann. 757 (1871); *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906 (1901); his mortgage creditor—*Johnson v. Bloodworth*, 12 La. Ann. 699 (1857); *Adler v. Adler*, 126 La. 472, 52 So. 668 (1910); his unsecured creditors—*Torregano v. Segura's Syndic*, 2 Mart. (N.S.) 158 (La. 1824); subsequent purchasers from the vendee—*McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1889); and purchasers at a judicial sale of the vendee's property—*Stevenson v. Brown*, 32 La. Ann. 461 (1880); cf. *Gonsoulin v. Adams & Co.*, 28 La. Ann. 598, 599 (1876). Also remote assuming vendees of the original vendee have been affected by the action of resolution. *Thompson v. Kilcrease*, 14 La. Ann. 340 (1859). Cf. *Landry v. Hawkins*, 156 So. 795 (La. App. 1934), where the vendee's mortgage successfully prevented the enforcement of the right of resolution.

17. *Schwing Lumber & Shingle Co. v. Arkansas Natural Gas Co.*, 166 La. 201, 116 So. 851 (1928), and authorities therein cited.

18. The article then simply read: "If the buyer does not pay the price the seller may sue for the dissolution of the sale."

19. Compliance with the prerequisites necessary to the successful maintenance of the action of resolution is essential in order to effect a voluntary retrocession of property sold in lieu of the judicial dissolution of the sale for non-payment. Otherwise, the transfer by the vendee to his vendor will be considered as a reconveyance. *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665 (1841); *Fulton v. Fulton*, 7 Rob. 73 (La. 1844); *Chretien v. Richardson*, 6 La. Ann. 2 (1851); *Shields v. Lafon*, 7 La. Ann. 135 (1852); *Nash v. Muggah*, 23 La. Ann. 539 (1871); *Payne v. Nowell*, 41 La. Ann. 852, 6 So. 636 (1889); *Liquidators of Prudential Savings & Homestead Soc. v. Langermann*, 156 La. 76, 100 So. 55 (1924); *Ward v. Hayes-Ewell Co.*, 167 La. 884, 120 So. 585 (1929).

tion of matters as though the sale had never taken place—must be accomplished.<sup>20</sup> Thus, it was held that: (1) the parties to the contract of sale and to the action must be the same—from this it followed that the whole claim for the purchase price must be represented or the action would fall, and if more than one person held the right to resolve all must join since there was no provision whereby the dissenting holders could be forced to relinquish their rights in favor of their co-owners;<sup>21</sup> (2) the seller must tender or return the portion of the purchase price paid by the buyer together with interest thereon;<sup>22</sup> (3) the buyer must return the property free of all encumbrances and alienations which he created<sup>23</sup> together with rents and revenues which accrued during his possession, less the cost of necessary improvements;<sup>24</sup> (4) third possessors claiming through the buyer must return rents and revenues which accrued during their possession.<sup>25</sup>

Prior to 1924, the right of resolution granted by Article 2561 was personal to the vendor and, consequently, was not *ipso facto* transferred with the sale of the promissory note which had been given for the purchase price.<sup>26</sup> The right to resolve the sale for non-payment was likewise lost where the purchase money note was transferred for value with the indorsement "without warranty or recourse," and even a subsequent reacquisition of the note by the vendor would not effect a restoration of the resolu-

20. Art. 2045, La. Civil Code of 1870; *Heirs of Castle v. Floyd*, 38 La. Ann. 583 (1886); *McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1889); *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906 (1901); *Bankston v. Owl Bayou Cypress Co.*, 117 La. 1053, 42 So. 500 (1906). Cf. *Frantom v. Rusca*, 182 So. 331 (La. App. 1938).

