

## Louisiana Law Review

---

Volume 78 | Number 4  
*Spring 2018*

---

# Bond for Deed in Louisiana: 99 Problems but Being a Sale Ain't One

Endya L. Hash

---

### Repository Citation

Endya L. Hash, *Bond for Deed in Louisiana: 99 Problems but Being a Sale Ain't One*, 78 La. L. Rev. (2018)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol78/iss4/13>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Bond for Deed in Louisiana: 99 Problems but Being a Sale Ain't One

## TABLE OF CONTENTS

Introduction .....	1290
I. The Birth of the Modern Bond for Deed Contract .....	1295
A. Jurisprudence .....	1296
B. Legislation .....	1301
C. Study and Failed Reform .....	1304
II. What Are We Getting Ourselves into?: How Parties Use Bond for Deed Contracts.....	1306
A. Methodology .....	1306
B. Secrets Revealed.....	1307
1. Risk of Loss and Repairs.....	1307
2. Rights of the Purchaser as to Third Parties .....	1308
C. Conclusions.....	1310
III. How to Fix the Bond for Deed Problem.....	1311
A. <i>Barber Asphalt's</i> Blunders: Possibility of Conditional Sales in the Civil Code.....	1312
1. Not a Sale .....	1312
2. Not a Sale Subject to a Modality.....	1315
3. Existence of Price.....	1316
4. Bond for Deed Exception.....	1317
B. To Codify or Not to Codify? .....	1318
C. Sales Solutions.....	1321
1. Sales Law .....	1321
a. Delivery .....	1321
b. Redhibition .....	1323
c. Eviction.....	1325
2. Solutions Particular to Bonds for Deed.....	1326
Conclusion.....	1330
Appendix A: Form Contracts .....	1331
Form A .....	1331
Form B .....	1332
Appendix B: Survey of Contracts .....	1339

## INTRODUCTION

In 2009, Robin Murray executed a rent-to-own agreement, formally called a bond for deed contract, for Ingrid Leverett's house.<sup>1</sup> Under the agreement, Murray would make monthly payments toward the purchase price, and after completion of the payments, Leverett would transfer title of the home.<sup>2</sup> Sometime before May 2011, Murray fell late on payments; as a result, Leverett cancelled the contract, evicted Murray's family, and filed criminal charges against Murray for stealing the stove, microwave, and dishwasher.<sup>3</sup> Murray claimed that she owned the appliances, which had stopped functioning, purchased new appliances before her wrongful eviction, and was waiting for the new appliances to be installed.<sup>4</sup> Leverett countered that Murray had taken the appliances in retaliation for the eviction.<sup>5</sup> Media reports of the trial arguments demonstrate confusion among the parties and their attorneys regarding each party's respective rights and duties under a bond for deed contract.<sup>6</sup>

Bond for deed contracts can result in situations like Murray's because Louisiana law lacks solutions for potential disputes associated with these contracts.<sup>7</sup> For example, if all of the appliances in Leverett's home were broken, the statutes and jurisprudence governing bond for deed contracts would not provide a clear answer as to who would bear the responsibility of replacing the appliances or whether Murray had the right to replace the appliances merely because she desired different ones.<sup>8</sup> As a result of the

---

Copyright 2018, by ENDYA L. HASH.

1. Paul Purpura, *New Orleans woman convicted of trying to steal appliances from former landlord*, NOLA, [http://www.nola.com/crime/index.ssf/2011/11/robin\\_murray\\_convicted\\_of\\_atte.html](http://www.nola.com/crime/index.ssf/2011/11/robin_murray_convicted_of_atte.html) (last updated Nov. 10, 2011, 6:22 AM) [<https://perma.cc/9FM7-FPEJ>]. This method of financing commonly occurs when the purchaser cannot obtain a mortgage. Vanessa Richardson, *Rent to own homes: When it's not time to buy*, BANKRATE (Sept. 26, 2016, 1:30 PM) (on file with author).

2. Purpura, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See, e.g.,* Berthelot v. Le Inv., L.L.C., 866 So. 2d 877, 881 (La. Ct. App. 2004) (providing an example of a court struggling to determine the applicable law); Lyons v. Pitts, 923 So. 2d 962, 965–66 (La. Ct. App. 2006).

8. *Compare* Keyes v. Brown, 158 So. 3d 927, 934 (La. Ct. App. 2015) (suggesting that sellers protect their security interests by requiring purchasers to maintain repairs), and Montz v. Theard, 818 So. 2d 181, 191 (La. Ct. App. 2002) (suggesting that normal maintenance expenses are the responsibility of the purchaser), *with* Regua v. Saucier, 129 So. 3d 798, 801 (La. Ct. App. 2013) (awarding reimbursement for cost of repairs

deficient law, Murray spent six months in jail.<sup>9</sup> Although these agreements can confuse laypersons, and even attorneys, people continually choose bond for deed contracts to finance a home when traditional financing options are not available.<sup>10</sup>

Most notably, the bursting of the housing bubble in 2008<sup>11</sup> caused a banking panic that affected America's entire financial system and increased the perceived credit risk throughout the country, causing difficulty for homebuyers like Murray who are attempting to obtain financing.<sup>12</sup> The crash of the housing market also affected homeowners in record-breaking ways; foreclosure filings in 2008 were up by 81%,<sup>13</sup> and in 2009, 2.8 million properties received foreclosure notices.<sup>14</sup> Damaged personal credit impacted previous homeowners' abilities to obtain financing, and the increase in

---

to purchaser as a matter of equity). Neither the Bond for Deed Act nor the relevant Civil Code articles illustrate these rights. *See* LA. REV. STAT. §§ 2941–49 (2018); LA. CIV. CODE ANN. arts. 2623–24 (2018).

9. Purpura, *supra* note 1.

10. *See Bond for Deed*, ESCROW SERVS., INC., <http://www.escroerv.com/bond-for-deed.html> (last visited Feb. 14, 2018) [<https://perma.cc/Q7KC-BLY8>].

11. On December 1, 2008, the National Bureau of Economic Research announced that the economy had entered into a recession in December 2007. Jeff Holt, *A Summary of the Primary Causes of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper*, 8 J. BUS. INQUIRY 120 (2009). Numerous commentators have weighed in on the cause of the recession, but many agree that the main cause likely was the quality of subprime loans that had deteriorated for six consecutive years before the crisis. *Id.* Other factors leading to the housing bubble and credit crisis include low short-term interest rates policy of the federal government, increased leveraging by investment banks, and increased debt-to-income ratios for households. *Id.* at 121. The problems could have been detected long before the crisis, but they were masked by rapidly rising home prices. *Id.* at 120.

12. *Id.* at 120, 127–28. Credit risk refers to the risk that a borrower may not repay a loan. *See id.* After the housing bubble burst, lenders were concerned about the ability of homes to retain value, which may affect the ability of owners to repay their loans. *See id.* When major lenders perceive a high credit risk, they are less likely to lend. *See id.*

13. Les Christie, *Foreclosures up a record 81% in 2008*, CNNMONEY (Jan. 15, 2009), [http://money.cnn.com/2009/01/15/real\\_estate/millions\\_in\\_foreclosure/](http://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/) [<https://perma.cc/U4LR-EK6F>].

14. Daren Blomquist, *A Record 2.8 Million Properties Receive Foreclosure Notices in 2009*, TAKE2REALESTATE, <http://www.take2realestate.com/Record+2.8+million+properties+receive+foreclosure+notices+in+2009> (last visited Feb. 14, 2018) [<https://perma.cc/9UUT-SHNW>]. Some homeowners, who purchased their homes without making any initial payments immediately before the downturn of the housing market, simply walked away from homes after prices plummeted. Holt, *supra* note 11, at 127.

foreclosures led to a greater supply of houses on the market, further decreasing home values.<sup>15</sup> This crash in the housing market led to the worst economic crisis in the United States since the Great Depression.<sup>16</sup> Other effects of the housing crisis, such as greater impoverishment among the middle class, are still affecting Americans trying to finance homes.<sup>17</sup> As a result of the issues created by the housing crisis, many prospective homebuyers today lack sufficient resources and the requisite creditworthiness to purchase a home through the traditional mortgage system.<sup>18</sup>

Though the negative effects of the housing crisis made the prospect of home ownership seem impossible to some, willing buyers and sellers continue to find solutions to financing barriers.<sup>19</sup> The increasingly popular bond for deed contract acts as one such solution.<sup>20</sup> In a bond for deed contract, the buyer pays monthly installments to the seller until the purchase price is satisfied, at which time the seller transfers title to the buyer.<sup>21</sup> Many Louisianans view these contracts as an alternative to a conventional mortgage.<sup>22</sup> In a conventional mortgage situation, the buyer borrows money to pay the price of the property upfront.<sup>23</sup> The buyer then begins to make payments on her loan.<sup>24</sup> The loan is secured by a mortgage on the property, which grants the mortgagee the right to repossess the property if the buyer stops making payments on the loan.<sup>25</sup> Similarly, in a bond for deed situation, the sale is financed by the seller, who retains title to the real estate as a form of security to allow a repossession of the home in the event that the buyer stops paying the installments.<sup>26</sup> The two contracts, however, are fundamentally different under Louisiana law.<sup>27</sup>

---

15. Holt, *supra* note 11, at 120, 127–28.

16. *Id.* at 127.

17. Tim Begany, *5 Consequences Of The Mortgage Crisis*, INVESTOPEDIA (Nov. 25, 2010), <http://www.investopedia.com/financial-edge/1110/5-consequences-of-the-mortgage-crisis.aspx> [<https://perma.cc/GVY3-SMKV>].

18. Holt, *supra* note 11, at 120, 127–28.

19. Richardson, *supra* note 1; *see also* ESCROW SERVS., INC., *supra* note 10.

20. ESCROW SERVS., INC., *supra* note 10.

21. Richardson, *supra* note 1.

22. *See 'Bond for Deed' – A Type of Owner Finance*, ST. TAMMANY REAL EST. INFO., <https://sttammanyrealestate.info/2011/04/25/bond-for-deed/> (last visited Feb. 14, 2018) [hereinafter ST. TAMMANY REAL EST. INFO.] [<https://perma.cc/4LTY-ZS2F>].

23. *See* DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES § 4:16, *in* 24 LOUISIANA CIVIL LAW TREATISE 150–51 (2012).

24. *See id.*

25. *See id.*

26. *See* ST. TAMMANY REAL EST. INFO., *supra* note 22.

27. *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16.

In Louisiana, specific statutes, jurisprudence, and the Louisiana Civil Code (“Code”) regulate bond for deed contracts.<sup>28</sup> Years ago, Louisiana courts struggled with importing the bond for deed doctrine, which originated in the common law, concluding that a sale conditioned on payment of a price would be contrary to established civilian principles of the law of sales.<sup>29</sup> Transplanting the conditional sale<sup>30</sup> from common law jurisdictions to the mixed jurisdiction of Louisiana has caused uncertainty as to how bond for deed contracts should be classified—as a sale, contract to sell, lease, or something else.<sup>31</sup> As a result, the bond for deed contract received *sui generis* treatment by a special statutory regime, leaving buyers and sellers largely unprotected and outside the strict regulations of either a sale or a lease.<sup>32</sup> Current law explicitly removes bond for deed contracts from the legislation pertaining to sales; therefore, the requirements of the seller’s obligation to deliver,<sup>33</sup> warranty against

---

28. LA. REV. STAT. §§ 9:2941–49 (2018); *see* TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16.

29. Huey L. Golden, *The Conditional Sale in Louisiana Jurisprudence: Anatomy of a Synecdoche*, 54 LA. L. REV. 359, 359–60 (1993).

30. A bond for deed contract is a conditional sale of an immovable. *Id.*

31. *See id.*

32. LA. REV. STAT. §§ 9:2941–49; *see, e.g.*, Barber Asphalt Paving Co. v. St. Louis Cypress Co., 46 So. 193, 199 (La. 1908) (establishing the rule that a conditional sale is impossible under Louisiana law).

33. In a typical sale of a home, the seller has the obligation to deliver the property upon execution of the writing that transfers its ownership. LA. CIV. CODE ANN. art. 2477 (2018). At the moment of delivery, the buyer is entitled to immediate corporeal possession; therefore, in a typical sale of a home the buyer can force the seller to move out of the property at the time of closing. *Id.*; *see also, e.g.*, Matthews v. Gaubler, 49 So. 2d 774 (La. Ct. App. 1951).

redhibitory defects,<sup>34</sup> or warranty against eviction<sup>35</sup> do not apply to bond for deed contracts.<sup>36</sup>

Because many bond for deed contracts are created with the assistance of real estate and escrow agents and without the assistance of an attorney, the legal community lacks data on how parties rely on these contracts in day-to-day transactions.<sup>37</sup> Additionally, because legal scholars have never extensively studied the use of these contracts in Louisiana, even they struggle to discern the practical, as opposed to theoretical, issues with these contracts.<sup>38</sup> A study of jurisprudence illustrates the breakdown of contractual relationships that result in protracted litigation, but a study of the existence and substance of the contracts outside of litigation is essential to understanding bond for deed practice. One way to understand what issues the law inadequately addresses is to examine the actual contracts in the public records and determine the common usage and intent of the parties. This Comment undertakes such an examination to reveal what the agreements contain and argues that conditional sales are not adverse to civilian principles. Rather, a bond for deed contract is a valid sale that can be fully regulated with the addition of a few articles to the Civil Code.

Part I of this Comment provides an overview of conditional sales in Louisiana law and describes how parties use bond for deed contracts today. Part II analyzes research collected on registered bond for deed contracts in East Baton Rouge Parish to discern the true intent of parties entering bond for deed contracts and identify whether the existing statutory regime adequately protects parties. Part III argues that treatment of a bond for deed

---

34. In a typical sale of a home, the seller has the obligation to warrant against redhibitory defects in the property, which are hidden defects that exist in the property at the time of delivery that render the property “useless, . . . its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect[, or] . . . without rendering the thing totally useless, [the defect] diminishes its usefulness or its value.” LA. CIV. CODE ANN. arts. 2520–21, 2530. Depending on the redhibitory defect, the buyer can have the sale rescinded or have the price reduced. *Id.* art. 2541.

