The Conditional Sale in Louisiana

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Comments

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The so-called “conditional sale” of the common law is a contract by which the possession of personal property is transferred under provisions reserving title in the transferor until payment of a specified amount of money (usually designated the “purchase price”). The attempts to introduce this security device

into Louisiana have raised a number of serious problems, which it is the purpose of this Comment to consider.

In the Roman law, a sale was not in itself translative of ownership; there had to be a separate transaction to constitute a legal transfer. In France, however, transmission of ownership is an essential element of a sale, and consequently, contrary to the Roman principles, the sale of a thing belonging to another cannot be effected. But the transmission of ownership is not an essential effect, and the parties may freely stipulate against the ordinary result, and provide that ownership will not be transferred until certain conditions have been complied with. Thus, without doing violence to the underlying theory of their law, the French recognize a counterpart of the conditional sale.

4. 1 Guillouard, Traité de la Vente & de L’Echange (2 ed. 1890) 13-14, no 5-6; 24 Laurent, Principes de Droit Civil Français (1877) 6-7, no 2; 10 Planiol et Ripert, Traité Pratique de Droit Civil Français (1932) 2-3, no 2.
5. 1 Guillouard, op. cit. supra note 4, 13-14, no 6: “La vente est par sa nature, disons-nous, translative de propriété, et le vendeur obligé de droit à effectuer cette translation; mais ce n’est là qu’un effet naturel du contrat, ce n’est point un effet essentiel, et les parties peuvent y dérogé en déclarant formellement que la propriété ne sera transférée à l’acheteur qu’après un certain temps, ou à l’arrivée d’une condition, ou bien encore lorsque le vendeur, qui n’est pas propriétaire au moment du contrat, aura pu traiter avec le véritable propriétaire de l’objet aliéné, ou enfin lorsque l’acquéreur aura payé son prix. ... Il n’y a rien d’immoral ni d’illégitime à différer la translation de propriété, et le principe de la liberté des conventions suffit pour permettre aux parties cette dérogation aux effets ordinaires de la vente.”
6. 24 Laurent, op. cit. supra note 4, at 9, no 4: “Faut-il conclure de là que la translation de la propriété est de l’essence de la vente? Non, la loi ne le dit pas, et cela ne résulte pas des principes. Les orateurs du Tribunat invoquent le droit naturel, c’est-à-dire la volonté de parties contractantes; or, les parties ont le droit de manifester une volonté contraire; rien ne les empêche de consentir une vente romaine, comme nous le dirons en expliquant l’article 1599. A plus forte raison, les parties peuvent-elles stipuler que la propriété ne sera transférée que lorsque l’acquéreur aura payé le prix; la vente aura toujours pour objet de transférer la propriété, mais la translation sera conditionnelle, de sorte que le vendeur restera propriétaire tant que la condition ne sera pas accomplie, c’est-à-dire tant que le prix ne sera pas payé.”
7. See also 10 Planiol et Ripert, op. cit. supra note 4, at 8, no 9; 5 Aubry et Rau, Cour de Droit Civil Français (5 ed. 1907) 2, § 349 n. 1; 19 Baudry-Lacantinerie et Saignat, Traité Théorique et Pratique de Droit Civil (1910) 8, no 11.
8. 24 Laurent, op. cit. supra note 5, at 55, § 352, n. 1; 19 Baudry-Lacantinerie, op. cit. supra note 5, at 8, 141, no 11, 141-143; Trib. de Saint-Omer, 7 août 1891, Sirey 1893.2.199; Cass. Ch. req., 17 juill. 1895, Dalloz 1896.1.157.

A counterpart of the conditional sale, based on Article 2457 of the French Civil Code, is recognized in French law. Note (1939) 14 Tulane L. Rev. 122, 123. For a discussion of the conditional sale in the civil law, see Cruz, The Validity of the Conditional Sale in Civil Law (1930) 4 Tulane L. Rev. 530.