21. *Augusta Ins. Co. v. Packwood*, 9 La. Ann. 74 (1854); *Swan v. Gayle*, 24 La. Ann. 498 (1872); *Barron v. Jacobs*, 38 La. Ann. 370 (1886); *Heirs of Castle v. Floyd*, 38 La. Ann. 583 (1886). See *Ward v. Hayes-Ewell Co.*, 167 La. 884, 887, 120 So. 585, 586 (1929). Cf. *Leflore v. Carson*, 7 La. Ann. 65 (1852); *Bryant v. Stothart*, 46 La. Ann. 485, 15 So. 76 (1894).

22. *School Directors v. Anderson*, 28 La. Ann. 739 (1876). See *George v. Knox*, 23 La. Ann. 354, 355 (1871). Cf. *Ware v. Berlin*, 43 La. Ann. 534, 9 So. 490 (1891); *Cappel v. Hundley*, 168 La. 15, 121 So. 176 (1929).

23. *Johnson v. Bloodworth*, 12 La. Ann. 699 (1857); *Stevenson v. Brown*, 32 La. Ann. 461 (1880); *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906 (1901); *Adler v. Adler*, 128 La. 472, 52 So. 668 (1910).

24. *School Directors v. Anderson*, 28 La. Ann. 739 (1876); *McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1889); *Ware v. Berlin*, 43 La. Ann. 534, 9 So. 490 (1891); *Cappel v. Hundley*, 168 La. 15, 121 So. 176 (1929).

25. *McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1889). Cf. Art. 2506, La. Civil Code of 1870.

26. *Swan v. Gayle*, 24 La. Ann. 498 (1872); *Heirs of Castle v. Floyd*, 38 La. Ann. 583 (1886); *Hamilton v. State Nat. Bank*, 39 La. Ann. 932, 3 So. 126 (1887). See *People's Bank v. Cage*, 40 La. Ann. 133, 140, 3 So. 721, 722 (1888); *Payne v. Nowell*, 41 La. Ann. 852, 855, 6 So. 636, 637 (1889). Contra: *Torregano v. Segura's Syndic*, 2 Mart. (N.S.) 158 (La. 1824); *Citizen's Bank of Louisiana v. Cuny*, 12 Rob. 278 (La. 1845).

tory right since the vendor did not remain liable on the instrument as an indorser.<sup>27</sup> The leading case of *Swan v. Gayle*<sup>28</sup> held that the right to dissolve the sale for non-payment of the price was not an "accessory to the note evidencing the unpaid price" and that, therefore, such right was not transmitted as an incident to the sale of the note.<sup>29</sup> But this case did not pass upon the question of whether or not that right could be assigned. Subsequent cases have indicated, however, that this right was assignable if the transfer of the note were accompanied by a special act of subrogation by the vendor.<sup>30</sup>

The doctrine of *Swan v. Gayle*<sup>31</sup> was extended in *Templeman v. Pegues*<sup>32</sup> to apply to a situation where the vendor sued the vendee to dissolve a sale of land for non-payment of the price after the purchase money notes had prescribed by the lapse of five years.<sup>33</sup> The theory was that the action of resolution was independent of the right to enforce payment of the notes and not being an accessory to them was not affected by their prescription.<sup>34</sup> The action to enforce the resolutive condition was itself held to be prescribed by the lapse of ten years from the date of maturity and default in the payment of the first of several notes given for the purchase price.<sup>35</sup>

27. *People's Bank v. Cage*, 40 La. Ann. 138, 3 So. 721 (1888).

28. 24 La. Ann. 498 (1872).

29. *Id.* at 502.

30. *Hamilton v. State Nat. Bank*, 39 La. Ann. 932, 3 So. 126 (1887). See *Heirs of Castle v. Floyd*, 38 La. Ann. 583, 588 (1886); *People's Bank v. Cage*, 40 La. Ann. 138, 140, 3 So. 721, 722 (1888). In the *Floyd* case, the concurring opinion (at pp. 591-593) presents the very logical argument that the right of resolution should pass with the assignment of the purchase money note without any special act of subrogation by the vendor. As to the principles announced by the jurisprudence prior to 1924, the statement made by a recent writer that "this right to dissolve is personal and non-transferable" appears to be too broad. See *Monroe, The Implied Resolutive Condition for Non-Performance of a Contract* (1938) 12 *Tulane L. Rev.* 376, 390.