35. In a typical sale of a home, the seller has the obligation to warrant against the buyer’s eviction, which is any loss or danger of losing the property. *Id.* art. 2500. Therefore, if a third person reveals a right that is superior to the buyer’s right to the property, the buyer can withhold the price or rescind the sale. *Id.* arts. 2557, 2560.

36. *See* LA. REV. STAT. §§ 9:2941–49; *see* Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 520 (5th Cir. 1981) (holding that redhibitory actions are only available when the underlying transaction is a sale).

37. *See* Meeting of the Council for the Louisiana State Law Institute (Oct. 29, 1993) (on file with the Louisiana State Law Institute).

38. *Id.* For example, scholars are unaware of the rate at which these contracts result in an actual transfer of ownership or merely a default and cancellation. *Id.*

contract as a sale protects the parties, clarifies applicable law, and gives effect to the true nature of this contract. The modern bond for deed contract in Louisiana can become a legitimate means of financing on which buyers, sellers, and mortgagees can rely.

### I. THE BIRTH OF THE MODERN BOND FOR DEED CONTRACT

Modern bond for deed contracts stem from the common law concept of a conditional sale or a sale in which the seller reserves title until the performance of a condition.<sup>39</sup> Although Louisiana originally rejected the conditional sale, courts ultimately came to understand the conditional sale's utility and carved out methods of enforcing these contracts in the context of real estate transactions.<sup>40</sup> Unfortunately, the resulting legal regime leaves practitioners with little guidance regarding the effects of modern bond for deed contracts.

In both the common and civil law systems, a contract forms the law of the parties, so the main objective of contract interpretation is to determine the parties' intent.<sup>41</sup> With this objective, common law courts interpret conditional sales to have the same effects as absolute sales in every respect except one: the seller reserves title until the performance of a condition, usually payment of the price.<sup>42</sup> Therefore, common law courts always have

---

39. TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16.

40. Barber Asphalt Paving Co. v. St. Louis Cypress Co., 46 So. 193, 199 (La. 1908) (holding that conditional sales are impossible under the Civil Code); Trichel v. Home Ins. Co., 99 So. 403, 404 (La. 1924) (holding that conditional sales are only impossible when selling movables).

41. RESTATEMENT (SECOND) OF CONTRACTS § 200 (AM. LAW INST. 1981); LA. CIV. CODE ANN. art. 2045 (2018); Chi. Mill & Lumber Co. v. Lewis, 68 So. 2d 913, 917 (La. Ct. App. 1953); Brun-Chaix, Inc., v. Abadie, 14 Teiss. 89, 91 (La. Ct. App. 1916); Kennedy v. Saheid, 209 So. 3d 985, 991 (La. Ct. App. 2016); Gaspard v. Safeway Ins. Co., 202 So. 3d 1128, 1132 (La. Ct. App. 2016); Green *ex rel.* Peterson v. Johnson, 149 So. 3d 766, 770 (La. 2014); Gorman v. City of Opelousas, 148 So. 3d 888, 892 (La. 2014).

42. *In re* Robinson, 40 F. Supp. 320, 323 (E.D. Penn. 1941), *aff'd*, 122 F.2d 336 (3d Cir. 1941); Cownie v. Local Bd. of Review in and for Des Moines, 16 N.W.2d 592 (Iowa 1944). This agreement effectively creates something similar to a traditional mortgage in the common law because there is a purchaser paying monthly installments and upon the purchaser's default the person to whom the installments are being paid will own and repossess the home. There are, however, many reasons why parties across the United States may choose these conditional sales arrangements over traditional mortgages, such as default rules regarding rights, tax schemes, and regulatory rules regarding recordation. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 3.3 cmt. a (AM. LAW INST. 1997); *see* Goodrich v. Nat'l Guarantee &



recognized these sales and continue to hold the parties' intent above all else.<sup>43</sup>

As in the common law, Louisiana contracts form the law of the parties, and intent is paramount.<sup>44</sup> Unlike the common law, however, the Louisiana Civil Code controls Louisiana contract interpretation, and the intention of the parties cannot contradict certain imperative rules provided by the Code.<sup>45</sup> Louisiana courts continue to hold that conditional sales cannot be reconciled with the Civil Code provisions on sales, and the parties' intentions cannot override the basic tenet that a bond for deed contract is not a sale in Louisiana.<sup>46</sup> Despite negative court treatment, parties continue to create bond for deed agreements.<sup>47</sup> After the courts attempted to address the contracts through jurisprudence alone, the Louisiana Legislature ("Legislature") intervened.<sup>48</sup>

#### A. Jurisprudence

In early jurisprudence, the Louisiana Supreme Court enforced conditional sales according to the parties' intent without hesitation.<sup>49</sup> In *Baldwin v. Young*, the Court held that a conditional sale in which the purchaser had not paid the price was enforceable according to the parties' intent, meaning that the seller could reclaim the thing sold.<sup>50</sup> In *Baldwin*, the seller sold a heater, and the purchaser installed the heater into a seminary.<sup>51</sup> The mortgagee of the building in which the heater was installed eventually foreclosed on the property and sold the land and buildings at a sheriff's sale.<sup>52</sup> The seller of the heater then

---

Fin. Co., 36 N.E.2d 435 (Ohio Ct. App. 1940); Joseph E. Tierney, Jr., *Security—Conditional Sale—Distinction Between Mortgage and Conditional Sale*, 24 MARQ. L. REV. 224, 225 (1940).

43. See, e.g., *Stroup v. Myers*, 21 N.E.2d 75 (Ind. App. 1939).

44. LA. CIV. CODE ANN. art. 2045; *Chi. Mill & Lumber Co.*, 68 So. 2d at 917; *Brun-Chaix, Inc.*, 14 Teiss. at 91; *Kennedy*, 209 So. 3d at 991; *Gaspard*, 202 So. 3d at 1132; *Green*, 149 So. 3d at 770; *Gorman*, 148 So. 3d at 892.

45. Art. 2045.

46. See, e.g., *Hewitt v. Safeway Ins. Co.*, 787 So. 2d 1182, 1190 (La. Ct. App. 2001) (Saunders, J., dissenting) (citing *Sec. Ctr. Prot. Servs., Inc. v. All-Pro Sec., Inc.*, 703 So. 2d 806 (La. Ct. App. 1997)); *Guste v. Hibernia Nat'l Bank*, 655 So. 2d 724, 732 (La. Ct. App. 1995); *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 634 So. 2d 466, 489–90 (La. Ct. App. 1994).

47. See TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16.

48. See *id.*

49. See *Baldwin v. Young*, 17 So. 883 (La. 1895).

50. *Id.* at 883.

51. *Id.*

52. *Id.*

sought to enjoin the new owner of the building and reclaim the heater.<sup>53</sup> The Court found that the heater was sold to the building's previous owner under a contract whereby ownership of the heater remained with the seller until the purchaser paid the price.<sup>54</sup> Thus, when the former building owner failed to pay, the ownership of the thing remained with the seller and did not transfer to the mortgage creditor under foreclosure.<sup>55</sup> The Court then stated that "there is no controversy on the issue of . . . ownership of the heater. It belongs to the vendor under his conditional sale."<sup>56</sup> The 1895 *Baldwin* Court recognized a conditional sale of a movable as possible and stated that ownership remained with the seller until the price was paid.<sup>57</sup>

Thirteen years after the decision in *Baldwin*, the Court held that conditional sales were impossible under the Civil Code in *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*<sup>58</sup> In this case, the parties contracted for the conditional sale of a steam shovel, according to which the buyer would pay for the shovel over time and, after paying in full, the seller would convey title.<sup>59</sup> The Court found that conditional sales are "impossible" under Louisiana's civil law for three reasons: (1) transfer of ownership is requisite to a sale; (2) a sale cannot be subject to a suspensive condition of payment; and (3) sales require that the price exists.<sup>60</sup> First, the Court found that an immediate transfer of ownership was necessary in order for a sale to have the mutuality of obligations necessary in any onerous contract.<sup>61</sup> The Court found that requiring one obligor to perform payment of the price while the other obligor did not need to perform the transfer of ownership created an inherently unfair contract that could not be enforced.<sup>62</sup> According to the Court, although payment of the price can be delayed in any sale, transfer of ownership cannot be delayed.<sup>63</sup> Second, the Court found that this contract could not be considered as having a suspensive condition of payment because a true suspensive condition

---

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 884.

57. *Id.*

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

59. *Id.* at 193.

60. *Id.* at 199. This Comment argues in Part III that this interpretation of the Civil Code is inaccurate.

61. *Id.*

62. *Id.*

63. *Id.* ("In a case like the present, the owner either parts with ownership, i.e., makes a sale; or he promises to part with it upon payment of the price, i.e., makes a promise of sale.").

suspends the existence of the contract.<sup>64</sup> In this case, both parties conceded that they intended for a contract to exist before the occurrence of the condition; therefore, this occurrence was certainly not a suspensive condition to the sale.<sup>65</sup> Third, the Court found that the price must exist to effect a sale, and a sale in which the price does not yet exist cannot possibly be enforced.<sup>66</sup>

Using this rationale, the Court determined that ownership of the steam shovel passed to the buyer at the time of formation of the contract.<sup>67</sup> Therefore, the contract was enforceable but not according to the intent of the parties, namely that the transfer of ownership be delayed.<sup>68</sup> The result of this holding is that Barber Asphalt Paving Co. had not stated a cause of action and the trial court properly dismissed the case.<sup>69</sup> Although the subject of intense scholarly criticism,<sup>70</sup> the holding regarding the impossibility of a conditional sale in the Code indisputably is the law.<sup>71</sup> The object of the contract in *Barber Asphalt* was a movable thing,<sup>72</sup> and the Court was not sympathetic to Barber Asphalt Paving Co.'s loss of ownership of the movable.<sup>73</sup> The Court, however, had a difficult time dismissing the action when faced with a contract regarding immovable property.<sup>74</sup>

In *Trichel v. Home Insurance Co.*, the Court determined that the prohibition on conditional sales does not apply to immovable property, but

---

64. *Id.* (“[T]he sale cannot have been under a suspensive condition; since a sale of that kind has no effect or operation, and the present sale had an effect or operation . . .”).

65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.*

69. *Id.*

70. *See* Golden, *supra* note 29; TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16; SAÚL LITVINOFF, OBLIGATIONS, BOOK 2 § 65, in 7 LOUISIANA CIVIL LAW TREATISE 96 (2012); F. Hodge O’Neal, *The Conditional Sale in Louisiana*, 2 LA. L. REV. 338, 339 (1940).

71. *See* *Trichel v. Home Ins. Co.*, 99 So. 403, 404 (La. 1924) (allowing these contracts to act as contracts to sell when the object is the sale of an immovable). Although these contracts are incompatible with the Civil Code, the legislative response has been to enact the Louisiana Lease of Movable Act, which allows movables to be leased to own and gives effect to contracts that would have been classified as impossible conditional sales before the legislation. *See* LA. REV. STAT. §§ 9:3301–42 (2018).

72. Generally, tracts of land, with their buildings, are immovables, and all other things are movables. LA. CIV. CODE ANN. arts. 462, 474 (2018).

73. *See Barber Asphalt*, 46 So. 193.

74. *Trichel*, 99 So. at 404. Generally, tracts of land, with their buildings, are immovables. LA. CIV. CODE ANN. arts. 462, 474.

the contract itself could not result in a change of title or interest in the property.<sup>75</sup> In *Trichel*, the parties effectively created a conditional sale of a home but fashioned their agreement as a contract to sell, which grants a right to specific performance.<sup>76</sup> Before the act of sale was completed, a fire destroyed the house, and the seller's insurance company refused to cover the incident because the seller's policy contained a clause providing that the entire policy "shall be void . . . if the interest of the insured be other than unconditional and sole ownership . . . or if any change . . . take place in the interest, title or possession of the subject of insurance."<sup>77</sup> The company argued that the conditional sale had constituted a change of title or interest that would trigger this policy provision.<sup>78</sup> The Court found that the contract had not operated as a change of title or interest because the contract was merely a contract to sell, not a deed translative of title.<sup>79</sup>

The Court recognized the existence of the *Barber Asphalt* bar to conditional sales but provided a unique method of circumventing this prohibition in the context of immovable property.<sup>80</sup> The Court first distinguished a sale of movable property from a sale of immovable property by noting that movable property can be sold by mere consent, whereas immovable property can be sold only by a deed translative of title.<sup>81</sup> Thus, because the parties intended to create a deed translative of title in a subsequent contract, the Court found that the contract was not a sale of immovable property but was a contract to sell.<sup>82</sup> Using this distinction, the Court found that a promise to sell immovable property did not constitute a completed sale; instead, a promise granted a right to specific performance

---

75. *Trichel*, 99 So. at 404.

76. *Id.* at 403. As a preliminary matter, the difference between contracts to sell and contracts of sale must be clear. Contracts of sale constitute a sale within themselves, and all of the effects of a sale, such as transfer of ownership and payment of the price, will follow. LA. CIV. CODE ANN. art. 2439. In contracts to sell, the parties are agreeing to enter into a sale later. LA. CIV. CODE ANN. art. 2623. Usually the subsequent contract of sale will be conditioned on uncertain events. Art. 2623. The most common contract to sell is a purchase agreement when buying a house. These agreements contemplate that parties will enter into an official contract of sale upon the conditions that purchasers secure financing and inspect the home, among others. The effects of a sale do not flow from a contract to sell, but if the conditions are met, a contract to sell forces the parties to enter into a contract of sale at a later date. Art. 2623.

77. *Trichel*, 99 So. at 403.

