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COMMENTS

BOND FOR DEED CONTRACTS

Louisiana attorneys, over the past several decades, have frequently employed the contractual device known as the "bond for deed" in preparing transactions which ultimately result in the sale of an immovable. This device is defined by statute as follows: "A bond for deed is a contract to sell real property, in which the purchase price is to be paid by the buyer to the seller in installments and in which the seller after payment of a stipulated sum agrees to deliver title to the buyer."¹ This definition contains three key ideas. Unlike the completed sale, which is usually accompanied by a conventional mortgage and the payment of installments to be applied to the purchase price, the bond for deed is a "contract to sell." The meaning of this phrase will be discussed in detail later. Secondly, the seller retains title, or ownership, until a stipulated sum is paid, at which time the seller delivers title to the buyer. Finally, only "real immovable property" can be the object of this type contract. This Comment attempts to show that the conventional employment of the bond for deed often does not conform to its statutory definition. In effect, the contract that is being employed is no more than a conditional sale, which has been condemned consistently but, perhaps, unjustifiably by the jurisprudence.² At the outset, however, a general discussion of the bond for deed and the regulation of its use is appropriate.

Bond for Deed Contracts—General Provisions

Because ownership of the immovable does not pass under a bond for deed until a stipulated amount of the purchase price is paid, this contract serves as a particularly useful security device for the seller. Of necessity, legislation was enacted to protect the purchaser,³ since purchasers are generally not as well informed as sellers nor as qualified to protect themselves against sharp

1. LA. R.S. 9:2941 (1950).

2. Roy O. Martin Lumber Co. v. Sinclair, 220 La. 226, 56 So.2d 240 (1951); Morelock v. Morgan & Bird Gravel Co., 174 La. 658, 141 So. 368 (1931); Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908); Givens v. Southern Farm Bureau Cas. Ins. Co., 197 So.2d 380 (La. App. 2d Cir. 1967); Remington Rand v. Boliew, 131 So.2d 835 (La. App. 2d Cir. 1961).

3. LA. R.S. 9:2941 (1950).

practices.⁴ For example, the prospective seller⁵ must give notice to the prospective buyer forty-five days prior to an action to cancel the contract for default on one of the installments.⁶ It has been held that this forty-five day notice is mandatory.⁷ However, if a mutual agreement to cancel the contract has been made, the seller may not thereafter maintain that the contract is still in force because the mandatory forty-five day notice had not been given, as this legislation was enacted primarily to protect the buyer.⁸ Finally, although the legislation's purpose was to protect the buyer and the notice is mandatory, there is at least one jurisprudential indication that the buyer may tacitly waive the mandatory notice requirement.⁹

Another safeguard for the purchaser is the provision that the vendor may not sell, by bond for deed, immovable property encumbered by a mortgage or privilege without first obtaining from the mortgage or privilege holder(s) a written guarantee to release the property upon payment by the buyer of a stipulated mortgage release price.¹⁰ The clear purpose of this statute

4. Smith, *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Particular Contracts*, 18 LA. L. REV. 43, 46 (1957).

5. He is only a "prospective" seller because he has not yet conveyed the ownership of the property. The same is true for the prospective buyer, who has not yet acquired ownership.

6. LA. R.S. 9:2945 (1950), which reads in part: "If the buyer under a bond for deed contract shall fail to make the payments in accordance with its terms and conditions, the seller, at his option, may have the bond for deed cancelled by proper registry in the conveyance records, provided he has first caused the escrow agent to serve notice upon the buyer, by registered mail at his last known address, that unless payment is made as provided in the bond for deed, within forty-five days from the mailing date of the notice, the bond for deed shall be cancelled. Where there is no mortgage or privilege existing upon the property, and the buyer shall be in default, the seller shall exercise the right of cancellation in the same manner . . ."

7. *Williams v. Dixie Land Co.*, 231 La. 834, 93 So.2d 185 (1956); *Leinhardt v. Marrero Land & Improvement Ass'n*, 137 So.2d 387 (La. App. 4th Cir. 1962).