31. 24 La. Ann. 498 (1872).

32. 24 La. Ann. 537 (1872).

33. Art. 3540, La. Civil Code of 1870.

34. *In accord: School Directors v. Anderson*, 28 La. Ann. 739 (1876).

35. The jurisprudence has consistently held that the action to dissolve the sale accrues at the moment the buyer is in default of payment of the purchase price; and regardless of whether it be payable in a lump sum at a future date or by installments, the ten year prescriptive period commences from the date of default in a payment. *George v. Lewis*, 11 La. Ann. 654 (1856); *Thompson v. Kilcrease*, 14 La. Ann. 340 (1859); *George v. Knox*, 23 La. Ann. 354 (1871); *Gonsoulin v. Adams & Co.*, 28 La. Ann. 598 (1876); *Latour v. Latour*, 134 La. 342, 64 So. 133 (1914).

1 Pothier, *Obligations* (Evans translation, 3 ed. 1853) 496, declares: "When a debt is payable at several terms, I see no inconvenience in holding that the time of prescription begins to run from the expiration of the first term, for the part then payable, and for the other parts only from the day of expiration of the respective terms of payment."

The general American rule is that when recovery is sought on a note

In sum, under Article 2561 of the Code prior to its amendment in 1924, three very important rules were formulated by the jurisprudence with reference to the right of resolution of the sale of immovable property for non-payment of the purchase price. (1) If more than one person held the right to dissolve the sale, all had to join as parties plaintiff or the action would fall, and there was no statutory provision whereby dissenting co-owners of this right could be compelled to surrender their interest so that the right could be exercised by the others.<sup>36</sup> (2) The transferee of promissory notes representing the purchase price could not sue to dissolve the sale for non-payment unless by a special act of subrogation the vendor had assigned this right in addition to the right to enforce payment.<sup>37</sup> (3) The action of resolution survived the prescription of the purchase money notes—"the credit evidencing the price"—by five years.<sup>38</sup> The last two rules were both based upon the assumption that the right of dissolution was not an accessory of the credit representing the price.

In 1924, the Legislature amended and re-enacted Article 2561 of the Civil Code by adding the following:

"This right of dissolution shall be an accessory of the credit representing the price, and if it be held by more than one person all must join in the demand for dissolution; but if any

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or other obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it. Note (1933) 82 A.L.R. 316, 325. Cf. *George v. Knox*, supra, at 355, where Wyly, J., dissents on the ground that prescription should run against the resolutive action in a like manner, and consequently that the action is prescribed only where ten years have elapsed from the date of maturity and default in the payment of the last installment of the series. But in *Edwards v. White*, 34 La. Ann. 989 (1882), and *Pike v. Charlotte*, 39 La. Ann. 300, 1 So. 895 (1887), it was held that the action of dissolution accrues at the time of the non-payment of such installments as come within the prescriptive period, if the payment of earlier unpaid installments is expressly remitted and the obligations discharged. For example, if the price be a lump sum payable in several installments, one of which becomes due every year, and the payment of the first is remitted by the vendor, and the second is not paid at maturity, the prescriptive period runs against the action to dissolve from the latter date.

36. *Augusta Ins. Co. v. Packwood*, 9 La. Ann. 74 (1854); *Swan v. Gayle*, 24 La. Ann. 498 (1872); *Barron v. Jacobs*, 38 La. Ann. 370 (1886); *Heirs of Castle v. Floyd*, 38 La. Ann. 583 (1886); *McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1889); *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906 (1901); *Bankston v. Owl Bayou Cypress Co.*, 117 La. 1053, 42 So. 500 (1906).

37. *Swan v. Gayle*, 24 La. Ann. 498 (1872); *Heirs of Castle v. Floyd*, 38 La. Ann. 583 (1886); *Hamilton v. State Nat. Bank*, 39 La. Ann. 932, 3 So. 126 (1887).