78. *Id.* at 404.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

of a sale.<sup>83</sup> Because no title transferred, ownership did not change hands, and the insurance policy was not void.<sup>84</sup> Once again, the Court found the contract enforceable but not according to the intent of the parties, which was to have a sale in which transfer of ownership was delayed.<sup>85</sup> Like *Barber Asphalt, Trichel* is also susceptible to severe criticism.<sup>86</sup>

After *Trichel*, one of the biggest problems courts faced was the nature of the right obtained by the purchaser in a bond for deed contract, if any. The Louisiana Supreme Court established in *Levine v. First National Bank of Commerce* that a purchaser in a bond for deed arrangement obtains an interest in the property.<sup>87</sup> In *Levine*, the seller had mortgaged the property, and the mortgage continued to exist after the execution of the bond for deed contract with the purchaser.<sup>88</sup> The seller's mortgage contained a "due-on-sale" clause, stating, "If . . . the Property or any interest in it is sold or transferred . . . without [mortgagee]'s prior written consent, [mortgagee] may . . . require immediate payment in full of all sums secured by this Security Instrument."<sup>89</sup> The Court had to determine whether the bond for deed contract, which lacked approval by the mortgagee, triggered the due-on-sale clause in the seller's mortgage.<sup>90</sup> The Court held that the conveyance of rights in the bond for deed contract sufficiently triggered the due-on-sale clause of the mortgage.<sup>91</sup> The Court interpreted the bond for deed's designation as a contract to sell as granting the purchaser the right to demand specific performance, namely, the transfer of the title upon the conclusion of the term of the parties' contract and the right of immediate and exclusive possession of the property.<sup>92</sup> Because the

---

83. *Id.* In other words, a contract to sell does not result in the transfer of property; the contract instead results in the legal right to demand the other party complete the sale at a later time. LA. CIV. CODE ANN. art. 2623 (2018); *Stumpf v. Richardson*, 748 So. 2d 1225 (La. Ct. App. 1999); *Thompson v. Thompson*, 30 So. 2d 321 (La. 1947).

84. *Trichel*, 99 So. at 405.

85. *See id.*

86. Scholars often note that the Civil Code allows for the sale of immovables by consent—without a written document—when the immovable is actually delivered and the transferor recognizes the transfer. LA. CIV. CODE ANN. art. 1839. Therefore, the distinction drawn by the Court is not accurate. *See TOOLEY-KNOBLETT & GRUNING, supra* note 23, § 4:22, at 193–95; *Golden, supra* note 29, at 359; *LITVINOFF, supra* note 70, § 65; *O'Neal, supra* note 70, at 359.

87. *Levine v. First Nat'l Bank of Commerce*, 948 So. 2d 1051, 1059 (La. 2006).

88. *Id.*

89. *Id.* at 1058.

90. *Id.* at 1054. The *Levine* Court also considered questions of federal law, but these questions are outside the scope of this Comment. *Id.*

91. *Id.*

92. *Id.* at 1058–59, 1059 n.8.

language of the contract did not require the Court to determine whether a real right in the property was transferred, the Court specifically avoided addressing the issue, and the law on that point remains uncertain.<sup>93</sup> Therefore, although the Court answered a few questions related to the enforcement and validity of these contracts, the Court left many other questions regarding the nature of the contract unanswered.

Construing a bond for deed agreement as a contract to sell gives the contract effect without overruling *Barber Asphalt* or classifying the contract as a sale.<sup>94</sup> Nevertheless, the Court did not address any other effects of the contract beyond the right to specific performance.<sup>95</sup> This recognition of bond for deed contracts left the legal community uncertain regarding the rights and obligations of the parties, such as the seller's obligation to deliver, warrant against redhibitory defects, and warrant against eviction.<sup>96</sup>

### *B. Legislation*

Recognizing the need for clarification, the Louisiana Legislature passed the Bond for Deed Act in 1934 to recognize and regulate conditional sales of immovables.<sup>97</sup> Although the statute successfully regulated some areas surrounding the bond for deed, the statute failed to resolve many issues facing the parties to bond for deed contracts and, in fact, created several additional problems.<sup>98</sup> The Act defines a bond for deed contract as “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.”<sup>99</sup> Civilian scholars continuously critique the Bond for Deed Act's inaccurate designation of the contract as a “contract to sell.”<sup>100</sup> This

---

93. *See id.* at 1058–59.

94. *Trichel v. Home Ins. Co.*, 99 So. 403 (La. 1924).

95. *See id.*

96. *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16, at 160.

97. The Legislature listed the following central objectives of the Act: (1) regulate the execution of agreements; (2) regulate agreements on mortgaged property; (3) require parties to provide payments to an escrow agent regulating the foreclosure of mortgages; (4) allow for cancellation for non-performance; and (5) define a bond for deed contract. Act No. 169, 1934 La. Acts 544–45.

98. *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16, at 160.

99. LA. REV. STAT. § 9:2941 (2018).

100. *See, e.g.*, David Levingston, *Bond for Deed Contract*, 31 LA. L. REV. 587 (1971); TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16, at 160; O'Neal, *supra* note 70, at 339. The bond for deed contract is not properly classified as a contract to sell because the contract requires the parties to fulfill the obligations

provision codifies the holding in *Trichel* and continues to restrict these contracts without clearly establishing the seller's obligation to deliver, warrant against redhibitory defects, or warrant against eviction. Civil law jurisdictions outside of Louisiana have classified this contract as a sale,<sup>101</sup> and Louisiana's statutory designation undermines the intent of the parties and neglects more appropriate civilian interpretations.<sup>102</sup> Although the distinction may seem semantic, whether the contract is considered a sale—as opposed to a contract to sell—seriously affects the rights of the parties.<sup>103</sup> The frequency at which parties participate in sales transactions without the assistance of an attorney forces sales law to provide a comprehensive suppletive law, which discerns the rights and obligations of parties when they neglect to include a provision in their contract.<sup>104</sup> Because these contracts are classified as contracts to sell, suppletive sales law cannot apply and parties are protected only by articles on conventional obligations and “[o]bligations in [g]eneral.”<sup>105</sup>

The Act also attempts to regulate how bond for deed contracts operate when a mortgage encumbers the property.<sup>106</sup> The Louisiana Legislature provides provisions that help buyers avoid eviction by mortgagees by following certain statutory safeguards, such as designation of an escrow agent to assure the buyer properly forwards payments to the mortgagee.<sup>107</sup> The adequacy of these protections is questionable because courts have not always required strict adherence to the specifications set forth in the Act.<sup>108</sup>

The Bond for Deed Act also purports to protect buyers from issues created by the uncertainty regarding the nature of their rights in the

---

contained in the contract of sale, namely to pay the price of the thing and deliver the thing. *See* LA. CIV. CODE ANN. arts. 2439, 2475, 2549, 2623, 2624 (2018). The *Trichel* Court's characterization of these contracts as contracts to sell was a mere artifice designed to allow the court to uphold the contract and not a theoretically sound interpretation of the Civil Code. *See* O'Neal, *supra* note 70, at 339.

101. Germany, France, Italy, Spain, and Cuba all classify these contracts as sales. Agustin Cruz, *The Validity of the Conditional Sale in Civil Law*, 4 TUL. L. REV. 531, 565–69 (Deutsche O'Neal trans., 1930).

102. *Id.*; *see also* O'Neal, *supra* note 70, at 339.

103. *See, e.g.*, *Trichel v. Home Ins. Co.*, 99 So. 403, 405 (La. 1924) (determining ownership affected whether insurance covered the burning of the home); *St. Landry Loan Co. v. Etienne*, 227 So. 2d 599, 599–600 (La. Ct. App. 1969) (determining status as sale affected whether home was subject to mortgage foreclosure).

104. *See* Hoffman F. Fuller, *Certainty of Promise in the Law of Sale*, 30 TUL. L. REV. 568, 574 (1956).

105. *See* LA. CIV. CODE ANN. arts. 2438–39.

106. LA. REV. STAT. §§ 9:2941–47.

107. TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:23, at 196.

108. *Id.*

property. Whether a bond for deed contract grants a real right in the property greatly affects the purchaser's rights with respect to third parties.<sup>109</sup> A real right is a right that is enforceable against the world, as opposed to a personal right that is only good against a particular party.<sup>110</sup> Currently, the law hints at the creation of a real right by a bond for deed contract, but there is no official affirmation.<sup>111</sup> The Louisiana Legislature amended the Bond for Deed Act in 2006 to provide a purchaser in a bond for deed contract the same protection under the public records doctrine that an actual sale confers to a buyer.<sup>112</sup> The statute provides, "Upon the recordation . . . of a bond for deed contract . . . any sale, contract, counterletter, lease, or mortgage executed by the bond for deed seller, and any lien, privilege, or judgment . . . that has not been filed previously for registry . . . shall be subject to the rights created by the bond for deed contract."<sup>113</sup> Typically, rules of recordation apply to real rights in immovable property.<sup>114</sup> There still is no explicit establishment of a real right in a bond for deed contract, and providing the benefits of recordation does not establish a real right.<sup>115</sup>

Moreover, the Bond for Deed Act of 1934 has remained largely ignored by the Louisiana Legislature since its enactment almost 83 years ago.<sup>116</sup> The few minor amendments to the Act made during that interim have failed to address the major issues regarding the rights and obligations of parties involved in bond for deed contracts.<sup>117</sup> The provisions only address certain issues related to mortgages that are rarely enforced and fail

---

109. See Edward C. Abell, Jr., *Real Right in Louisiana*, 21 LA. L. REV. 462 (1961).

110. *Id.* at 462–63.

111. See LA. REV. STAT. § 9:2941.1.

112. See Act No. 582, 2006 La. Acts 2168; TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:24; § 9:2941.1.

113. § 9:2941.1(A) (2006).

114. See, e.g., LA. CIV. CODE ANN. art. 1839 (2018) ("An instrument involving immovable property shall have effect against third persons only from the time it is filed for registry.").

115. See, e.g., LA. REV. STAT. § 9:2941–49 (2018); Meeting of the Council for the Louisiana State Law Institute, at 4 (Dec. 17, 1993) (on file with the Louisiana State Law Institute).

116. In 1999, the cancellation provision was altered to allow for service of notice of cancellation upon the buyer by certified mail. Act No. 517, 1999 La. Acts 1733. In 2006, § 9:2941.1 was added to prohibit interest for subsequent filing by or against the bond for deed purchaser and provide for the cancellation of certain mortgage records after registry of the sale. Act No. 582, 2006 La. Acts 2168.

117. See Act No. 517, 1999 La. Acts 1733; Act No. 582, 2006 La. Acts 2168.



to alleviate the uncertainty created in the jurisprudence regarding the applicability of buyer protections found in sales law.<sup>118</sup>

### C. Study and Failed Reform

Although largely unchanged since 1934, the Bond for Deed Act was the subject of close study and consideration in 1993 when the Legislature requested that the Louisiana State Law Institute (“Law Institute”)<sup>119</sup> recommend appropriate reform.<sup>120</sup> Though the Louisiana Legislature did not adopt its final proposal, the Law Institute’s Bond for Deed committee discussed the importance of bond for deed contracts in Louisiana by identifying its financial and social benefits as well as discussing pitfalls of the provisions.<sup>121</sup>

The committee first considered whether bond for deed contracts should be abolished, and it quickly concluded that the financial advantages of bond for deed contracts militate against abolition.<sup>122</sup> Their advantages<sup>123</sup> meant that, although sellers had occasionally abused the bond for deed system,<sup>124</sup> most professional developers found the contract helpful in the realm of residential housing and even more successful than mortgages in certain situations.<sup>125</sup> The committee also concluded that, aside from the financial benefits of properly regulated bond for deed contracts, there is a public interest in the law bringing together parties who wish to participate in sales of immovables and in facilitating those transactions.<sup>126</sup> Having been assured of the social and financial utility of these contracts, the

---

118. Golden, *supra* note 29, at 372–73.

119. “The Louisiana State Law Institute . . . was chartered, created and organized as an official law revision commission, law reform agency and legal research agency of the State of Louisiana, by Act 166 of the Legislature of 1938 . . .” LA. STATE LAW INST. (Dec. 15, 1977), <http://www.lsl.org/foreword> [<https://perma.cc/EM5W-WUPQ>].

120. H.R. Res. 246, Reg. Sess. (La. 1993).

121. *See, e.g.*, Meeting of the Council for the Louisiana State Law Institute (Dec. 17, 1993) (on file with the Louisiana State Law Institute).

122. Meeting of the Council for the Louisiana State Law Institute, at 5–6 (Oct. 29, 1993) (on file with the Louisiana State Law Institute).

123. These advantages include reduction of foreclosure costs, the financing of a sale by people who are willing to take the risk without the intervention of a bank, and savings on closing costs. *Id.*

124. Sellers have been accused of taking advantage of buyers who made payments and subsequently defaulted, gaining no equity in the property. *Id.*

125. Meeting of the Council for the Louisiana State Law Institute, at 4 (Dec. 17, 1993) (on file with the Louisiana State Law Institute).

126. Meeting of the Council for the Louisiana State Law Institute, at 2–3 (Feb. 18, 1994) (on file with the Louisiana State Law Institute).

committee attempted to propose a regime that would adequately protect buyers and aid these transactions.<sup>127</sup>

The committee's final proposal classifies a bond for deed contract as a *sui generis* contract.<sup>128</sup> The proposal replaces the Bond for Deed Act with a series of 14 articles that retain the basic import of the current act while solving the biggest problems.<sup>129</sup> The most important features of the proposal were the contract's classification as a *sui generis* contract, granting of a real right for the buyer in the immovable, and application of the law of eviction.<sup>130</sup> No documentation exists explaining the Legislature's rejection of the Law Institute's final proposal.

The housing crisis's effects have only increased the need for the reform of Louisiana's bond for deed system.<sup>131</sup> One escrow service revealed that it services hundreds of bond for deed contracts per year in Louisiana.<sup>132</sup> Considering that not all bond for deed contracts require escrow services,<sup>133</sup> and that other escrow services operate in the state,<sup>134</sup> these contracts potentially affect thousands of Louisianans. Despite widespread use, the statutory classification of these contracts as "contracts to sell" as opposed to "contracts of sale" fails to express the intent of the parties and instead leaves purchasers and sellers unprotected.<sup>135</sup> When the committee of the Law Institute met in 1993 to discuss these contracts, the committee members heard several opinions of professional realtors but did not perform an empirical analysis of these contracts—nor did they uncover data concerning contractual provisions.<sup>136</sup> Since that time, there have been no attempts to understand the use of bond for deed contracts in practice or empirically break down their provisions.<sup>137</sup>

---

127. Final Draft Bond for Deed Revised Contract for Sale Approach (Sept. 19, 1994) (on file with the Louisiana State Law Institute).