The conditional sale should not be confused with a synallagmatic promise of sale, that is, a contract containing two promises: a promise to buy and a promise to sell. Such a contract is equivalent to an absolute sale in French
In France, the vendor under such a contract has an absolute right to recover the thing, even to the prejudice of bona fide purchasers or of mortgage creditors of the first vendee. 7

Although there was some authority to the contrary, 8 it is now well settled that a conditional sale of movable property (as it is known to the common law) is not possible under the laws of this state. 9 In Louisiana, the vesting of title is the essence of a contract of sale and is an element which cannot be contracted against by the parties. “Divided incidents of ownership” subsisting in the buyer and seller are not recognized. 10 Where all the essential elements of a sale are present, the effects of an absolute

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8. In Baldwin v. Young, 47 La. Ann. 1466, 1469-1470, 17 So. 883, 884 (1895), the court stated: "In this case there is no controversy on the issue of the ownership of the heater. It belongs to the vendor under his conditional sale. It is the case of the property of the third person . . . unless it is to be maintained that our Code transforms the property of the vendor who has never parted with the ownership into that of the purchaser. . . . We find no warrant in our Code for this view of the law. . . . We think it beyond doubt that the mortgage yields to the vendor's privilege on the movable sold and attached to the mortgaged property. . . . It seems to us on the same principle the claim of the vendor, who remains the owner of the movable placed in the mortgaged premises must be admitted against the mortgage creditor. . . ." One early case held that a conditional sale followed by delivery is a vente à réméré (a sale with a power of redemption): Smoot v. Baldwin, 1 Mart. (N.S.) 528 (1823). Cf. Patterson v. Bonner, 19 La. 508 (1841).

Art. 2457, La. Civil Code of 1870 (which corresponds to Art. 1584, French Civil Code) provides: "The sale may be made purely and simply, or under a condition either suspensive or resolutive." Compare the language of Sanders, Lectures on the Civil Code of Louisiana (1925) 472: "The sale may be either absolutely or on a condition. The condition may be resolutory, entitling the person to rescind the contract in case certain conditions are not complied with, or it may be suspensive." Is a conditional sale a contract with a suspensive condition?


An agreement to sell which is conditioned on the payment of a certain sum at a specified date and in which the prospective purchaser promises, in case of his failure to pay, to return the property delivered to him, is an option to purchase: Smith & Standifer v. Ivey Bros., 119 La. 357, 44 So. 126 (1907). An option to purchase is essentially different from an option to return a purchase. In one case the title does not pass until the option is determined, in the other the property passes at once, subject to the right to rescind and return: Wm. Franz & Co. v. Fink & Moss, 6 Orleans App. 289 (1909).

sale follow whether the parties intended them or not.\(^1\) If a conditional sale contract is entered into, the clause reserving title to the vendor is disregarded, and the effect of the transaction is that the title passes to the buyer immediately by operation of law.\(^2\) Therefore, the purchaser of moveables under a contract of conditional sale can give a clear title to third parties even though the price remains unpaid.\(^3\)

Attempts by stipulation to avoid the effect of the prohibition against the conditional sale have been consistently nullified by the courts. For instance, an agreement that the vendor should have the privilege of repossessing the object if the vendee should fail to pay the price and that in the event of such repossession all payments should be retained by the vendor as rent and compensation for deterioration, was held to be in effect a prohibited stipulation that the ownership of the thing should remain in the vendor until the payment of the purchase price.\(^4\)

Many contracts which provide for a reservation of title are in the form of a lease,\(^5\) or contain language more appropriate to a lease than to a conditional sale.\(^6\) But, the form of the instrument is of little import in determining the nature of the contract;\(^7\) nor does the name which the parties give the transaction fix its character.\(^8\) The law goes behind the descriptive terms used and looks to the substance of the transaction.\(^9\) A so-called con-


\(^{12.}\) Byrd v. Cooper, 166 La. 402, 117 So. 411 (1928). However, the thing is subject to a vendor's lien securing the price: Standard Chevrolet Co. v. Federal Hardware & Implement Mutuals, 178 So. 642 (La. App. 1937).

In Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908), the vendor lost his security when the vendee resold the property to a third person; the reservation of title was disregarded and the vendor's lien was lost upon resale. This case has been criticized because it limits contractual freedom. It is argued that the moment at which title should pass is a purely "accidental" element of the sale which the parties should be free to determine according to their convenience. Cruz, supra note 6, at 571-574.


\(^{14.}\) Thomas v. Philip Werlein, 181 La. 104, 158 So. 635 (1935). Such a stipulation is deemed not written. If the vendor relies thereon and forcibly seizes the property, he is liable in damages.

\(^{15.}\) Movable as well as immovable property may be leased. Arts. 2676, 2678, La. Civil Code of 1870.


\(^{17.}\) Grapico Bottling Works v. Liquid Carbonic Co., 163 La. 1057, 1113 So. 454 (1927).

\(^{18.}\) See Bohanon v. Stewart, 4 La. App. 150, 153 (1926).

\(^{19.}\) Cf. Long v. Sun Co., 132 La. 601, 61 So. 684 (1913) (the designation of a contract as a "sale" does not make it such where it is apparent that the parties were making a "lease.")
tract of lease by which the "lessee" binds himself at once and irrevocably for a rental equal to the full value of the thing and is to become owner thereof when the "rent" is paid in full (and without the payment of any further consideration) is nothing other than a conditional sale; and the effect is to vest title in the "lessee" as purchaser from the very inception of the contract. A transferor cannot hold the transferee liable for the price of the thing and at the same time retain the ownership of the thing in himself as security. Where the parties intended a transfer of ownership for a fixed sum of money, "denominated by them as rental or hire, the transaction will be deemed a sale and not a lease." Stipulations restricting the right of the vendee to use, enjoy, or dispose of the thing should not be considered as converting the contract into one of lease but should be ignored and considered as not written.

The question of whether a contract is a conditional sale or a lease depends upon the circumstances attending the transaction. Factors tending to indicate that a so-called "lease" is in reality a sale are: that the "lessee" is given practically all the rights of an owner; that the "rentals" are large, represent the full value of the thing, and are in fact intended as a purchase price; that it is reasonable to assume the thing will be consumed or will have

22. Grapico Bottling Works v. Liquid Carbonic Co., 163 La. 1057, 1062, 113 So. 454, 456 (1927). In Bohanon v. Stewart, 4 La. App. 150, 153 (1926), the court said: "It is not the name which the parties give to the contract which fixes its character. Their common intention must control rather than the literal sense of the terms. ... So, also, the construction put upon it by both or by one with the assent of the other." Furthermore, neither party is estopped from contending that the contract is a sale by the fact the transaction is designated a lease: Grapico Bottling Works v. Liquid Carbonic Co., supra.
23. Philip Werlein v. Sallis, 8 La. App. 61 (1928). See the test set forth in Note (1922) 17 A.L.R. 1421, 1435-1436 for distinguishing conditional sales from leases: "Contracts are frequently made which involve elements both of conditional sale and of lease, and it is not always clear whether such contracts are to be construed to be conditional sales or leases. The test most frequently applied in determining the character of a contract, in this regard, is as to whether or not the so-called lessee is obligated to accept and pay for the property at some future time. If this is the effect of the contract, it will be construed to be one of conditional sale, and not one of lease, notwithstanding the use of terms therein commonly used in leases and not ordinarily used in sales contracts."
served its usefulness during the period of the "lease"; that the contract contains a clause by virtue of which, on default in payment of an installment, the entire price of the contract becomes due.

Where the parties resort to a lease agreement, with a provision for the payment of an additional sum by the lessee in order to obtain title, the courts subject the transaction to an equally close scrutiny. Such a contract "is simply a lease with an option to purchase, and is not a sale." But, even in this type of agreement, the additional payment must be a substantial sum; where it is a merely nominal amount the contract is deemed to be a sale translatible of ownership from its very inception.