8. *Farthing v. Neely*, 129 So.2d 224 (La. App. 3d Cir. 1961), opinion on rehearing.

9. *See Hymel v. Old Homestead, Inc.*, 135 So. 2d 685 (La. App. 4th Cir. 1961), where the purchaser maintained that even though he had not paid an installment for twenty-five years, sellers had never put him in default. The court said that the purchaser, by not paying an installment for twenty-five years, had abandoned the contract and the sellers were entitled to consider it as such. It seems the court was either overlooking the fact that the forty-five day notice, or putting in default, is mandatory, or was intimating that there had been an implied mutual rescission of the contract.

10. LA. R.S. 9:2942 (1950) provides: "It shall be unlawful to sell by bond for deed contract, any real property which is encumbered by mortgage or privilege without first obtaining a written guarantee from the mortgage or privilege holders to release the property upon payment by the buyer of a stipulated mortgage release price, with which agreement the secured notes shall be identified. The agreement shall be recorded in the mortgage records

is to safeguard a vendee of mortgaged property from fraud, deceit, and misrepresentation, thus insuring him an unencumbered title.¹¹ However, only substantial compliance with this statute is necessary. For example, a buyer who has agreed to pay the seller and the mortgagee jointly, applying the payments to the mortgage, is estopped from asserting the absolute nullity of his contract on grounds that the seller had not obtained the written guarantee from the bank to release the property upon payment of the mortgage release price.¹² In any event, a seller may suffer criminal penalties by failing to comply substantially with this provision.¹³

In addition to this specific legislation, the courts have played an independent and important role in regulating the bond for deed. Litigation has resulted, for instance, from forfeiture clauses which, if enforced, would enable a seller to retain all the installments previously made as "liquidated damages." The usual text of such a clause is as follows: "Upon payment of all the installments, seller agrees to deliver a warranty deed to buyer. However, upon default in any installment, seller has the option, after giving the requisite notice, to cancel this contract and retain all previously paid installments as liquidated damages."¹⁴ Unfortunately, no statutes governing the bond for deed contract mention the measure of damages to which a prospective vendor is entitled upon cancellation for non-payment of the price.¹⁵ Nevertheless, the courts have generally been adamant in their condemnation

of the parish where the property is situated before any part of the property is offered for sale under bond for deed contracts. The provisions of this Part likewise shall apply to any property offered for sale by bond for deed contract which may be subsequently mortgaged or encumbered by a privilege."

11. *Scott v. Apgar*, 238 La. 29, 113 So.2d 457 (1959).

12. *Id.*

13. LA. R.S. 9:2947 (1950) provides: "Any person who sells by bond for deed contract any real property encumbered by mortgage or privilege without first obtaining and recording the guarantee required by R.S. 9:2942, shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or both.

"Any seller in a bond for deed contract of property encumbered with a mortgage or privilege, who requires promissory notes to represent the purchase price or any portion thereof, shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or both."

14. *See, e.g., Louisiana Delta Farms Co. v. Davis*, 202 La. 445, 12 So.2d 213 (1942); *Ekman v. Vallery*, 185 La. 488, 169 So. 521 (1936); *Heeb v. Codifer & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (1926); *Chauvin v. Theriot*, 180 So. 847 (La. App. 1st Cir. 1938); *Victor v. Lewis*, 157 So. 293 (La. App. Or. Cir. 1934); *Subdivision Realty Co. v. Woulfe*, 135 So. 71 (La. App. Or. Cir. 1931).

15. *See* LA. R.S. 9:2941-47 (1950). *See also* Comment, 33 TUL. L. REV. 180, 194-95 (1958).

of forfeiture clauses, declaring them, without further explanation, to be void *ab initio* as unreasonable, arbitrary, and therefore against public policy.¹⁶ A few decisions have not pronounced the forfeiture clause void *ab initio*, but have required that the amount of payments forfeited bear some reasonable relation to the fair rental value of the property for the time the prospective purchaser occupied the premises.¹⁷ At least one court has indicated that such a clause could be a valid penal clause within the purview of Louisiana Civil Code article 1934(5).¹⁸