128. *Id.*

129. *Id.*

130. *Id.*

131. ESCROW SERVS., INC., *supra* note 10.

132. E-mail from Escrow Services, Inc. (Oct. 4, 2016, 14:54 CST) (on file with author).

133. LA. REV. STAT. § 9:2943 (2018) ("All payments . . . under bond for deed contracts of property then or thereafter burdened with a mortgage . . . shall be made to some . . . escrow agent.").

134. This information can be found via a Google search for "escrow services bond for deed Louisiana."

135. *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16, at 160.

136. *See* Meetings of the Council for the Louisiana State Law Institute (on file with the Louisiana State Law Institute).

137. *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16, at 160.

## II. WHAT ARE WE GETTING OURSELVES INTO?: HOW PARTIES USE BOND FOR DEED CONTRACTS

To comprehend what parties intend to accomplish by using bond for deed contracts, and to understand how parties fail to protect themselves, analyzing registered contracts in the mortgage and conveyance records of East Baton Rouge Parish is essential.<sup>138</sup> A study of the contracts actually used by parties illustrates the accuracy of the civil law scholars' critiques and the existence of any additional aspects of the parties' relationship that should be specifically regulated in the statutory regime. This study reveals what real estate practitioners, as well as contracting parties, understand the main issues to be in these types of arrangements.

### A. Methodology

To gain an understanding of the basic provisions that parties have included in bond for deed contracts, research methodology included a review of 117 contracts, dating from 2014 to 2016, on file in the mortgage and conveyance records at the East Baton Rouge Parish Clerk of Court's Office.<sup>139</sup> The method employed in conducting this study was the following process: all contracts from 2014 to 2016 were read for major similarities and differences; contracts filed within a year from the research date then were read carefully; and the type of provisions included in each contract was catalogued.<sup>140</sup> Analysis of this data identified trends in the types of provisions parties are using, altering, or neglecting on these contracts.<sup>141</sup> Evidence of the contracts' origins and the contracts' authors was also collected. The vast majority of parties used two different generic or "form" contracts.<sup>142</sup> For ease of discussion, these forms are referred to as "Form A" and "Form B."<sup>143</sup> The few remaining contracts that were not identified as either Form A or Form B were each composed of unique provisions, although many of these provisions were similar to Form B.<sup>144</sup>

Form A is used in 19% of registered bond for deed contracts and consists of a memorandum of a bond for deed contract created by Escrow

---

138. Analyzing a defined set of registered contracts was essential. The author chose East Baton Rouge for obvious convenience.

139. *See infra* Appendix B.

140. *Id.* The contracts that were read carefully for information on specific provisions included contracts filed from September 2015 through August 2016.

141. *Id.*

142. *See infra* Appendix A.

143. *See infra* Appendix B (providing copies of these common contract forms).

144. *See infra* Appendix B.

Services, Inc., an escrow company that professes to service these contracts.<sup>145</sup> Form A includes provisions that create a special mortgage on the property to allow the purchaser to secure the seller's obligations under the agreement; allow the escrow agent to file a cancellation if payment records show default or breach of other obligations as determined by the escrow agent; create a usufruct on the property for the purchaser; and grant the escrow agency "power of attorney" for matters relating to the bond for deed agreement.<sup>146</sup>

The majority of the registered contracts are Form B, a fill-in-the-blank form easily found online.<sup>147</sup> Form B, used in 74% of registered contracts, includes substantially longer provisions than Form A and covers a broad range of issues from the terms of the future sale to liquidated damages, which are discussed below.<sup>148</sup>

### *B. Secrets Revealed*

Although the registered contracts provide many interesting provisions for discussion, the most pressing issues are the risk of loss and repairs and the rights of the purchaser as to third parties.<sup>149</sup>

#### *1. Risk of Loss and Repairs*

Risk of loss or destruction of property because of a fortuitous event is concerning in contracts of this nature, and provisions addressing the risk of loss place the burden of covering any damage on a certain party.<sup>150</sup> Interestingly, none of the registered contracts specifically addressed which party assumes the risk of loss or destruction of the original property; 59% of the contracts, however, stipulated that the purchaser assumes the risk of loss or destruction of any improvements.<sup>151</sup> If these parties intended the purchaser to bear the risk of loss in the original property also, a simpler drafting of the provision would have merely stated that the purchaser assumed the risk of loss of all property subject to the bond for deed

---

145. *Id.*; ESCROW SERVS., INC., *supra* note 10. *See, e.g., infra* Appendix A.

146. *See infra* Appendix A.

147. *See infra* Appendix B. This information can be found via a Google search for "Louisiana Bond for Deed Contracts." The file is automatically downloaded and does not appear to be housed on any website in particular.

148. *See infra* Appendices A, B.

149. *See infra* Appendix A.

150. *See* Meeting of the Council for the Louisiana State Law Institute, at 2 (Dec. 17, 1993) (on file with the Louisiana State Law Institute).

151. *See infra* Appendix B.

contract, including improvements. Because parties opted for the more complex construction of the provision, the drafting suggests *a contrario* the purchaser is not taking the risk of loss of the original property. An interpretation of the plain language<sup>152</sup> of the registered contracts suggests that the sellers are continuing to assume the risk of loss of the principal property.<sup>153</sup>

Furthermore, 29% of the registered contracts dictated purchaser responsibility for repairs and 59% established purchaser responsibility for “upkeep” of the property.<sup>154</sup> The inclusion of these specific provisions once again implies that, without such provisions, responsibility belongs to the seller.<sup>155</sup> Shifting these obligations to the purchaser has serious implications that parties may not foresee. For example, should injury occur because of the property being poorly tended, the law does not provide whether the buyer or seller is responsible for those injuries.<sup>156</sup> The seller may be able to use this provision to shift some amount of tort liability to the purchaser by arguing that the purchaser contractually accepted the duty to keep the premises safe for visitors and occupants.<sup>157</sup>

The law of conventional obligations, unlike the law of sales, provides no clear explanation of liability should the property be destroyed or require significant repair.<sup>158</sup> For example, the sales articles provide that risk of loss generally transfers from the seller to the buyer at the time of delivery and that the seller warrants that the thing sold is fit for the thing’s intended use.<sup>159</sup> These provisions apply only to contracts classified as sales, and the categorization of a bond for deed contract as a contract to sell results in an inability to apply these protective default provisions.<sup>160</sup>

## 2. *Rights of the Purchaser as to Third Parties*

The registered contracts completely neglect to address the rights of purchasers with respect to third parties that may hold rights related to the

---

152. The Civil Code dictates that contracts should be interpreted using the generally prevailing meaning of words, or the plain language. LA. CIV. CODE ANN. art. 2047 (2018).

153. See *infra* Appendix A.

154. See *infra* Appendix B.

155. See *infra* Appendix B.

156. See TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16, at 160.

157. *Id.*

158. See, e.g., LA. CIV. CODE ANN. arts. 2467, 2475, 2492 (2018).

159. Arts. 2467, 2475.

160. See LA. CIV. CODE ANN. art. 2438.

property.<sup>161</sup> A provision of this nature would explain the purchaser's right as to judgments against the property when the purchaser is not at fault, such as if a creditor obtains a judgment to seize the seller's assets.<sup>162</sup> The registered contracts provide no legal protection for the purchasers regarding their rights relative to third parties; therefore, applicable default laws are necessary.<sup>163</sup>

This issue has arisen at least once in litigation.<sup>164</sup> Recall the Louisiana Supreme Court case *Levine v. First National Bank of Commerce*. In *Levine*, the seller mortgaged the property, and that mortgage continued to exist after the bond for deed was executed.<sup>165</sup> The Court had to determine whether the bond for deed contract, which lacked approval by the mortgagee, triggered the due-on-sale clause in the seller's mortgage.<sup>166</sup> The Court held that the conveyance of rights in the bond for deed contract sufficiently triggered the due-on-sale clause of the mortgage.<sup>167</sup> Because the language of the contract did not require the Court to determine whether a real right in the property was transferred, the Court specifically avoided addressing the issue.<sup>168</sup>

Parties are unable to contract for every situation, and their contracts do not provide stipulations for every contingency.<sup>169</sup> Because so many of these contracts are entered into in Louisiana<sup>170</sup> and because the contracts involve the sale of immovable things, public policy requires more comprehensive default rules to protect both primary parties and third parties.<sup>171</sup>

---

161. See *infra* Appendix A.

162. Meeting of the Council for the Louisiana State Law Institute, at 4 (Dec. 17, 1993) (on file with the Louisiana State Law Institute).

163. See *infra* Appendix A.

164. See, e.g., *Levine v. First Nat'l Bank of Commerce*, 948 So. 2d 1051 (La. 2006).

165. *Id.*

166. *Id.* at 1054. Questions of federal law were also considered in this case but are outside the scope of this Comment. See *id.*

167. *Id.* at 1066.

168. *Id.*

169. See N. Stephan Kinsella, *Smashing the Broken Mirror: The Battle of the Forms, UCC 2-207, and Louisiana's Improvements*, 53 LA. L. REV. 1555, 1557 (1993).

170. E-mail from Escrow Services, Inc. (Oct. 4, 2016, 14:54 CST) (on file with author).

171. Professor J. Denson Smith regarded the Bond for Deed Act as "recogniz[ing] that purchasers under such contracts are generally not as well informed as are sellers nor, consequently, as qualified to protect themselves against sharp practices, and [the Act] is aimed at giving them a degree of protection that their situations demand." *Farthing v. Neely*, 129 So. 2d 224, 238 n.4 (La. Ct. App.

*C. Conclusions*

The totality of the circumstances surrounding these transactions reveals that this representation of the bond for deed contract as a contract to sell does not accurately embody the parties' intentions.<sup>172</sup> The fact that 93% of these contracts are form contracts easily found online and filled with boilerplate language, combined with representations by escrow and real estate agents, reveal that the parties approach bond for deed contracts as they would any other sale of real estate.<sup>173</sup> The parties intend for this transaction to result in a sale of the property in every respect except one: the transfer of title will be delayed. The ready availability of this standard contract online, however, may induce an erroneous assumption that the form contract fully protects both parties' interests.<sup>174</sup>

Furthermore, the types of provisions the parties include in these contracts relate to things the parties know that owners do, such as pay taxes and pay for homeowner's insurance.<sup>175</sup> Parties realize that if title does not transfer the seller would be on the hook still for taxes and insurance, and parties make clear that although this is the case, the premiums and taxes will be paid by the buyer to the seller to compensate for this cost.<sup>176</sup> Again, the inclusion of provisions that would alter these responsibilities indicates that parties intend for this to be a sale in every way, except for the delay of ownership. Parties are thinking about the major consequences of withholding title that they consider important without realizing other legal consequences, such as opting out of the default sales provisions of the Civil Code, such as the seller's obligations of delivery, warranty against redhibitory defects, and warranty against eviction.

Escrow service providers filing these agreements advertise on their websites that rent-to-own contracts are an easier and cheaper method of selling a home than a traditional mortgage.<sup>177</sup> Sellers and purchasers rely on the escrow agent's representation that the contract is a sale even though this understanding is not always memorialized in the contract the parties

---

1961). The recordation provision in the Act provides a ranking scheme to protect the buyer vis-à-vis third parties. *See* LA. REV. STAT. § 9:2941.1 (2018).

172. *Infra* Appendix A.

173. *See infra* Appendix B.

174. *See, e.g.,* Kinsella, *supra* note 169, at 1557 (discussing the use of form contracts and the difficulty in their interpretation).

175. *See infra* Appendix B.

176. *See infra* Appendix B.

177. ESCROW SERVS., INC., *supra* note 10.

sign.<sup>178</sup> This confusion creates an even greater divide between the classification of the contract and its practical use.

Leaving the regulation of a contract that concerns the sale of an immovable to articles on conventional obligations and obligations in general ignores the specific needs of the parties.<sup>179</sup> The Louisiana Legislature acknowledged that fact early in the history of bond for deed contracts in Louisiana by passing the Bond for Deed Act in 1934, which was intended to provide a body of suppletive law separate from sales.<sup>180</sup> The registered contracts reveal, however, that parties would be more adequately protected if the contract was treated as a sale and buyers and sellers were subject to all of the rights and obligations of parties to a sale, such as seller's obligations to deliver, warrant against redhibitory defects, and warrant against eviction.<sup>181</sup>

### III. HOW TO FIX THE BOND FOR DEED PROBLEM

Understanding the problem with the lack of protection for parties to a bond for deed contract, potential solutions include amending the Bond for Deed Act or designating the contract as a sale. It is necessary to examine first whether classifying these contracts as a sale is a possibility, then whether this option is preferable to simply amending the Bond for Deed Act, and finally, how the Civil Code and Bond for Deed Act should be altered to protect these parties.

Surveying the various issues raised by the obscurity in the law regulating bond for deed contracts reveals that the comprehensive law of sales would resolve many uncertainties and diminish the need for the current Bond for Deed Act. The issues exacerbated by the Act and identified by Louisiana jurisprudence and the registered contracts can be solved with a simple Civil Code revision to protect parties in situations common to the law of sales.<sup>182</sup>

---

178. *Infra* Appendix A.

179. A conventional obligation is a term used by the Civil Code that means contract. *See* LA. CIV. CODE ANN. art. 1906 (2018). "Obligations in general" refers to the body of law in the Civil Code that regulates all types of obligations, which are legal relationships whereby a person is bound to render a performance in favor of another. *See id.* art. 1756 (2018).

180. Act. No. 169, 1934 La. Acts 544.

181. *See, e.g.*, Bond for Deed Revised Contract for Sale Approach, art. 8 (Sept. 19, 1994) (on file with the Louisiana State Law Institute) ("When a third person holds a right to the property superior to the grantor's the rights of the grantee are governed by the provisions of the Civil Code governing eviction in the law of sales.").

182. *See* LA. CIV. CODE ANN. arts. 1915–16.