38. *Templeman v. Pegues*, 24 La. Ann. 537 (1872); *School Directors v. Anderson*, 28 La. Ann. 739 (1876).

refuse, the others by paying the amount due the parties who refuse shall become subrogated to their rights."<sup>39</sup>

Under the Article as thus amended, it would appear that the right of dissolution was affected as follows: (1) Although the whole claim for the purchase price must still be represented in order to maintain the action successfully, the parties to the contract of sale and to the action need no longer be the same, for if any of the holders of the right of dissolution refuse to join in its exercise the others may become subrogated to their rights by paying the amount due to them and thereafter may proceed to sue.<sup>40</sup> (2) The right of dissolution, being made "an accessory of the credit representing the price,"<sup>41</sup> is an accessory for all possible purposes and is consequently acquired by the purchaser of the note given by the vendee without any special act of subrogation by the vendor. (3) Although the action of dissolution is prescribed by the lapse of ten years, the action now being "an accessory to the credit" is extinguished with the extinction of the buyer's obligation to pay the price—that is, with the prescription of the purchase money note.<sup>42</sup>

The general characteristic of an accessory right<sup>43</sup> is embodied in the maxim *accessorius sequitur principalem* (an accessory follows or depends upon the principal).<sup>44</sup> This feature is embodied

39. La. Act 108 of 1924. There has been no jurisprudence since 1924 which has satisfactorily dealt with all the possible effects of this change in the law. As there is no qualifying or restrictive language indicating otherwise, the statute seems to cover sales of both movables and immovables.

40. The items of payment covered by the "amount due to the parties who refuse" would appear to include the *pro rata* share of the dissenting co-owners in the unpaid portion of the purchase price together with such share of the rents and revenues which must be returned. Otherwise the requirements of the *restitutio in integrum* would not be fulfilled.

41. The cases of *Torregano v. Segura's Syndic*, 2 Mart. (N.S.) 158 (La. 1824), and *Citizen's Bank of Louisiana v. Cuny*, 12 Rob. 278 (La. 1845), announcing this principle, appear to have been re-established, while the previously leading case of *Swan v. Gayle* together with its jurisprudence appears to have been overturned by the 1924 amendment. Cf. *Haas v. Haas*, 182 La. 337, 162 So. 5 (1935).

42. The last two views are not in accord with opinions expressed in a recent law review article. However, the effect of La. Act 108 of 1924 upon the right of resolution does not appear to have been considered. See *Monroe*, *supra* note 30.

43. An accessory right or obligation has been defined as "something which may aid to enforce the principal obligation." *Swan v. Gayle*, 24 La. Ann. 498, 503 (1872). The Civil Code definition is in Article 1771, La. Civil Code of 1870: "An accessory contract is made for assuring the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgage and pledge."

44. Art. 2645, La. Civil Code of 1870 states: "The sale or transfer of a *credit* includes everything which is an accessory to the same; as suretyship, privileges and mortgages." (Italics supplied.)

in the Code and in the jurisprudence with regard to mortgages,<sup>45</sup> privileges<sup>46</sup> and other security devices,<sup>47</sup> each of which is transferred with the assignment of the principal obligation to which it is by nature attached. It is only reasonable to conclude that the Legislature intended the word to have the same meaning here.

Perhaps the most far reaching effect of the 1924 Act which made the resolutive right "an accessory of the credit" was to make the right coexistent with the purchase money note. The extinction of the latter by prescription or otherwise would necessarily entail the extinction of the former. If a purchase money note has prescribed,<sup>48</sup> no legal rights may be predicted thereon.<sup>49</sup> With the prescription of the note, the legal obligation of the buyer ceases to exist, for all that remains is a natural obligation to pay the price for which the law does not provide a remedy.<sup>50</sup> Even independently of statute, it seems more in accord with legal principles that the vendor should not be granted the right of dissolution in this situation, for to do so would not discharge the only

45. Arts. 2645, 3278, 3284, 3285, 3411, La. Civil Code of 1870; *Blood v. Volers*, 6 La. Ann. 784 (1851); *Oakey & Hawkins v. The Sheriff*, 13 La. Ann. 273 (1858); *Frost v. McLeod*, 19 La. Ann. 80 (1867); *L. H. Gardner & Co. v. Maxwell*, 27 La. Ann. 561 (1875); *Perkins v. Gumbel*, 49 La. Ann. 653, 21 So. 743 (1897); *Gaines v. Bonnabel*, 168 La. 262, 121 So. 764 (1929).