It is submitted that the first approach listed above, that such a clause is void *ab initio*, is the correct one. From the seller's viewpoint, the object of a bond for deed contract is payment of money. According to the Civil Code a creditor is entitled *only to interest* as damages due for the delay in the performance of an obligation to pay money.¹⁹ This approach has been followed in several decisions²⁰ and appears to be in accordance with the meaning of the appropriate Civil Code articles.²¹ Since forfeiture clauses entitle the vendor to much more than interest on the sum due, they should be void *ab initio*. Moreover, it is submitted that forfeiture clauses should be void *ab initio* even when the amount to be forfeited approximately equals the amount which would have to be paid as interest. The intention behind the forfeiture clause is not to approximate the interest which might be due but to penalize the purchaser. In other words, these clauses are actually indicative of stipulated or "agreed upon" damages, which are unrelated, except by coincidence, to interest on the sum due. The only damages to which the prospective seller is entitled in bond for deed contracts for nonpayment of the price are interest.²²

16. *Scott v. Apgar*, 238 La. 29, 113 So.2d 457 (1959); *Ekman v. Vallery*, 185 La. 488, 169 So. 521 (1936); *Heeb v. Codifer & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (1926); *Farthing v. Neely*, 129 So.2d 224 (La. App. 3d Cir. 1961); *Subdivision Realty Co. v. Woulfe*, 135 So. 71 (La. App. Orl. Cir. 1931).

17. *Louisiana Delta Farms Co. v. Davis*, 202 La. 445, 12 So.2d 213 (1942); *Pruyn v. Gay*, 159 La. 981, 106 So. 536 (1925).

18. *Cointment v. Segrest*, 184 So. 360 (La. App. 1st Cir. 1938).

19. LA. CIV. CODE art. 1935 reads: "The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to those damages without proving any loss, and whatever loss he may have suffered he can recover no more."

20. *Heeb v. Codifer & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (1926); *Chauvin v. Theriot*, 180 So. 847 (La. App. 1st Cir. 1938); *Claude Neon Fed. Co. v. Angell*, 153 So. 581 (La. App. 2d Cir. 1934).

21. LA. CIV. CODE arts. 1935-38, 1944.

22. *Id.* art. 1935.

Although damages for nonpayment of money are interest on the sum due, when the prospective seller sues to *cancel* the bond for deed contract, rather than to collect the price, it would be inequitable to refuse him compensation for the period of time during which the prospective purchaser has occupied the premises. The legal status of the prospective purchaser is important here, since this status is helpful in properly computing damages. One court has compared the prospective purchaser to a tenant or lessee, subject to being ejected like the tenant who has breached his lease or whose lease has expired.²³ Another court has likened the prospective purchaser to a bona fide possessor of land.²⁴ Actually, the prospective purchaser fits neatly into neither category. Unlike the lessee, he looks forward to ownership of the property; unlike the bona fide possessor, he does not possess as owner. Although the prospective purchaser is not a lessee, it is submitted that this is the most appropriate legal status for purposes of categorizing him. Except for events which may, or may not, take place in the future, the position held by the prospective purchaser is very similar to the position held by the lessee in that he is neither an owner nor one who possesses as owner. Therefore, unlike a bona fide possessor, a prospective purchaser should not be entitled to the fruits and revenues of the land, although one court has indicated that he is.²⁵ In any event, upon cancellation of the contract by the seller because of default in payment by the buyer, the courts have consistently held that the seller is entitled to the fair rental value for the period during which the purchaser has occupied the premises,²⁶ plus any actual loss beyond reasonable wear and tear occasioned by the buyer's occupancy.²⁷ The buyer, when the seller cancels, is entitled to a return of the installment, insurance premiums, taxes which he had contractually agreed to pay,²⁸ and the cost

23. *Brown v. Weldon*, 199 So. 620 (La. App. 1st Cir. 1941).

24. *Heeb v. Codifer & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (1926).

25. *Bandel v. Sabine Lumber Co.*, 194 La. 31, 193 So. 359 (1940), where the court held that a prospective purchaser was entitled to damages when the prospective seller executed a mineral lease on the property before the time that the act of sale was to be passed. *But see* Note, 2 LA. L. REV. 749 (1940), where the author criticizes the theoretical basis upon which the *Bandel* court allowed damages.