A. Barber Asphalt's Blunders: Possibility of Conditional Sales in the Civil Code

For almost a century, Louisiana has refused to consider the possibility of a sale in which transfer of ownership is conditioned on payment of the purchase price.<sup>183</sup> This refusal stems from a line of jurisprudence that begins with the landmark holding of the Louisiana Supreme Court in *Barber Asphalt*, determining that a conditional sale was legally impossible.<sup>184</sup> A deeper look into the Court's rationale reveals the use of faulty civilian logic to disguise a policy decision against mortgages on movables, which is no longer relevant today.<sup>185</sup> The *Barber Asphalt* Court provided three basic rationales for why a conditional sale was legally impossible: (1) the transaction did not fit the definition of a sale; (2) the transaction did not fit the definition of a sale subject to a modality; and (3) sales require a price to have been paid.<sup>186</sup>

1. Not a Sale

The Court began by attempting to classify the contract according to the parties' intent, and it determined that the intent of the parties was to enter into a contract of sale, described in the Civil Code at that time as "an agreement by which one gives a thing for a price in current money, and the other gives the price to have the thing itself."<sup>187</sup> The Court also cited a Code article describing a sale as perfect between the parties when there exists "an agreement for the object and for the price."<sup>188</sup> Interpreting the plain meaning of these Code articles, the Court should have concluded that a sale had taken place because there was an agreement for the object and price and that agreement stipulated that a thing was to be transferred and a price was to be paid for the thing. The Court instead interpreted the essential elements of a sale to be "[a] thing, the property in which is transferred from the seller to the buyer; and a price in money paid or promised."<sup>189</sup>

---

183. See, e.g., *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 46 So. 193 (La. 1908); *Trichel v. Home Ins. Co.*, 99 So. 403 (La. 1924).

184. See *Barber Asphalt*, 46 So. 193.

185. See generally LA. REV. STAT. § 9:3302 (2018).

186. *Barber Asphalt*, 46 So. 193.

187. *Id.* at 194 (quoting LA. CIV. CODE art. 2439 (1908)).

188. *Id.* (quoting LA. CIV. CODE art. 2456 (1908)).

189. *Id.* at 196.

The Civil Code has never stipulated that the thing must be immediately transferred for a sale to occur.<sup>190</sup> In *Barber Asphalt*, the Court interpreted the statutory phrase “gives a thing” to mean an immediate transfer, which is inconsistent with the Court’s previous interpretation of the phrase “gives the price” to mean that the price can be transferred immediately or merely promised.<sup>191</sup> Based on the plain language of the Code articles, if the transfer of the price can be promised, the transfer of the thing also can be promised because where the law does not distinguish, the courts must not distinguish.<sup>192</sup> By disallowing the promise of the transfer of the thing, the Court adds a requirement to a sale that does not exist in the plain language of the articles and has never existed as a principle of the civil law of sales.<sup>193</sup> Transfer of title is an essential element of any sale, but the time at which the ownership must pass is not defined by the Code.<sup>194</sup> Thus, delay in the transfer of title creates no barriers to classifying this contract as a sale.

Furthermore, essential elements of contracts are best understood through the contrast to natural and accidental elements, as explained by Pothier.<sup>195</sup> According to Pothier, essential elements are those things without which a contract cannot exist.<sup>196</sup> Natural elements are those things that ordinarily are present in a contract but may be omitted by special agreement; accidental elements are things for which the parties may agree.<sup>197</sup> In summary, “the law ‘imposes the essential elements, presumes the natural, and authorizes the accidentals,’ while the will of the parties consequently ‘respects the essential, accepts or refuses the natural, and creates, by itself, the accidentals.’”<sup>198</sup> When all the essential elements of a sale are present, the effects of an absolute sale must follow whether the

---

190. A review of the relevant articles under the sales title of the Civil Code show no such requirement. See LA. CIV. CODE ANN. art. 2439 (2018); TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:17.

191. See *Barber Asphalt*, 46 So. at 196.

192. *Martin v. Bryan*, 12 La. Ann. 722, 722 (La. 1857) (“[W]e cannot distinguish where the law does not distinguish.”).

193. See *Cruz*, *supra* note 101, at 547.

194. See *Levingston*, *supra* note 100, at 596; *Cruz*, *supra* note 101, at 537.

195. Pothier is an 18th-century French jurist known for his study of Roman law and influence on the drafters of the French Civil Code. POTHIER, A TREATISE ON THE LAW OF OBLIGATION OR CONTRACTS 17–32 (William David Evans trans., 1826). See *Cruz*, *supra* note 101, at 547.

196. See *Cruz*, *supra* note 101, at 547.

197. See *id.*

198. *Id.* (quoting JOSE MARIA MANRESA Y NAVARRO, 8 COMENTARIOS AL CODIGO CIVIL ESPANOL 578 (1907)).

parties intended them or not.<sup>199</sup> Louisiana Civil Code article 2439 sets forth the essential elements of a sale: “Sale is a contract whereby a person transfers ownership of a thing to another for a price in money. The thing, the price, and the consent of the parties are requirements for the perfection of a sale” and, arguably, are the *only* essential elements.<sup>200</sup> This Code article provides the same content as Article 2439 of the Code of 1870, which made even clearer the notion that these things were the only essential elements of the sale by making the title of the Article “Sale contract defined—Essentials.” Although the titles of articles are not law, this title reveals that, at least traditionally, the Civil Code defined these three things as the only essential elements of a sale.<sup>201</sup> The *Barber Asphalt* Court wrongfully considered a timing element—the immediate transfer of ownership—as an essential element to a sale with no justification from the Civil Code.<sup>202</sup>

Current Louisiana Civil Code article 2456 appears to provide justification for the *Barber Asphalt* Court’s holding, as the article states that ownership transfers whenever there is agreement on the thing and the price is fixed.<sup>203</sup> A complete analysis reveals, however, that this rule is merely suppletive, or, as Pothier would say, a *natural* element, because the moment at which ownership is transferred is not the essence of the contract of sale—without which there is either no contract at all or a contract of another description.<sup>204</sup> The French equivalent to Article 2456 maintains that the Article does not contain any precepts enacted for the preservation of the public order; consequently, the parties may derogate from the Article in their agreement.<sup>205</sup> No reason exists to justify why parties could not derogate from this Article through their contract.<sup>206</sup>

The Court in *Barber Asphalt* said conditional sales are impossible under civil law principles governing sales. The idea of retention of title does not originate in the Code Napoleon or the Civil Codes of Spain or

---

199. *Thomas v. Philip Werlein*, 158 So. 635 (1935).

200. LA. CIV. CODE ANN. art. 2439 (2018). MARCEL PLANIOL & GEORGE RIPERT, *TREATISE ON THE CIVIL LAW*, vol. 2, pt. 1 § 1358 (2d ed.1939).

201. Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 1073 (1988).

202. *See Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 46 So. 193 (La. 1908).

203. LA. CIV. CODE ANN. art. 2456 (2018).

204. *See Levingston*, *supra* note 100, at 594; Cruz, *supra* note 101, at 537; *see also* LA. CIV. CODE art. 1764 (1870).

205. LITVINOFF, *supra* note 70, § 65.

206. *See Cruz*, *supra* note 101, at 541; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1583 (Fr.).

Louisiana.<sup>207</sup> Germany, France, Italy, Spain, and Cuba, however, all have admitted that these types of sales are valid.<sup>208</sup> These adaptations in other civilian jurisdictions reveal that the *Barber Asphalt* Court was mistaken in interpreting these contracts as impossible in a civilian system.<sup>209</sup> Additionally, the *Barber Asphalt* Court also repudiated *Baldwin*, which was persuasive prior jurisprudence establishing the possibility of a conditional sale and without sufficient explanation repudiated the prior holding.<sup>210</sup>

## 2. *Not a Sale Subject to a Modality*

Once the *Barber Asphalt* Court established that the contract was not a sale unless ownership transferred, the Court addressed whether the contract could be a sale under a suspensive condition and, again, characterized this arrangement as legally impossible.<sup>211</sup> The Court correctly observed that contracts subject to a suspensive condition cannot have effects until the condition is met.<sup>212</sup> Because conditional sales are intended to have effects prior to the occurrence of the condition, they cannot possibly be sales under a suspensive condition.<sup>213</sup> The Court, however, failed to explore alternative modalities for this type of sale, such as a term for performance.<sup>214</sup>

Planiol<sup>215</sup> describes a sale as a contract whereby one person obligates herself to transfer the ownership of a thing and another person obligates herself to pay the value of the thing in money.<sup>216</sup> As with any obligation, the parties' performances are due simultaneously unless one or both of them have been granted a term for performance.<sup>217</sup> Louisiana Civil Code article 1778 states that

[a] term for the performance of an obligation is a period of time

---

207. Cruz, *supra* note 101, at 533.

208. *Id.* at 565–69.

209. *See id.*

210. *See Baldwin v. Young*, 17 So. 883 (La. 1895).

211. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 46 So. 193, 193–94, 196–97 (La. 1908).

212. *Id.* at 197.

213. *Id.*

214. *See id.* at 193.

215. Planiol is an early 20th-century scholar known as a major innovator of French civil law. PLANIOL & RIPERT, *supra* note 200, § 1353.

216. *Id.*

217. TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 4:16, at 160; LITVINOFF, *supra* note 70, § 14.

either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable . . . [W]hen it is not determinable . . . the obligation must be performed within a reasonable time.<sup>218</sup>

The payment of the price in the context of conditional sales must be a term and not a condition because the obligation to pay is certain. Therefore, deciding that a conditional sale is a sale subject to a term would have been a reasonable rationale that would have undercut the logic of the option, but the Court completely ignored that possibility.

### 3. *Existence of Price*

The *Barber Asphalt* Court's final and most perplexing holding states, "A price cannot be paid until there is a price; and there cannot be a price until there is a sale . . ." <sup>219</sup> Suggesting that the sale must exist before the price exists directly contradicts Louisiana Civil Code article 2439, which describes a sale as "an agreement" to the thing and the price.<sup>220</sup> According to the plain language of the article, to have a sale, an agreed-upon price must already exist.<sup>221</sup> The Court attempted to make the existence of both the sale and the price dependent on one another, but this circular argument provides no actual guidance and muddles principles of code interpretation.

The Court's mistaken characterization of a transfer of ownership as an essential element of a sale made conditional sales impossible.<sup>222</sup> Meanwhile, other civilian jurisdictions have recognized that transfer of ownership is an essential effect, but not an essential element, of a sale.<sup>223</sup> Upon close inspection, the Court likely was using this faulty civilian logic as a disguise for a policy decision against creating a mortgage upon movable property.<sup>224</sup>

---

218. LA. CIV. CODE ANN. art. 1778 (2018).

219. *Barber Asphalt*, 46 So. at 198.

220. See LA. CIV. CODE art. 2439 (1908).

221. *Barber Asphalt*, 46 So. at 198.

222. *Id.*

223. See Cruz, *supra* note 101, at 559–69.

224. Until 1974, Louisiana did not allow mortgages on movables. LA. REV. STAT. § 9:3302 (2018); see also *Barber Asphalt*, 46 So. at 196 ("A contract of [this] kind is, as a matter of course, not possible under our law, since our law does not recognize the validity of a mortgage on movables . . ."); LITVINOFF, *supra* note 70, § 68, at 104.

#### 4. Bond for Deed Exception

Without solving the underlying theoretical problems of *Barber Asphalt*, the *Trichel* Court found bond for deed contracts possible under Louisiana law simply because the object of the contract was immovable property.<sup>225</sup> The *Trichel* Court also construed the contracts in a way that gave sellers all rights of ownership, except those which had been abrogated by the parties via the contract, while the purchaser incurred obligations but obtained almost no rights.<sup>226</sup> The unsound rationale of the *Trichel* Court and resulting solution is unsupported by Louisiana law. The Court acknowledged that the true nature of this contract is a conditional sale, which is impermissible under Louisiana law when selling immovable property because immovable property must be transferred by a deed translatif of title.<sup>227</sup> This distinction between movable and immovable property has no merit under Louisiana law.<sup>228</sup> Louisiana Civil Code article 2440 provides that “[a] sale . . . of an immovable must be made by authentic act or by act under private signature, except as provided in Article 1839.”<sup>229</sup> Article 1839 states, “[A]n oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath.”<sup>230</sup> When confronted with verbal contracts of sale, courts have had no problem recognizing a transfer of immovable property.<sup>231</sup> Thus, parties to a conditional sale may validly transfer ownership without the execution of a subsequent writing.

Furthermore, the classification of the contract as a contract to sell is inaccurate. Bond for deed contracts are not contracts to sell because during the interim period before ownership transfers the purchaser is entitled to possession of the property and the seller is entitled to installment

---

225. See *Trichel v. Home Ins. Co.*, 99 So. 403 (La. 1924).

226. See *id.*

227. See, e.g., *St. Landry Loan Co. v. Etienne*, 227 So. 2d 599 (La. Ct. App. 1969); *Trichel*, 99 So. 403. See *Levingston*, *supra* note 100, at 594.

228. *Id.*; see *Cruz*, *supra* note 101, at 537.

229. LA. CIV. CODE ANN. art. 2440 (2018).

230. *Id.* art. 1839.