The right to foreclose a mortgage, being but an accessory right, is effectually extinguished by the extinction of the debt upon which it is founded, whether the mode of extinction was by payment, prescription or otherwise. *Succession of Virgin*, 18 La. Ann. 42 (1866); *Morano v. Shaw*, 23 La. Ann. 379 (1871); *Rhys v. Moody*, 163 La. 1039, 113 So. 367 (1927) (extinction by payment); *McDaniel v. Lalanne*, 23 La. Ann. 661 (1876) (extinction by prescription). This is so even though the act creating the vendor's privilege and mortgage has been timely reinscribed. Art. 3369, La. Civil Code of 1870; *State ex rel. Landry v. Broussard*, 177 So. 403 (La. App. 1937) (extinction by prescription of the note).

46. Arts. 2645, 3186, 3227, 3249, 3277(3), La. Civil Code of 1870; *Auguste v. Renard*, 3 Rob. 389 (La. 1843); *Jeckell v. Fried*, 18 La. Ann. 192 (1866). See *Succession of Forstall*, 39 La. Ann. 1052, 1057, 3 So. 277, 278 (1887). Cf. *State ex rel. Landry v. Broussard*, 177 So. 403, 404 (La. App. 1937).

47. Arts. 3035, 3059, La. Civil Code of 1870. 1 Pothier, *op. cit. supra* note 35, at 306: "It results from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety; it being of the nature of an accessory obligation, that it cannot exist without its principal; therefore, whenever the principal is discharged, in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise. . . ."

48. Art. 3540, La. Civil Code of 1870, treats of this prescriptive period.

49. Arts. 3457, 3459, 3528, La. Civil Code of 1870. 1 Pothier, *op. cit. supra* note 35, at 327, declares: "It is the nature . . . of all accessory obligations that the extinction of the principal obligation induces that of the accessory. . . ."

50. Arts. 1757(2), 1758(3), La. Civil Code of 1870.

legal obligation which the buyer, in the absence of a contrary agreement, is under a duty to perform.<sup>51</sup>

When the right of dissolution exists independently of recordation and is not an accessory of the credit, it constitutes a secret lien which can be enforced even against third parties who acquire the property in reliance upon clear public records.<sup>52</sup> This contradiction of settled public policy was eliminated in France by a law of 1855.<sup>53</sup> Louisiana has not yet taken care of this situation completely; however, the hardships of the situation have been considerably alleviated by the 1924 Act, as herein discussed.<sup>54</sup>

### CONCLUSION

In summary, the most reasonable and logical conclusions to be drawn from Act 108 of 1924, amending and re-enacting Article 2561 of the Civil Code, appear to be as follows:

1. The right of resolution of the sale for non-payment of the purchase price is now open to one or more holders of the right to whom the vendee is legally obligated to pay the price.

51. Cf. Arts. 2439, 2549, La. Civil Code of 1870.

52. The rigidity and detail with which the Code requires the recordation of acts of sale and all other instruments affecting immovable property to be effective against third parties should be the most convincing proof that third parties are to be protected in the absence of recordation. Public sentiment against unrecorded encumbrances upon immovables has found expression both in the Civil Code and in every state constitution since 1868. See Arts. 2246-2270, 3271, 3273, 3274, 3342-3370, La. Civil Code of 1870; and La. Const. of 1868, Art. 123; La. Const. of 1879, Arts. 176, 177; La. Consts. of 1898 and 1913, Arts. 186-187; La. Const. of 1921, Art. XIX, § 19. The constitutional provisions may be found in Long, *Constitutions of the State of Louisiana* (1930) 553-555.