26. *Scott v. Apgar*, 238 La. 29, 113 So.2d 457 (1959); *Pruyn v. Gay*, 159 La. 981, 106 So. 536 (1925); *Farthing v. Neely*, 129 So.2d 224 (La. App. 3d Cir. 1961).

27. *Farthing v. Neely*, 129 So.2d 224 (La. App. 3d Cir. 1961).

28. *Ekman v. Vallery*, 185 La. 488, 169 So. 521 (1936).

of any improvements placed on the property with the seller's express or implied consent.²⁹

When the seller breaches the contract by refusing to pass the act of sale to which the purchaser is entitled after paying the requisite amount of installments, the buyer is entitled to specific performance and damages.³⁰ If the seller has previously sold the property to a third party, the prospective purchaser can recover from the seller the reasonable value of the property less an amount representing the balance due on the purchase price.³¹ It would also appear that if the prospective purchaser's bond for deed contract were recorded before the sale to the third party, he could prevail against the third party purchaser by bringing a possessory action, if in possession, or a petitory action, if out of possession, once the required number of installments were paid.³²

As to the appropriate prescriptive period for an action to cancel the bond for deed contract for nonpayment of the price, the jurisprudence is inconsistent and confusing. It is well settled that an action to cancel *a sale* for nonpayment of the price is prescribed by the ten year period running against personal actions found in Louisiana Civil Code article 3544.³³ This prescriptive

29. *Id.*; *Heeb v. Codifer & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (1926). In *Heeb* the court stated the prospective purchaser is entitled to the improvements within the purview of Civil Code article 508 whereby a bona fide purchaser is entitled to reimbursement from the true owner. It appears that such reasoning is conceptually erroneous since the prospective purchaser does not possess the property as owner. It seems more correct to allow reimbursement in such a case on the theory that to do otherwise would result in an unjust enrichment to the seller. Thus the seller should compensate for the improvements.

30. *Bandel v. Sabine Lumber Co.*, 194 La. 31, 193 So. 359 (1940). See also Note, 2 LA. L. REV. 749 (1940).

31. *Dozier & Williams v. Dixie Land Co.*, 231 La. 834, 93 So.2d 185 (1956).

32. See LA. CODE CIV. P. arts. 3651, 3655-56. Assuming the prospective purchaser is not in possession, he must wait until he has paid the required number of installments before he can bring the petitory action. This is because he is not yet owner, or entitled to ownership, until the stipulated amount of installments is paid.

If the prospective purchaser is in possession, there is certainly doubt as to whether he is entitled to bring the possessory action before he obtains the ownership by paying the installments. If he is treated as a lessee, then he is clearly not entitled to the benefit of a possessory action under the provisions of LA. CODE CIV. P. 3656, since he does not possess for himself. On the other hand, if he is treated as a bona fide possessor, then he is entitled to use the possessory action. It is submitted that for purposes of uniformity, the courts should follow the analogy to the lessee, although admittedly the analogy is imperfect in one major respect. The prospective purchaser is looking forward to ultimate ownership, whereas the lessee is not.

33. See *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 17 So.2d 264 (1944); *Louisiana Truck & Orange Land Co. v. Page*, 199 La. 1, 5 So.2d 365 (1941).

period is applicable even when the action may result in the recovery of immovable property,³⁴ since this action is considered personal.³⁵ However, the supreme court, without discussion, has indicated that the action to cancel a bond for deed contract for nonpayment of the price is not governed by the ten year prescription. The court distinguished bond for deed contracts on the basis that these are contracts to sell, and not contracts of sale.³⁶ Prior to that decision, an appellate court had indicated that the ten-year prescriptive period was applicable. However, in this latter case the appellate court held that the prospective purchaser would not benefit by such a plea, since he had no title and was in possession only by virtue of the very contract which he was claiming had prescribed.³⁷ In other words, since defendant's rights in the property rested solely on the contract, he would be obliterating those rights by claiming the contract had prescribed.