231. See, e.g., *Kinchen v. Redmond*, 100 So. 607 (1924); *LeBlanc v. Watson*, 13 F.2d 76, 77 (5th Cir. 1926) (“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.”); *Rebman v. Reed*, 335 So. 2d 37 (La. Ct. App. 1976), *writ denied* 338 So. 2d 699 (Lemmon, J., concurring) (stating that the purpose of a writing requirement was to prevent misunderstanding of verbal terms and was primarily evidentiary).

payments, which is not the case in a typical contract to sell.<sup>232</sup> Contracts to sell are distinct from contracts of sale, and a bond for deed is significantly more theoretically similar to a sale than to a contract to sell because of the obligations incurred by the parties.<sup>233</sup> In bond for deed contracts, the parties are performing obligations that are typical of a sale, namely transfer of possession from seller to buyer and payment of the price by the buyer.<sup>234</sup> These obligations typically are never present in a contract to sell, specifically because the obligations simply do not exist until the actual act of sale.<sup>235</sup> The existence of these obligations and the lack of other various obligations typically existing in a contract to sell, such as a home inspection or obtaining financing, make a bond for deed contract theoretically more similar to a sale than a contract to sell. In every way but the transfer of title, parties are acting like the sale is executed, and the law should be able to enforce these contracts according to the parties' intent.<sup>236</sup>

#### *B. To Codify or Not to Codify?*

Based on the preceding argument, bond for deed contracts are sales contracts and should be recognized as such in the Civil Code. The Civil Code undoubtedly recognizes liberty to contract, and the touchstone of contract interpretation is the principle that “[i]nterpretation of a contract is the determination of the common intent of the parties.”<sup>237</sup> In a bond for deed contract, the parties intend a contract of sale in which ownership is transferred upon full payment of the price.<sup>238</sup> Parties typically view these agreements as financing options for the sale and maintain title only as security for the underlying financial obligation.<sup>239</sup> In a true bond for deed

---

232. Levingston, *supra* note 100, at 594. This period is colloquially referred to as the “closing” period.

233. Compare LA. CIV. CODE ANN. arts. 2467–2564, with arts. 2623–24.

234. See LA. REV. STAT. § 9:2944 (2018).

235. See LA. CIV. CODE ANN. arts. 2440, 2475.

236. Cruz, *supra* note 101, at 537; Levingston, *supra* note 100, at 594, 596.

237. LA. CIV. CODE ANN. art. 2045; Cruz, *supra* note 101, at 551–55.

238. Levingston, *supra* note 100, at 594 (citing Cruz, *supra* note 101, at 537).

239. See, e.g., Alexandra Stevenson & Matthew Goldstein, *Renting to Own Gains Favor, and Risks Rise*, N.Y. TIMES, Aug. 22, 2016, at A1; David J. Mitchell, *Ascension Assessor Mert ‘Smiley’ Campaigns on his Record While Challenger says Constituents are Unhappy*, ADVOCATE (Oct. 21, 2015, 4:17 AM), [http://www.theadvocate.com/new\\_orleans/news/communities/article\\_a657934d-c027-5fb9-917e-d6379868c1f1.html](http://www.theadvocate.com/new_orleans/news/communities/article_a657934d-c027-5fb9-917e-d6379868c1f1.html) [<https://perma.cc/6Y95-557J>]; Purpura, *supra* note 1. A fraction of these parties potentially intend a lease with an option to purchase but mistakenly create a bond for deed contract. A “[l]ease is a synallagmatic contract by which one party, the lessor, binds himself to give to the other party, the lessee,

contract, the Louisiana Legislature and the courts should consider the intent of the parties, and the law of sales should apply.

Parties entering these types of contracts do so via escrow agencies or without the assistance of counsel.<sup>240</sup> Laypersons without a detailed knowledge of sales law are not likely to anticipate every contingency for which they should contract.<sup>241</sup> This assumption is true for most contracts of sale.<sup>242</sup> To illustrate, when buying a used car from a friend, people typically do not think to write out a contract that includes provisions for undisclosed defects—redhibitory defects. These types of parties unconsciously rely on supplemental rules of law to protect their interests.<sup>243</sup> The principal benefit of classifying the bond for deed as a sale is that the classification provides the parties with a rich body of suppletive laws that establish the rights and obligations of buyers and sellers.<sup>244</sup> Sophisticated parties can always contract against this body of law that is meant to protect unsophisticated buyers, but these suppletive laws are particularly important in bond for deed contracts because parties entering bond for deed contracts are usually both unsophisticated and unrepresented.<sup>245</sup> This dependency is the main reason why sales law has such a large breadth of suppletive law and why sales law provides greater protections for parties to bond for deed contracts.<sup>246</sup>

Although these contracts are sales, the fact that ownership does not immediately transfer will require some additional rules specific to the bond for deed contract. Occasional modifications to a civil code to account

---

the use and enjoyment of a thing for a term in exchange for a rent that the lessee binds himself to pay.” LA. CIV. CODE ANN. art. 2668. A contract for lease may include an option to buy, which is “a contract whereby a party gives to another the right to accept an offer to sell . . . a thing within a stipulated time.” LA. CIV. CODE ANN. art. 2620. A bond for deed is similar to a lease with an option to purchase because both include an obligor (1) obtaining possession of the immovable; (2) paying money in defined increments to the obligee; and (3) eventually completing a contract of sale. Historically, courts have not had a problem differentiating bond for deed contracts from lease contracts with an option to purchase and subsequently applying appropriate law. *See, e.g.*, *Gen. Talking Pictures Corp. v. Pine Tree Amusement Co.*, 156 So. 812, 813 (La. 1934); *Bohanon v. Stewart*, 4 La. App. 150, 153 (1926); *H.J. Bergeron, Inc. v. Parker*, 964 So. 2d 1075, 1076 (La. Ct. App. 2007); *Upton v. Whitehead*, 935 So. 2d 746, 748 (La. Ct. App. 2006).

240. *See infra* Appendix B.

241. Fuller, *supra* note 104.

242. *Id.*

243. *Id.*

244. *See* LA. CIV. CODE ANN. arts. 2438–2630.

245. *See supra* note 244.

246. *See supra* note 244.



for new types of contracts are expected.<sup>247</sup> Scholars agree that “[r]ecognizing the advantages of codification and trying to avoid its defects where possible, the framers of the codes now in force always left ‘an open door’ for the new situations that might arise, but which could not be predicted when the code was written.”<sup>248</sup> These types of sales were not explicitly provided for in Louisiana’s original code articles because people did not commonly use them in the early 19th century, but today, these contracts are so common that legislative progress must be made, and the Code must speak to them.<sup>249</sup>

By enacting the 1934 Bond for Deed Act, the Legislature understood the need for special rules dictating bond for deed contracts, but the construction of the Act and its inaccurate classification do not allow courts to appropriately enforce bond for deed contracts as the parties intended.<sup>250</sup> The 1994 Louisiana State Law Institute’s proposal for revisions to the Bond for Deed Act drafted by Professor Saúl Litvinoff<sup>251</sup> illuminates the idea that when creating a body of law to govern these contracts, the Legislature must consider public policy as well as the intent of the parties typically partaking in these types of contracts.<sup>252</sup> As a result, the unhelpful Bond for Deed Act should be replaced with a new Civil Code title on bond for deed and all of the general sales provisions should apply to these contracts, in addition to some particular rules of the bond for deed title. The new bond for deed articles would explain the nature of these contracts and how they are used when mortgaged immovable property is involved and will import the spirit of the Law Institute’s 1994 proposal to the Louisiana Legislature.<sup>253</sup> Such a fundamental principle—whether a contract constitutes a sale—is a subject better suited for the Civil Code than the Revised Statutes.<sup>254</sup> Integration into the Code, as opposed to the Louisiana Revised Statutes, will allow these rules to be interpreted along with the Code as a whole and contribute to a comprehensive understanding of civilian principles.<sup>255</sup>

---

247. See Levasseur, *supra* note 201.

248. Cruz, *supra* note 101, at 541.

249. *Id.*

250. See *Trichel v. Home Ins. Co.*, 99 So. 403 (La. 1924).

251. The late Professor Litvinoff was a Professor Emeritus and Boyd Professor of Law at the Louisiana State University Paul M. Hebert Law Center.

252. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127.

253. *Id.*

254. *Id.*

255. See Levasseur, *supra* note 201.

### *C. Sales Solutions*

Transferring the legislative regime from the Bond for Deed Act to the Civil Code presents minor challenges but is a simple solution overall. Two main provisions establishing the contract as a sale would be necessary. These provisions would exist either as a chapter under the sales title or as a separate title, and the first provision would provide a simple definition of a bond for deed contract. The article could provide simply, “A sale of an immovable in which the parties agree that the transfer of ownership is delayed until all or a part of the price is paid is enforceable according to the intention of the parties.” Additionally, a Code article similar to Articles 2659 and 2664, which provide that the giving in payment and the exchange are, respectively, governed by the sales title, will be necessary. Tracking the language of those articles, the new article could provide, “The bond for deed contract is governed by the rules of the contract of sale, with differences provided for in this chapter/title.”<sup>256</sup> After these additions, the protections found in the Bond for Deed Act regarding encumbered property would remain merely translated into a form better suited for the Civil Code. This section explores some of the most helpful provisions of sales law that will be implemented into bond for deed contracts, as well as the necessary additions to the code.

#### *1. Sales Law*

Sales law involves such a range of protective suppletive provisions that explaining all the possible solutions flowing from application of the suppletive sales law is beyond the scope of this Comment, which instead addresses a few major provisions that would be especially useful in the context of bond for deed contracts: the seller’s obligations to deliver; to warrant against redhibitory defect; and to warrant against eviction.<sup>257</sup>

##### *a. Delivery*

The seller’s obligation to deliver the thing sold is a fundamental obligation to the contract of sale.<sup>258</sup> Article 2485 provides that

when the seller fails to deliver or to make timely delivery of the thing sold, the buyer may demand specific performance of the obligation of the seller to deliver, or may seek dissolution of the

---

256. See LA. CIV. CODE ANN. arts. 2659, 2664 (2018).

257. Fuller, *supra* note 104.

258. LA. CIV. CODE ANN. art. 2485.

sale. In either case, and also when the seller has made a late delivery, the buyer may seek damages.

Effective delivery that discharges any liability of the seller is accomplished in the correct manner, on time, and at the proper place.<sup>259</sup> The correct manner, time, and place will vary based on whether the thing sold is movable or immovable.<sup>260</sup> Article 2477 provides that delivery of an immovable is deemed to take place upon execution of the writing that transfers its ownership.<sup>261</sup> Technically, delivery occurs contemporaneously with the execution of the act of sale, and at the moment of delivery, the buyer is entitled to immediate corporeal possession.<sup>262</sup> Although, theoretically, one could argue for a slight delay in relinquishing corporeal possession in circumstances in which the seller is prevented from timely vacating, courts will not allow delay in cases in which the parties' agreement explicitly calls for possession at the time of the sale.<sup>263</sup> If the seller is unable to deliver corporeal possession of the property at the time of the sale, the parties should enter into a delayed occupancy agreement that will specify how long the seller may stay on the property and provide compensation to the buyer for the continued right of occupancy.

Not only must delivery occur immediately, but the seller must also deliver a thing or things to the buyer that conform to the contract.<sup>264</sup> In sales of immovables, there are specific rules related to delivery of the full "extent of the immovable."<sup>265</sup> In the event that the full extent of the premises is not delivered, there are specific remedies available depending on the type of sale and the actual extent of the premises that are missing.<sup>266</sup> These remedies are mandatory for sales but do not apply to other transactions. First, if the sale is a sale by measure—that is, a sale made

---

259. *Id.* art. 2477.

260. *Lanier Bus. Prods., Inc. v. First Nat'l Bank of Rayville*, 388 So. 2d 442, 445 (La. Ct. App. 1980) (applying the rule that delivery of movables must be made in a "reasonable" time); *Matthews v. Gaubler*, 49 So. 2d 774, 777 (La. Ct. App. 1951) (applying the rule that delivery of immovables occur at the time of execution of the act of sale).

261. Art. 2477.

262. *Matthews*, 49 So. 2d 774.

263. *Id.*

264. LA. CIV. CODE ANN. art. 2489 (providing that the seller must deliver the thing sold in the condition that, at the time of the sale, the parties expected, or should have expected, the thing to be in at the time of delivery, according to its nature). *Id.* art. 2461.

265. *Id.* art. 2491 ("The seller must deliver to the buyer the full extent of the immovable sold.").

266. *Id.* arts. 2492, 2494–95.

with an indication of the extent of the premises at a rate of so much per measure—Article 2492 provides that if the amount delivered is less than promised, the buyer gets a proportionate reduction in the price.<sup>267</sup> If the amount delivered is more than promised, the buyer must pay a proportionate supplement, but if the extent delivered exceeds by more than 1/20 the extent specified in the contract, the buyer can recede from the contract.<sup>268</sup>

Second, if the sale is a sale made with an indication of the extent of the premises at a lump price, Article 2424 provides that no reduction or supplement is allowed unless there is a surplus or a shortage of more than 1/20 the extent specified in the contract.<sup>269</sup> If there is a surplus that gives the seller the right to increase the price, then the buyer can recede—instead of paying a supplement—at his option.<sup>270</sup> Lastly, if the sale is a sale of a certain and limited body or of a distinct object for a lump price, it is a sale per aversionem.<sup>271</sup> Article 2495 provides that there is no recovery of any kind in this type of contract because it is presumed that both seller and purchaser intended to contract with reference to the boundaries, rather than with reference to the quantity, length, or depth of the property.<sup>272</sup> All of the supplemental provisions regarding the seller's obligation to deliver apply to every sale and protect the parties while maintaining the basic obligations. If a bond for deed contract is classified as a sale, these laws apply to protect buyers and sellers alike.

#### *b. Redhibition*

The seller's obligation to warrant against redhibitory defects is a unique buyer protection found only in Louisiana law, which builds upon the Roman idea that a person cannot sell something that is defective, and stands in opposition to the common law idea of *caveat emptor*, or “let the buyer beware.”<sup>273</sup> Article 2520 provides that

[a] defect is redhibitory when it renders the thing useless, or . . . so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such

---

267. Art. 2492.

268. *Id.* Note that this right to rescission does not apply to shortages.

269. Art. 2494.

270. *Id.* Note that the right of rescission does not apply to shortages.

271. Art. 2495.

272. *See id.*

273. *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 23, § 11:47; *Caveat*, BLACK'S LAW DICTIONARY (10th ed. 2014).

a defect gives the buyer the right to obtain rescission of the sale.<sup>274</sup>

Importantly, redhibitory defects only allow rescission of sales.<sup>275</sup>

The Civil Code classifies redhibitory defects by their remedy. When the defect is such that it renders the thing useless or so inconvenient that it must be presumed that the buyer would not have bought the thing, then the defect justifies complete rescission of the contract of sale.<sup>276</sup> When the defect is such that it diminishes the usefulness or value of the thing such that it must be presumed that the buyer would still have bought, but for a lesser price, the defect justifies *quanti minoris*, or a reduction of the price.<sup>277</sup>

A common example of a redhibitory defect in immovable property is a house with a termite infestation that was not discovered after reasonable inspection.<sup>278</sup> In a sale of such a house, the buyer could demand rescission or reduction of the price.<sup>279</sup> If, however, that same buyer opted to finance the sale through a bond for deed agreement as opposed to a typical mortgage, the buyer would have no recourse and would be subject to only the terms of the contract and suppletive contract law.<sup>280</sup> Classifying bond for deed as a sale in the Code would grant this buyer access to judicial remedies not currently found in the Bond for Deed Act, such as recovery for redhibitory defects.<sup>281</sup>

---

274. The full text of Louisiana Civil Code article 2520 states,

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

LA. CIV. CODE ANN. art. 2520.