53. *Loi sur la transcription en matière hypothécaire*, 23 mars 1855, 1 Codes et Lois pour la France, l'Algérie et les Colonies (20 ed. Colin 1925) 400, *Petite Collection Dalloz, Code Civil* (1938) 844, under Art. 2203: "Art. 7. L'action résolutoire établie par l'article 1654 du Code Napoléon ne peut être exercée, après l'extinction du privilège du vendeur, au préjudice des tiers qui ont acquis des droits sur l'immeuble du chef de l'acquéreur, et qui se sont conformés aux lois pour les conserver."

"The resolatory action established by Article 1654 of the Code Napoleon cannot be exercised after the extinction of the vendor's privilege to the prejudice of third parties who have acquired rights in the immovable through the vendee, and who have complied with the law to protect them." (Translation supplied.)

A similar law should be enacted in Louisiana.

54. The only result of the suggested interpretation of the statute which might conceivably be considered a hardship is that the vendor or subsequent holders of the purchase notes will be deprived of their right of resolution after the notes have prescribed. Indeed, the right of resolution, as formerly exercised, effectively nullified the operation of our prescription laws. The principles of public policy relative to prescription of the principal right (to demand payment) would seem to apply as well to the accessory right of resolution. In *Templeman v. Pegues*, 24 La. Ann. 537, 539 (1872), on the original hearing Mr. Justice Wyly gives an excellent statement of the public policy underlying the laws of prescription.

2. The right of resolution is an accessory of the purchase money note representing the price so that such right is transferred by the vendor without any other act than the mere assignment of the note to another, and this right ceases to exist after the note has prescribed.

W. T. PEGUES

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## DISTINGUISHING CHARACTERISTICS OF INSURANCE CONTRACTS; HOSPITALIZATION

Courts always have great difficulty in distinguishing contracts of insurance<sup>1</sup> from other contracts containing obligations contingent upon the happening of certain events. Examples of the latter are contracts for the performance of personal services, contracts which provide for contingent incidental benefits, and contracts of warranty and guaranty.<sup>2</sup> This discussion is confined chiefly to the problem involved in those insurance contracts in which the promisor, for a consideration, undertakes to do some act valuable to the insured upon the happening of a specified event. Because of the vital importance to the general public of the recent rapid increase in the number of plans for the distribution of the costs of hospitalization,<sup>3</sup> special consideration will be given to that type of contract.

The problem focuses on the application of the varying defi-

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1. The decisions involving the question of whether a company is transacting the business of insurance arise principally under the state regulatory acts, the question being presented in diverse ways: *Hunt v. Public Mut. Benefit Foundation*, 94 F. (2d) 749 (C.C.A. 3rd, 1938) (injunction sought by company); *South Georgia Funeral Homes v. Harrison*, 184 S.E. 875 (Ga. 1936) (injunction sought by state); *State v. Towle*, 80 Me. 287, 14 Atl. 195 (1888) (action for penalty); *Fikes v. State*, 87 Miss. 251, 39 So. 783 (1906) (prosecution of agent); *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N.E. 567 (1905) (mandamus by company); *State v. Western Auto Supply Co.*, 134 Ohio St. 163, 16 N.E. (2d) 256 (1933) (quo warranto). However, the action may be a private one: *Sisters of the Third Order of St. Francis v. Guillaume*, 222 Ill. App. 543 (1921); *Marcus v. Heralds of Liberty*, 241 Pa. 429, 88 Atl. 678 (1913).

2. For a complete discussion of the difficulties in distinguishing between contracts of insurance and other contracts of contingent obligation, see *Vance, Insurance* (2 ed. 1930) 57-65, §§ 23-25.

3. The largest group hospitalization insurance plan in the United States was announced on June 9th by Alfred P. Sloan, Jr., chairman of General Motors Corporation. *Times-Picayune*, June 10, 1939, p. 2, col. 7.