Both of these positions appear untenable. The contract to sell is obviously a contract, and it is not specifically provided for in any of the other prescription articles. Using the identical reasoning which the courts have so consistently employed for the contract of sale, the action to enforce the resolutive condition for nonpayment of the purchase price is a personal action prescribed in ten years under Civil Code article 3544.³⁸ Also, the prospective purchaser should not defeat his purposes by making such a plea. The purchaser is not claiming that all the actions under the contract have prescribed. He is only claiming that *one action* under the contract has prescribed—the action to enforce the resolutive condition for nonpayment of price. Indeed, “the action to enforce the resolutive condition is an action *to enforce a part . . . of a contract*. It is not an action to annul or to rescind a contract, which may be based only on some vice existing *ab initio* in the contract.”³⁹

34. Normally actions to recover immovable property are denominated as real actions and are prescribed by the thirty-year liberative prescription under LA. CIV. CODE art. 3548.

35. *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 17 So.2d 264 (1944).

36. *Louisiana Delta Farms Co. v. Davis*, 202 La. 445, 12 So.2d 213 (1942).

37. *Southwestern Improvement Co. v. Whittington*, 193 So. 483 (La. App. 1st Cir. 1940).

38. LA. CIV. CODE art. 3544 reads: “In general, all personal actions, except those before enumerated, are prescribed by ten years.”

39. *R. E. E. DeMontluzin Co. v. New Orleans & N. E. R.R.*, 166 La. 822, 828, 118 So. 33, 35 (1928). In short, the prospective purchaser has much to gain by the plea of prescription running against the prospective vendor's action to enforce the resolutive condition for nonpayment. If the vendor can find no other way to cancel, the prospective purchaser can sue for specific performance.

The Bond for Deed and Conditional Sales

As intimated earlier, the everyday use of the bond for deed contract does not conform to its statutory definition of a "contract to sell."⁴⁰ On the contrary, the purpose of this section is to demonstrate that the bond for deed contract, as generally utilized by Louisiana attorneys, is no more than a *conditional sale*—a legal conception consistently condemned as "impossible" by the Louisiana jurisprudence since the landmark *Barber Asphalt* decision in 1908.⁴¹

In order to support authoritatively the above contention, a necessary first step is to distinguish the true contract to sell from the conditional sale. The supreme court, in *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*,⁴² defined the conditional sale as one in which ownership of the thing sold is prevented from passing to the purchaser until the price is paid. In other words, it is a sale subject to the suspensive condition of the price being paid, at which time ownership is passed to the purchaser. Thus far, the definition of a conditional sale is very similar to that of a contract to sell, which also has been defined as a contract in which ownership does not pass to the purchaser until payment of the price.⁴³ It is, however, the period between the making of the initial contract and the payment of the price wherein lies the difference. During the interim period, the purchaser is either entitled or not entitled to possession of the property. It is submitted that where the purchaser is entitled to possession of the property, the parties have usually contemplated that an actual sale has taken place, subject to the suspensive condition that ownership will not pass until the price is paid.⁴⁴ Where the purchaser is not entitled to immediate possession, a true contract to sell exists whereby the parties are only looking forward to a *contract of sale* on some

40. See LA. R.S. 9:2941 (1950).

41. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908).

42. *Id.*

43. *Williams v. Bowie Lumber Co.*, 214 La. 750, 38 So.2d 729 (1948); *Peck v. Bemiss*, 10 La. Ann. 159, 162-63 (1885). See also *Comments*, 4 LA. L. REV. 634 (1942), 26 TUL. L. REV. 498 (1952).

44. See Cruz, *The Validity of the Conditional Sale in Civil Law*, 4 TUL. L. REV. 530, 537 (1930), where the author states: "The sale subject to a suspensive condition supposes that the sale does not exist until the condition occurs, and in the conditional sale the effects of a sale are obtained without the condition of the payment of the price having been fulfilled by the vendee; nevertheless, he obtains the possession and use of the thing sold as soon as he enters the contract and only leaves the acquisition of the title subject to the condition." (Emphasis added.)

specified date in the future. For example, suppose the parties executed the following agreement:

"I, Seller, agree to sell my house to buyer for \$20,000 two weeks from date of this agreement.