275. *Id.*

276. *Id.*

277. *Id.*

278. *See, e.g., Mitchell v. Popiwchak*, 677 So. 2d 1050, 1052 (La. Ct. App. 1996).

279. Art. 2520.

280. *Id.* art. 1915.

281. *See* LA. REV. STAT. §§ 9:2941–49 (2018).

*c. Eviction*

The seller's obligation to warrant against eviction is also a fundamental effect to any contract of sale.<sup>282</sup> Article 2500 defines eviction as the buyer's loss of, or danger of losing, the whole or part of the thing sold because of the third person's right that existed at the time of the sale.<sup>283</sup> This warranty does not protect against physical dispossession but a third person's legal right; therefore, a trespasser can never evict an owner because trespassers do not have a lawful claim to the property.<sup>284</sup> Loss of the thing occurs when a third party's superior right to the thing is judicially decreed, making the buyer no longer the full owner.<sup>285</sup> The buyer experiences a danger of loss when the buyer can show that a third person has perfect title to the thing.<sup>286</sup> Under a full warranty sale, an evicted buyer may demand rescission, withhold the price, and demand damages and reimbursements for any fruits or improvements to the property.<sup>287</sup>

As Professor Litvinoff observed, the rules governing eviction in the law of sales provide rules of "unquestionable fairness" for the buyer, and their application protects a buyer from loss of the immovable because of undetected defects in the chain of title evidencing a third person's superior rights that existed at the time of contracting.<sup>288</sup> Typically, a warranty against eviction is implied in every sale, but unless bond for deed contracts are recognized as sales, courts are not likely to apply eviction articles without legislative instruction.<sup>289</sup> Application of the law of eviction entitles the purchaser to restitution of the price, restitution of fruits and revenues, all costs occasioned by the lawsuit concerning the eviction, and, sometimes, damages.<sup>290</sup> Application of the law of eviction, redhibition, and the seller's obligation to deliver in sales is necessary to protect unsophisticated purchasers and should apply to purchasers in bond for deed contracts as well.<sup>291</sup>

---

282. See LA. CIV. CODE ANN. art. 2500.

283. *Id.*

284. See *id.*; see also *Blanchard v. Norman-Breaux Lumber Co.*, 44 So. 2d 112 (1949).

285. See art. 2500 cmt. b.

286. See *id.* cmt. a.

287. See *id.* arts. 2506, 2507, 2509.

288. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127, at 13. See Art. 2500.

289. See LA. CIV. CODE art. 2503.

290. See *id.* art. 2506.

291. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127, at 13.

## 2. Solutions Particular to Bonds for Deed

Although sales law solves many issues with bond for deed contracts, because of the muddled jurisprudential history of these contracts in Louisiana, a few additional codal provisions under the bond for deed title of the Civil Code could provide guidance to courts and attorneys. These additions would import the most helpful provisions of the Bond for Deed Act, as well as add provisions inspired by the final proposal by the Law Institute Bond for Deed committee.<sup>292</sup>

The Code must establish that a purchaser in a bond for deed contract acquires a real right in the immovable effective against third parties by registry.<sup>293</sup> The original Bond for Deed Act and its treatment by jurisprudence suggests that a real right is created by the requirement of recordation, but recordation alone does not create a real right.<sup>294</sup> In a bond for deed contract the parties contemplate a transfer of ownership, the ultimate real right.<sup>295</sup> Therefore, the Legislature and the courts should acknowledge that the purchaser has much more than the undefined interest in the property that the courts currently recognize.<sup>296</sup> This proposed revision clarifies the law and lays a framework through which courts can analyze the legal issues as opposed to the old statute, which mainly provided for the effect of the contract without laying the appropriate civilian framework.<sup>297</sup>

Additionally, the law should provide that a purchaser has the rights and obligations of an owner from the time the agreement is created, although ownership is not acquired until the price is paid.<sup>298</sup> A provision of this type would be a completely new addition to bond for deed law and would once again provide the framework through which the courts can analyze and apply these contracts in a way that makes both the intent of

---

292. *Id.*

293. *Id.* at 5. *See generally* LA. REV. STAT. § 9:2942 (2018) (suggesting a real right is acquired by virtue of recordation).

294. *See* LA. REV. STAT. § 9:2941.1; *Levine v. First Nat'l Bank of Commerce*, 948 So. 2d 1051 (2006). *Compare* *Trichel v. Home Ins. Co.*, 99 So. 403, 404 (La. 1924) (finding an interest was not transferred), *with Levine*, 948 So. 2d at 1058–59 (finding an interest definitely was transferred and hinting that a right had been transferred). *See* Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127, at 5.

295. *See supra* note 293.

296. *See Levine*, 948 So. 2d 1051.

297. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127, at 5.

298. *Id.*

the parties and the intent of the Legislature effective.<sup>299</sup> Because a transfer of ownership is the ultimate goal in these agreements and parties contemplate that the purchaser will become owner, the default rule would give effect to the purpose of bond for deed contracts.<sup>300</sup> Moreover, as future owner, the purchaser arguably has the greatest interest in caring for the property under a bond for deed contract. Therefore, it follows that the responsibility to maintain the property should belong to the purchaser.

Providing the purchaser with the rights and obligations of an owner throughout the duration of the contract would solve certain problems, such as making the purchaser liable in tort for harm caused by the property.<sup>301</sup> This application is consistent with the purpose of tort law: to hold at fault parties responsible.<sup>302</sup> It follows that when harm is caused by the property, the party at fault would be the party who has possession of the property and is responsible for repair and upkeep.<sup>303</sup> Moreover, the purchaser would be responsible for taxes and insurance, a responsibility that is already conferred in practice under most bond for deed contracts.<sup>304</sup> Most importantly, the purchaser would bear the risk of loss of the property in these situations.<sup>305</sup> Courts generally maintain that the risk of loss follows ownership and forces the seller to assume this risk, but courts treating the purchaser as the owner for purposes of tort, insurance payments, and taxes—but not risk of loss—would be inconsistent.<sup>306</sup> Furthermore, because the purchaser has the most to gain from the contract, namely right of ownership to the immovable, the purchaser should bear the risk of loss as well.<sup>307</sup> This liability provides another incentive to purchasers to care for and keep up the value of the property, as well as allowing the purchaser to make improvements to the property.<sup>308</sup>

Mortgages encumber many properties sold under a bond for deed contract. The law protects mortgagees by requiring notification before

---

299. *See id.*

300. *Id.*

301. *Id.*

302. *See* LA. CIV. CODE ANN. art. 2315 (2018).

303. If sellers are not allowed onto the property, then they have no control over the property, and therefore they have no duty of care to maintain the safety of the property.

304. *See infra* Appendix B.

305. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127, at 5.

306. *See* Trichel v. Home Ins. Co., 99 So. 403 (La. 1924).

307. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127, at 5.

308. *Id.*



entering into bond for deed contracts.<sup>309</sup> This requirement incentivizes mortgagees to continue their business and aids in keeping properties in commerce.<sup>310</sup> When owners sell their mortgaged property, the mortgagee typically requires notification because mortgagees have an interest in knowing who has possession of the property, the purchaser's ability to pay, and whether the purchaser will continue with upkeep and repairs of the encumbered property.<sup>311</sup> The law should continue to incentivize mortgagees to allow bond for deed contracts by requiring notification when an owner attempts to sell through a bond for deed contract.<sup>312</sup> Moreover, protection of buyers demands that failure to comply with the notice requirement will make the seller liable for any damages sustained by the buyer as a result of the failure.<sup>313</sup>

One of the most important additions must establish that timely payment by the purchaser to the escrow agent of the amount due under the bond for deed contract must preclude foreclosure for the nonpayment by a mortgagee who provides written consent to the bond for deed.<sup>314</sup> This right is reflected in the Bond for Deed Act and must remain as a policy matter.<sup>315</sup> When purchasers enter into this type of agreement, they expect the right to possess for as long as they have fulfilled their obligations under the contract.<sup>316</sup> Although this rule initially seems to disadvantage mortgagees, holders of mortgages typically are highly sophisticated parties and purchasers are not. Also, mortgagees must consent to the bond for deed contract to be held to this provision.<sup>317</sup> Therefore, mortgagees are not put at any real disadvantage by the law, and the purchasers are protected.<sup>318</sup>

As a complement to the foreclosure preclusion, the law should provide additional options for the purchaser in the event of seller default on the

---

309. LA. REV. STAT. § 9:2942 (2018).

310. *See, e.g.*, Act No. 169, 1934 La. Acts 544; Meeting of the Council for the Louisiana State Law Institute (Dec. 17–18, 1993) (on file with the Louisiana State Law Institute).

311. *See, e.g.*, *Levine v. First Nat'l Bank of Commerce*, 948 So. 2d 1051, 1054–55 (La. 2006).

312. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127.

313. *Id.*

314. LA. REV. STAT. § 9:2944.

315. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127; Meeting of the Council for the Louisiana State Law Institute (Sept. 16, 1994) (on file with the Louisiana State Law Institute).

316. *See* § 9:2944.

317. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127.

318. *See* § 9:2944.

mortgage and express options that the current statute lacks.<sup>319</sup> When the seller fails to make mortgage payments due in excess of the amount owed by the purchaser under the bond for deed contract, the Code should allow for the purchaser either to pay the delinquent installments to the mortgagee and deduct the sum paid from the debt owed to the seller or recede from the contract.<sup>320</sup> Should the purchaser choose to recede, dissolution may be effected by a written notice to the seller declaring the contract dissolved and the reasons for doing so.<sup>321</sup> In a situation in which the purchasers recede, if they provided some sort of down payment or if the cost of the payments is more than fair rental value of the property, they would be entitled to damages under the Code's damages articles amounting in the return of those payments.<sup>322</sup> Similarly, if the escrow agent fails to make payments to the mortgagee, then the purchaser should have a right to pay the delinquent installments and deduct the sums paid from the debt owed to the seller.<sup>323</sup>

Professor Litvinoff argued that provisions of this type essentially import the principles found in Article 2694 of the lease title in which a lessee may make repairs that are the responsibility of the lessor and then either demand reimbursement or deduct the amount paid from the rent owed to the lessor.<sup>324</sup> The purpose behind both rules is to allow those persons in possession of an immovable to protect their interest in the immovable—or in a bond for deed contract their right in the immovable—at the expense of the true owner.<sup>325</sup> This provision provides mortgagees with slightly more protection because the rule clarifies that the purchaser is allowed to pay on

---

319. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127. See § 9:2944.

320. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127.

321. *Id.*

322. See LA. CIV. CODE ANN. arts. 1994–2004 (2018).

323. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127.

324. *Id.*; LA. CIV. CODE ANN. art. 2694 (“If the lessor fails to perform his obligation to make necessary repairs within a reasonable time after demand by the lessee, the lessee may cause them to be made. The lessee may demand immediate reimbursement of the amount expended for the repair or apply that amount to the payment of rent, but only to the extent that the repair was necessary and the expended amount was reasonable.”).

325. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127, at 11–12; see *Lake Forest, Inc. v. Katz & Besthoff No. 9, Inc.*, 391 So. 2d 1286 (La. Ct. App. 1980).

behalf of the seller in the case of default.<sup>326</sup> The provision also affords purchasers with options and extra protection by clarifying that they can deduct these costs from the total amount due to the seller.<sup>327</sup>

Finally, implementing these proposed revisions would have the unexpected effect of keeping Murray out of jail.<sup>328</sup> Under this new regime, Murray would have had the right to dispose of the appliances because she indisputably possesses the right to act as the owner of the property. Then, after dissolution of the contract, Murray would only be liable for damages to Leverett under the Civil Code articles regulating damages, as opposed to facing criminal sanctions.<sup>329</sup>

#### CONCLUSION

The current confusion that clouds bond for deed law results from problematic jurisprudence that makes these agreements incompatible with the Civil Code. With a few revisions classifying these contracts as sales, bond for deed contracts can continue to be used throughout Louisiana and be trusted by sellers, purchasers, and mortgagees. These agreements do not conflict with civilian notions of sales, and with a few adjustments to clarify the rights of purchasers and mortgagees, these agreements can become a useful and beneficial part of Louisiana real estate transactions.

*Endya L. Hash\**

---

326. Final Draft Bond for Deed Revised Contract for Sale Approach, *supra* note 127.

327. *Id.*

328. *See* Purpura, *supra* note 1.

329. *Id.*

\* J.D./D.C.L., 2018. Paul M. Hebert Law Center, Louisiana State University. The author thanks Professors Melissa Lonergass and Heidi Thompson for their thoughtful comments and guidance. The author also thanks Amber Allan, Isabelle Lang, Jared DeSoto, Elizabeth Long, and Victoria Lloyd for their unending support and patience. Finally, a special thanks to the author's first teachers Cecile M. Rash and Kelly B. Rablee, whose brilliance and compassion continue to inspire the author daily.

## APPENDIX A: FORM CONTRACTS

*Form A*

The following is a copy of the language used in Form A:

THIS IS A MEMORANDUM OF THAT CERTAIN BOND FOR DEED executed this same date before the undersigned Notary Public, by and between \_\_\_\_\_ (hereinafter “owner” which term shall denote either singular or plural) and the undersigned “Purchaser”, in order to effect property registry and give notice thereof pursuant to Louisiana Law, La. R.S. 9:2721, et seq., to the effect that Owner will sell and Purchaser will purchase the following described immovable property:

## PROPERTY DESCRIPTION

The Purchase Price is \$\_\_\_\_\_, and said Bond for Deed is fully incorporated herein by reference, and made a part of hereof as though set forth in full herein or annexed hereto. It is the intention of the parties hereto to hereby ratify, approve and confirm the Bond for Deed as a matter of public notice and record, and nothing herein shall in any way affect or modify the terms and conditions of the referenced Bond for Deed, a summary of which is as follows:

SPECIAL MORTGAGE: In conformity with La. Civil Code Art. 3294, Owner hereby grants to \_\_\_\_\_, Mortgagee, a Special Mortgage on the property located in the State of Louisiana, Parish of East Baton Rouge as described above.

executed between the parties. The maximum amount secured by this mortgage is Five Hundred Thousand Dollars. The actual amount of the indebtedness shall be determined by the outstanding fees due Escrow Services, Inc., as well as the amount of damages sustained by the mortgagee as a result of the breach, by Owner, of the obligations set forth in said agreement.