Although an agreement by which title is retained in the vendor is unknown to the laws of this state, it is well established that, where a conditional sale is contracted in some other state and the article is later brought here, the rights of the parties under the contract will be recognized through rules of comity. Thus, the rights of the original vendor under a conditional sale contracted in a foreign jurisdiction are superior to those of a Louisiana citizen who purchases the thing in good faith and for a valuable consideration after it is brought into this state. However, if there is any evidence of an attempt to circumvent Louisiana law, the transaction will not be upheld. If the vendor consents to the buyer's transfer of the property into Louisiana,
this act is deemed a sufficient attempt to evade Louisiana law. An even clearer case is made out where at the time of the contract it is intended that the property be used in this state. The result is the same whether the property is delivered to the vendee in this state or in the foreign jurisdiction.

With regard to immovable property, “bond for deed” agreements are enforceable. Such agreements reach very nearly the same result as is effected by conditional sales. For instance, the contract enforced in Pruyn v. Gay provided for: (1) immediate

35. American Slicing Mach. Co. v. Rothschild & Lyons, 12 La. App. 257, 125 So. 499 (1930). The court in this case distinguished those cases in which the rights of the conditional vendors under contracts executed in other states were upheld: “In none of these cases, though, does it appear that the property conditionally sold was removed to Louisiana with the consent of the seller. Nor does any of them go farther than to hold that the buyer cannot deprive the unpaid seller of his property by unauthorized removal of it to this state. And though all of them do uphold the right of the unpaid seller to invoke the aid of the courts of this state to repossess himself of his property the act allegedly brought into Louisiana, yet none of them involved his right to invoke such aid where, as here, he had himself shipped the property into Louisiana and the reservation of the title thereto in himself manifested an effort to avoid the effect of the very laws whose protection he invoked.” (12 La. App. 292-293, 125 So. at 502).

In Note (1933) 87 A.L.R. 1308, 1311, it is stated: “... the rules of comity are sometimes not permitted to override the settled public policy of the state to which the property is subsequently removed, as evidenced by the statute of that state; and there are cases in which, notwithstanding the fact that the removal was without the knowledge and consent of the vendor, or that no removal was contemplated under the contract, the reserved title of the conditional vendor has been subordinated to the rights of the subsequent bona fide purchasers from, or creditors of, the vendee in the state to which the property was removed, although such title would have been good against purchasers in the state where the contract was made.”


A contract made in Georgia for the conditional sale of machinery to be delivered in Louisiana may, while the machinery is in transit, be revoked by agreement of the parties; and a sale may be made in Louisiana conferring a vendor’s privilege on the machinery. Pratt Engineering & Machine Co. v. Cecilia Sugar Co., 135 La. 179, 65 So. 100 (1914).


38. A “bond for deed” is “a contract to sell real property, in which the purchase-price is to be paid to the vendor in installment payments by the purchaser, for his convenience, and in which the vendor after final payment of the agreed price, covenants and agrees to deliver to the purchaser a deed and title to the property purchased.” La. Act. 169 of 1934, § 7 [Dart’s Stats. (1939) § 5021.15].


Where an insurance policy contains a clause stipulating that the policy shall be void if there is a change in the interest of the insured, a mere promise of sale does not operate as a forfeiture. Trichel v. Home Ins. Co., 155 La. 459, 99 So. 403 (1924).

The sale of encumbered property by a “bond for deed” contract is unlawful. La. Act 169 of 1934, § 1 [Dart’s Stats. (1939) § 5021.9].

40. 159 La. 981, 106 So. 536 (1925).
possession by the vendee; (2) monthly payments on the purchase price; (3) payment of taxes and insurance by the vendee; (4) conveyance of a deed after full payment, provided, that in case of default, the vendor might keep all prior payments as liquidated damages and fair rental. Under this type of contract the vendor has an option as to two courses of action. He may demand specific performance of the contract; or, he may rescind the contract and hold prior payments forfeited as rentals.