"I, Buyer, agree to buy Seller's house for \$20,000 two weeks from date."

At the time of this agreement, it is clear that ownership did not pass. On the contrary, the parties intended to execute a written contract of sale two weeks from date. Since the parties did not intend a sale at the time of the initial agreement, the purchaser has no right to possession during the interim period.

An example of the conditional sale is as follows:

"I, Seller, hereby sell my house to Buyer for \$20,000, subject to the condition that ownership shall not pass to Buyer until the price is paid.

"I, Buyer, accept Seller's offer and condition stated."

In this case the parties intended to make a sale. Since a usual concomitant of any sale is the transfer of possession, the purchaser is entitled to possession of the above house. The purchaser is not yet entitled to the ownership, since this part of the sale is subject to the suspensive condition of paying the price.

Commentators in other jurisdictions have noted the distinction between the two types of real estate conveyances, the contract to sell being denominated as a mere marketing device and the conditional sale as the true security device. In Iowa, a commentator stated:

"The Iowa law governing contracts for the sale of land encompasses two distinct types of conveyancing instruments. A "marketing" or "binder" contract ordinarily provides for payment of the full purchase price and delivery of a deed within a relatively short time. This type of contract is thus used to implement an immediate transfer of all the vendor's interest in the land, and the vendor usually remains in possession until the transaction has been completed. The installment contract, on the other hand, is a long term conveyancing device designed to give the purchaser immediate possession and enjoyment of the land while extending his payment of the purchase price over a period of years. . . ."45

45. Note, 46 IOWA L. REV. 786 (1961).

Similarly, a California commentator concluded that two primary land conveyancing devices exist. The marketing instrument, or contract to sell, is characterized by deposit receipts, earnest money, or mutual escrow instructions. This is not intended to be an agreement whereby title is reserved as security. The second device is the installment land contract or contract for deed—an “agreement under which the seller retains title primarily as security for the price as opposed to the initial phase of an otherwise financed purchase.”⁴⁶

As previously mentioned, the bond for deed contract is defined by statute as a contract to sell. The purchaser should thus not be entitled to possession of the property. Yet in every Louisiana decision this writer has read on the subject, the parties ostensibly executing a bond for deed actually *intended* to make a conditional sale, a sale inherently accompanied with the security device of retention of ownership until the price is paid. Furthermore, there was never an issue pertaining to the purchaser's right to immediate possession. In short, the conditional sale has been persistently utilized in Louisiana to convey immovable property under the guise of bond for deed contracts.

Astute counsel in at least two Louisiana decisions have recognized that the bond for deed in their cases were not contracts to sell but actually conditional sales. In *St. Landry Loan Co., Inc. v. Etienne*⁴⁷ counsel contended the bond for deed contract under review was actually a conditional sale, a transfer unknown to the law of Louisiana. The court agreed that conditional sales are unknown in Louisiana with respect to movables, but submitted that they are permissible with regard to immovables. The reason for allowing the latter, according to that court, was that a sale of immovable property, unlike movable property, is not complete until there is “a deed translative of title, since verbal sales or parol evidence cannot in Louisiana prove title to realty.” In accord is an earlier supreme court decision, *Trichel v. Home Insurance Co.*,⁴⁸ in which the court elucidated: “But with real estate the case is different; neither consent, nor delivery, nor payment of the price suffice to transfer the ownership; there

46. Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 n.2 (1960). See also Note, 9 U.C.L.A. L. REV. 453 (1962), where throughout the article the author refers to the land installment contract (bond for deed) as a conditional sale.

47. *St. Landry Loan Co. v. Etienne*, 227 So.2d 599 (La. App. 3d Cir. 1969).

48. *Trichel v. Home Ins. Co.*, 155 La. 459, 99 So. 403 (1924).

must be a deed translative of the title."⁴⁹ Following this theory, since ownership of immovable property does not pass until execution of a deed translative of title, the parties are free to stipulate as to the moment they will execute such a deed and thus pass ownership.