CANCELLATION: It is hereby stipulated that Escrow Services, Inc. Shall be authorized to file for record a cancellation of this Bond for Deed and Special Mortgage upon which all interested persons may rely, should payment records show default or expiration of Bond for Deed or breach of other obligations, as determined in the sole discretion of Escrow Services, Inc.

ESCROW AGENT: Owner and Purchaser, including their successors and/or assigns, have appointed Escrow Services, Inc., 450 Causeway, Ste, B, Mandeville, LA 70448 as Escrow Agent for the Bond for Deed.

USUFRUCT: Owner hereby grants a usufruct in favor of Purchaser over the property subject to this agreement. Said usufruct is for the benefit of Louisiana Homestead Exemption and shall automatically terminate upon cancellation of this agreement.

POWER OF ATTORNEY: Owner further declares and acknowledges that Owner has made and appointed Escrow Services, Inc., to be their true and lawful agent and attorney-in-fact, giving and by these presents, granting unto the said agent, full power and authority to act for Owner, in Owner's name and on Owner's behalf, to sell and deliver the hereinabove described real estate and all of owner's rights, title and interest therein, with warranty of title and with subrogation of all actions of warranty, unto any person, firm, corporation or association, in accordance with the terms of the Bond for Deed and to receive the balance, if any, due at such time. Owner further acknowledges that it has authorized the said agent and attorney-in-fact, in agent's sole and unconditional discretion, to sign all papers, document and acts necessary to accomplish the above purposes and to do any and all things which the said agent deems necessary or property in connection therewith.

This Power of Attorney is intended to be effective for an indefinite duration, for which any party may rely, until a revocation thereof is filed in the conveyance records where this Power of Attorney is recorded.

THUS DONE AND PASSED, in counterpart on this date, in the presence of two undersigned competent witnesses, who hereunto sign their names together with Owner and Purchaser, and me, Notary, after reading of the whole.

*Form B*

The following is a copy of the language used in Form B:

BE IT KNOWN, that on this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 20\_\_\_, before me, the undersigned Notary Public duly commissioned and qualified in and for the State and Parish aforesaid, and in the presence

of the competent witnesses hereinafter named and undersigned,  
PERSONALLY CAME AND APPEARED:

---

(Hereinafter called "Seller")

AND

---

(Hereinafter called "Purchaser")

Collectively the Seller and Purchaser are hereinafter referred to as  
"Appearers".

Appearers declare that this Contract is a Bond for Deed with each  
other to the effect that Seller will sell land; Purchaser will purchase the  
immovable property as hereinafter described with any and all  
improvements situated thereon.

NOW IT IS CLEARLY UNDERSTOOD AND AGREED THAT  
THIS DOCUMENT IS NOT A SALE, TRANSFER OR CONVEYANCE  
BUT ONLY A WRITTEN AGREEMENT TO SELL, TRANSFER AND  
CONVEY THE HEREIN DESCRIBED PROPERTY IN THE FUTURE  
PROVIDED ALL OF THE TERMS, CONDITIONS, PAYMENTS AND  
OBLIGATIONS SET FORTH HEREIN ARE FULLY, COMPLETELY  
AND TIMELY MET BY PURCHASER.

TERMS OF SALE: Appearers further declare that contemporaneously  
with the final payment, a sale is to be executed by the said Seller in favor  
of the said Purchaser in the standard form for a Louisiana cash sale with  
full warranty of title. The cost of all necessary certificates and vendor's  
fee shall be paid by Seller and all notarial fees and other expenses shall be  
paid by Purchaser.

PROPERTY: If, and only if, Purchaser makes all payments prescribed  
herein and promptly pays all tax assessments and insurance as set forth  
hereinafter. Seller will at that time execute a sufficient warranty deed,  
selling and conveying unto Purchaser the following described real  
property, to wit:

PROPERTY DESCRIPTION

The said property is subject to any and all restrictions, conditions and servitudes that may appear in the records of

\_\_\_\_\_.

**CERTIFICATES:** Appearers take cognizance of the fact that no survey, nor title examination has been made on the herein described property examination has been made on the herein described property in connection with this Act, and Appearers do hereby relieve and release me, Notary, from any and all liability in connections with encroachment which might appear on such survey and title defects which might have been disclosed by such title examination.

**PUBLIC RECORDS:** This Bond for Deed will be recorded in the mortgage and conveyance records of the Parish where the Property is located.

**PURCHASE PRICE:** The total purchase price for the property and any improvements thereon shall be the sum of

\_\_\_\_\_ (\$\_\_\_\_\_)  
DOLLARS.

Appearers declared that contemporaneously with the execution of this instrument, Purchaser has paid to Seller the sum of

\_\_\_\_\_ (\$\_\_\_\_\_)  
DOLLARS,

cash in hand paid, the receipt whereof and the sufficiency thereof is hereby acknowledged, and Purchaser does hereby bind assigns, to pay unto Seller the additional sum of

\_\_\_\_\_ (\$\_\_\_\_\_)  
DOLLARS,

with interest at the rate of \_\_\_\_\_% per annum on the unpaid principal balance, payable as follows:

**PAYMENTS:** Said payments are to be made beginning \_\_\_\_\_, 20\_\_, and on the same day of each succeeding month thereafter until the full principal sum has been paid. All payments are to be made to Seller, or to any banking or savings institution designated by Seller. If such an institution is designated, the Purchaser will pay the collection fees required.

**ACCELERATION:** Seller may require immediate payment in full of all sums if:

1. Within any consecutive twelve-month period Purchaser defaults by failing to pay in full any two monthly payments within 30 days of the due date; OR,
2. Purchaser defaults by failing to pay in full any principal payment required by this Bond for Deed Contract within 30 days of the due date; OR
3. Purchaser defaults by failing, for a period of thirty days after notice, to perform any other obligations contained in this Bond for Deed contract.

**WARRANTY:** Seller further declares and warrants that the property is not subject to any liens or encumbrances whatsoever and has not been alienated since its acquisition of the same and transferred to the said Purchaser, execute or permit any mortgages, liens or encumbrances to be placed on the said property and will at the time that the title is transferred, clear any inscriptions appearing on the Mortgage and conveyance Certificates.

Further, the parties acknowledge that this contract is binding and heritable upon the heirs and assigns of all parties. In the event that the Purchaser must take legal action to cure any title defect, cancel any lien or encumbrance or other wise incur legal expenses to ensure transfer of the property (e.g. open succession in the event of the seller's death) those expenses, including attorneys' fees, will be paid by the Seller.

**TAX DEDUCTION:** The interest paid by the Purchaser shall be deductible on the income tax return of Purchaser as allowed by IRS.

**WAIVER:** Purchaser expressly consents to a waiver of the requirement of Louisiana Revised Statute 9:2943 that a Louisiana bank be designated as "Escrow" Agent. Seller and Purchaser expressly waive any right that they may have to claim the invalidity of this Bond for Deed Contract because of the noncompliance with the said statute and all parties agree not to initiate or suggest that any action be taken against Seller under R.S. 9:2947. Purchaser further understands that the said statutes are the Purchaser's protection.

**SPECIAL MORTGAGE:** In order to secure the full and faithful performance of the foregoing obligation of Seller to deliver title to the above described property, Seller does by these presents further specially mortgage and hypothecate the hereinabove property unto and in favor of Purchaser and Purchaser's successors and assigns.



The amount of this special mortgage is equal to the sum of all payments, including but not limited to interest, principal, insurance premiums, taxes, escrow or collection fees, the expenses of maintenance and repairs, and all other payments permitted and/or required by this contract, including reasonable attorney's fees, paid by the Purchaser. This special mortgage shall also secure the loss value to Purchaser, which loss of value is defined to be the difference between the principal purchase price and the market value of the property at the time of foreclosure of this property. The maximum amount of the obligation secured by this special mortgage shall be three (3) times the purchase price.

**REPAIRS AND OCCUPANCY:** Purchaser is hereby granted the immediate right of exclusive occupancy of the herein described property and agrees to keep the property in good repair, to repair and maintain the improvements, and assume all risk of loss and destruction of said improvements. Purchaser agrees to keep the subject property covered under a termite contract with licensed and bonded pest control contractor.

**NO LIENS OR PRIVILEGES:** No person shall be entitled to a lien or privilege on the immovable property described hereinabove, nor a claim against Seller as owner, under R.S. 9:4801 or R.S. 9:4802 unless Seller shall have specifically agreed in writing to the price and work of any undertaking by Purchaser or any other Person.

**TAXES:** All taxes assessed against the herein described property up to and including the tax year 20\_\_ have been paid. Taxes for the tax year 20\_\_ have been prorated through the date hereof. All property taxes, any state, local or other assessments, from the date of this Act and thereafter shall be the responsibility of Purchaser, and will be promptly paid by Purchaser when due, prior to the time the same become delinquent.

**INSURANCE:** Purchaser further agrees to carry, at Purchaser's expense, fire and extended coverage (minimum \$ \_\_\_\_\_ personal liability) insurance and flood insurance in the minimum amount required. All necessary insurance policies to protect all parties to be in the names of the respective parties, Seller and Purchaser, as required. Certificates of such insurance shall be delivered to Seller at the time of execution of this agreement. It is understood and agreed that all insurance proceeds that might be paid under said insurance policies will be distributed between Seller and Purchaser as their respective interest may exist at the time of the payment of such insurance proceeds. If the existing insurance is continued, Purchaser agrees to review coverage to ascertain the suitability.

DEFAULT: Appearers further declare that the payment of each installment, plus the payment of all taxes, and any state, local or other assessments and insurance premiums is of the essence of this agreement and that if any of the said installments, taxes, assessments or insurance premiums are not paid when due or if Purchaser shall in any other manner violate the covenants hereunder, them in any of such events, Purchaser shall be in default and Seller shall have the right, at Seller's option:

1. To seek specific performance of this Agreement, and to accelerate all installments due for the unexpired term of this Agreement, and declare said amount immediately due and payable, together with an attorney's fee of 20% of the total amount due by Purchaser in the event an attorney is employed to protect any interest or enforce any rights of Seller under this Agreement. Upon payment of all such amounts Seller will immediately convey title to the herein described property to Purchaser. Purchaser expressly waives demand and all notices of demand; OR

2. To have this Agreement and the Special Mortgage granted hereinabove canceled in accordance with the provisions of R.S. 2945 and Civil Code Art. 2017, without the necessity of a judicial dissolution. It is expressly agreed that Seller may serve the required forty-five day notice. Purchaser expressly waives any additional time in which to perform that may be allowed by Louisiana Civil Code Art. 2013. In such event all of Purchaser's rights under this Agreement shall be forfeited as hereinafter provided.

FORFEITURE: in the event of such default and cancellation under R.S. 9:2945, the title to the above described property shall be free and clear from any and all claims by Purchaser, and Seller shall be entitled to retain all payments heretofore made by Purchaser and all improvements placed upon-the said premises without reimbursing Purchaser therefor.

It is expressly agreed and stipulated that the initial payment, plus the total installments paid by Purchaser, constitute the stipulated compensatory amount and/or liquidated damages which Seller is entitled to retain to fairly compensate Seller for: (1) the fair and reasonable rental value of the property involved herein which is owed to Seller for Purchaser's use of the property during the term of this Agreement, (2) reasonable compensation owed to Seller for Seller's removal of the said property from the market, and the resultant loss of all opportunities to sell the subject property to a third party during the term of this agreement, (3)

reimbursement of real estate broker's commission, closing fees and costs, taxes, fees and Federal and State incomes taxes paid or incurred by Seller as a result of this Agreement.

Further, Purchaser covenants and agrees that they and all persons holding possession of the property described herein shall immediately surrender said property and the improvements thereon to Seller upon cancellation of this Agreement.

**NO WAIVER:** Seller's failure to strictly and promptly enforce his rights under this Agreement shall NOT operate as a waiver of Seller's rights, and said Seller hereby expressly reserves the right to always enforce prompt payment of all installments during the entire term of this Agreement, or to seek cancellation of this Agreement and forfeiture of all payments to day of such cancellation, regardless of any indulgences or extensions previously grant.

**COMPLIANCE:** Each party agrees to comply with the reasonable requirements of the taxing and policing authorities having dominion over the property. Seller agrees to take no act which renders performance impossible by the Purchaser and to take all reasonable measures to permit Purchaser to satisfy Purchaser's obligations.

**THUS DONE AND SIGNED,** in my notarial offices at on the day, month and year first written at the beginning of this Agreement in the presence of \_\_\_\_\_ and \_\_\_\_\_, lawful and competent witnesses, who herewith sign their names with the Appearers, and me, Notary, after due reading of the whole.

## APPENDIX B: SURVEY OF CONTRACTS

## Survey of Contract Forms

	<b>Form A</b>	<b>Form B</b>	<b>Original Form</b>
<b>2016</b>	23.8%	66.7%	9.5%
<b>2015</b>	17.6%	74.5%	7.8%
<b>2014</b>	17.8%	75.5%	6.7%

## Responsibilities For Duration of the Contract (Contracts Filed in 2016)

	<b>Purchaser</b>	<b>Seller</b>	<b>Silent</b>
<b>Paying Taxes</b>	58.8%	5.9%	35.3%
<b>Paying Insurance Premiums</b>	58.8%	5.9%	35.3%
<b>Repairs</b>	29.4%	0.0%	70.6%
<b>Risk of Loss of Improvements</b>	58.8%	0.0%	41.2%
<b>Upkeep</b>	58.8%	0.0%	41.2%

## Inclusion of Provisions (Contracts Filed in 2016)

<b>Defining Default</b>	70.6%
<b>Defining Damages</b>	47.1%