In order to uphold “bond for deed” agreements, the courts have recognized a distinction between movable and immovable property. As to movable property,

“the sale is complete between the parties by their mere consent, and as to the whole world by delivery. Hence where the thing sold has been delivered and there remains only to pay the price, it is quite immaterial what name the parties give to such price. . .”

On the other hand, with regard to real estate, neither consent, delivery, nor payment of the price is sufficient to transfer the ownership; there must be a deed translative of the title.

The doctrine of the Pruyn case is limited and qualified by Heeb v. Codifer & Bonnabel, where the court, although recognizing “bond for deed” agreements, did not allow the vendor to retain payments made by the vendee because they bore no reasonable relation to the fair rental value of the property. While Article 2117 does recognize that a penal clause in a contract is valid, such penalty is by way of compensation for damages resulting from the inexecution of the principal obligation.

41. In case of the vendee's failure to make payments, the vendor is entitled to have the “promise of sale” erased from the records.

42. By virtue of acceleration clauses he can usually sue for the full balance.

43. Cf. Art. 2456, La. Civil Code of 1870, which does not make a distinction between moveables and immovables.


45. Ibid. Even though the “bond for deed” agreement does not pass title, it may be recorded, thereby protecting the vendee as regards subsequent purchasers. A “promise of sale” of real estate amounts to a sale only in the sense that it entitles either party to enforce specific performance; it does not transfer ownership, nor does it put the thing at the risk of the promisee. Trichel v. Home Ins. Co., supra. In a contract for the future sale of immovables, the risk of loss is on the seller since title does not pass. Page v. Loeffler, 146 La. 890, 84 So. 194, 22 A.L.R. 563 (1920). “Bond for deed” contracts are not void as containing the potestative condition. Middleton v. Natal, 9 La. App. 596 (1928).


47. La. Civil Code of 1870.

the vendor under a “bond for deed” contract exercises his right not to sell as a result of default in payments, he can retain only a fair rental and must account for the balance.49

Under Louisiana law the security advantages of the conditional sale are not necessary to protect the interests of the vendor. One security device he has is a privilege on the property sold to the extent of the unpaid purchase price.50 However, this privilege can be exercised only so long as the thing remains in the possession of the vendee.51 Another protection to the vendor is the resolutory condition (implied in every contract of sale), by virtue of which he may dissolve the contract for the nonpayment of the purchase price.52 If the property is immovable, even though it has passed into the hands of third parties, the vendor may dissolve the sale and retake the property.53 As to movables the right of resolution may be exercised only so long as the property remains in the possession of the original vendee,54 but if the vendor desires greater security, he may protect himself by a chattel mortgage,55 which after recordation is good against third parties. Therefore, under Louisiana law, the vendor has ample security without the troublesome conditional sale of other jurisdictions.

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49. Ekman v. Vallery, 185 La. 488, 169 So. 521 (1936). La. Act 169 of 1934, § 2 [Dart's Stats. (1939) § 5021.10] provides that payments under a “bond for deed” agreement must be made in escrow. This protects the vendee to a certain extent, but he still forfeits prior payments if he defaults.
52. Arts. 2561-2564, La. Civil Code of 1870. See also, Comment (1939) 1 LOUISIANA LAW REVIEW 800.
"Defendant's [vendor's] remedy was to sue for enforcement of its vendor's lien or for a dissolution of the sale, and not through its agents to forcibly seize the radio in plaintiff's [vendee's] possession." Thomas v. Philip Werlein, 181 La. 104, 111, 158 So. 635, 637-638 (1935).
53. Johnson v. Bloodworth, 12 La. Ann. 699 (1837); Le Bourgeois v. Le Bourgeois, 23 La. Ann. 757 (1871). There is a clear distinction between effecting a resolution of the sale and exercising a vendor's privilege; the latter is an enforcement of the contract.