It is submitted that the reason presented for differentiating immovables from movables is devoid of merit⁵⁰ under both the Louisiana Civil Code and the Louisiana jurisprudence, other than those decisions cited above. In the first place, Civil Code article 2440 provides, in part, that a sale of an immovable may be made and consummated under a private writing.⁵¹ When not confronted with a bond for deed, the courts have often recognized this principle and have held that a deed translative of title is not required to pass ownership.⁵² Furthermore, Civil Code article 2275 provides that even verbal sales are capable of passing the ownership of immovable property provided certain conditions are met.⁵³ Since a deed translative of title is not required for the sale of movables or immovables, its presence or absence should not serve as a basis for distinguishing the application of the prohibition against conditional sales.

Having concluded that the bond for deed contract, as used in practice, is no more than a conditional sale, having demonstrated that our jurisprudence has presented no sound justification

49. *Id.* at 462, 99 So. at 404.

50. Other writers have also questioned the distinction between movable and immovable property. See Cruz, *The Validity of the Conditional Sale in Civil Law*, 4 TUL. L. REV. 530, 573 (1930); Comment, 33 TUL. L. REV. 180, 195 n.114 (1958).

51. LA. CIV. CODE art. 2440 reads: "All sales of immovable property shall be made by authentic act or under private signatures.

"Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

52. *LeBlanc v. Watson*, 13 F.2d 76, 77 (5th Cir. 1926), where the court in discussing *Trichel* and *Pruyn* held: "A deed is merely the evidence of ownership, and we do not understand that the Supreme Court of Louisiana meant to say that, where property has been bought and paid for under a binding contract, nothing short of a deed will make the purchaser owner." *Accord*, *Kinchen v. Redmond*, 156 La. 418, 100 So. 607 (1924); *Teal v. McKnight*, 110 La. 256, 24 So. 434 (1903). See also *Noto v. Blasco*, 198 So. 429 (La. App. 1st Cir. 1940), which indicates the same.

53. LA. CIV. CODE art. 2275 reads: "Every transfer of immovable property must be in writing; but if a verbal sale, or other disposition of such property be made, it shall be good against the vendor, as well as against the vendee, who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property thus sold." See also *Larido v. Perkins*, 132 La. 660, 61 So. 728 (1913), where the court deals with a verbal sale of an immovable and admits its validity if the conditions of Civil Code article 2275 are met.

for distinguishing movables and immovables in this context, two conclusions could logically follow. Either the courts have unjustifiably permitted conditional sales of immovables or have unjustifiably denied conditional sales of movables. It is suggested that the latter conclusion is the correct one, primarily because there is no legal basis for not recognizing conditional sales of movables. As alluded to earlier, *Barber Asphalt*⁵⁴ was the first decision to pronounce the conditional sale of a movable as "impossible" under the Civil Code. In that case a seller claimed the ownership of a steam shovel, alleging that he had sold same to buyer with the stipulation that ownership of the property would remain in the petitioner until final payment. Stripped of unnecessary verbiage, the agreement was structured similar to the following:

"Seller agrees to deliver possession of the steamshovel to Buyer; however, title shall not pass until the full purchase price is paid."

The court stated that the seller's purpose was obvious—by retaining ownership he was better able to secure payment of the price. However, the court held that ownership of the steamshovel had passed at the moment of the agreement, not upon payment of the price, because where there is consent as to object and price the sale immediately follows whether or not the parties intend otherwise.⁵⁵

The most potent argument against such a position is a mere recitation of the first paragraph of Civil Code article 2471: "A sale, made with a suspensive condition, does not transfer the property to the buyer, until the fulfillment of the condition. . . ." The import of this article is clear—there may be consent as to the object and price, and the parties are still free to agree that the ownership shall not be transferred until a certain suspensive

54. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1903).

55. The court based this argument on the provisions of LA. CIV. CODE art. 2456: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid." As article 2456 does not distinguish movables and immovables, the same argument used by the *Barber Asphalt* court could be used to direct that an immediate sale of an immovable occurs under the same circumstances. It is this writer's position that article 2456 does not require the passing of immediate ownership in connection with the sale of either type of property, if the parties clearly intended otherwise.

condition is fulfilled. The parties are free to determine all "accidental" elements according to their convenience,⁵⁶ and a stipulation to the effect that ownership will not be transferred until the price is paid is such an element. Of course, the ultimate transfer of ownership is an essential element of any sale; but *the time at which* the ownership will pass is not.

Other arguments by the *Barber Asphalt* court against conditional sales were advanced. First, the court stated that "there cannot be a price until there is a sale. . . . It is the sale which creates the price; the existence of the sale is a condition precedent to there being a price."⁵⁷ Second, the court disliked the fact that the buyer was unconditionally bound to pay the price, but the seller was not bound to do anything until the price was paid. It appears that each of these arguments is unsound. As to the court's conclusion that there cannot be a price until there is a sale—that it is the sale which creates the price—it is clear that the reverse of this statement is true. Civil Code article 2439 states, in essence, that the price is one of the things which perfects the sale,⁵⁸ and not vice-versa. As to the argument that the seller,

56. See LA. CIV. CODE art. 1764, which provides: "All things that are not forbidden by law, may legally become the subject of, or the motive for contracts; but different agreements are governed by different rules, adapted to the nature of each contract, to distinguish which it is necessary in every contract to consider:

"1. That which is the essence of the contract, for the want whereof there is either no contract at all, or a contract of another description. Thus a price is essential to the contract of sale; if there be none, it is either no contract, or if the consideration be other property, it is an exchange.

"2. Things which, although not essential to the contract, yet are implied from the nature of such an agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect.

"3. Accidental stipulations, which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties. The term given for the payment of a loan, the place at which it is to be paid, and the nature of the rent payable on a lease, are examples of accidental stipulations.

"What belongs to the essence and to the nature of each particular description of contract, is determined by the law defining such contracts; accidental stipulations depend on the will of the parties, regulated by the general rules applying to all contracts." See also Cruz, *The Validity of the Conditional Sale in Civil Law*, 4 TUL. L. REV. 530, 573 (1930).

57. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 166, 46 So. 193, 198 (1908).

58. LA. CIV. CODE art. 2439 provides: "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.

"Three circumstances concur to the perfection of the contract, to wit: the thing sold, the price and the consent."

unlike the buyer, would not be bound to do anything until the price is paid, it seems that the seller is bound before he passes the ownership to the buyer. Of course, no examples appear in the jurisprudence where the court held the seller of a movable in a conditional sale bound before ownership was passed to the buyer, since the courts have condemned such sales before this secondary issue could arise. However, having concluded that, as used in practice, the bond for deed contract is merely a conditional sale, authority for the proposition that a seller is bound even before title is passed may be found by studying this contract. An appellate court held the seller must retain title to the property so that he can pass it to the buyer upon payment of the price.⁵⁹ Likewise, the supreme court held a vendor under a bond for deed liable when he sold the property to a third person prior to the time he was to have passed the ownership to the purchaser.⁶⁰

Conclusion

At the outset of this Comment it was stated the bond for deed contract has enjoyed frequent use by Louisiana attorneys over the past several decades. In retrospect, this writer concludes this statement must be qualified since the *true* bond for deed is statutorily defined as a *contract to sell*, and the bond for deed actually employed is merely a conditional sale. The judiciary has generally overlooked this fact, or, when confronted with the issue that the transaction was a conditional sale, responded by distinguishing conditional sales of movables and immovables. Hopefully it has been demonstrated that there is no foundation for such a distinction. Therefore, either the conditional sales of both movables and immovables should be condemned or upheld. It is submitted the latter solution is the preferable one since it was incorrect to outlaw the conditional sales of movables in the first place. Hence it is urged that the judiciary uphold conditional sales of both movables and immovables, not only for theoretical correctness, but for the very practical purpose of uniformity.

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59. *Middleton v. Natal*, 121 So. 681 (La. App. Orl. Cir. 1928).

60. *Williams v. Dixie Land Co.*, 231 La. 834, 93 So.2d 185 (1956).