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Lay-Away Sales in Louisiana - - - Payment of the Price as a Suspensive Condition to Transfer of Ownership

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Comments

Lay-Away Sales in Louisiana - - - Payment of the Price as a Suspensive Condition to Transfer of Ownership

While recent years have witnessed an increased use of the "lay-away" plan of purchasing goods, little is to be found in current jurisprudence or legal literature concerning such agreements. It is hoped that this Comment will serve to show the position such agreements should occupy in Louisiana sales law, with emphasis upon the legal relations resulting between the parties.[1]

1. The writer is indebted to Daniel J. McGee, member of the Mamou Bar, and former Associate Editor of the Louisiana Law Review, for his recent survey of

THE LAY-AWAY SALE

In general the conventional "lay-away sale" is an agreement between the buyer and seller looking toward a transfer of ownership in property. The parties usually agree as to some specific thing, which is laid aside by the seller, until the buyer pays the price. However, it sometimes happens that only a class of thing is agreed upon, with no specific thing being appropriated until the time of delivery. Because of the buyer's inability to pay the full price in cash, the seller extends a period of credit, but retains possession of the thing until the price is paid in full. Most lay-away agreements provide for a fixed amount to be paid in regular installments. It is sometimes provided that if the buyer defaults in payment, the amount paid toward the price will be forfeited, and the thing returned to stock for resale. It is the custom of sellers, however, to give notice of default to the buyer before such action is taken.

In the recent Louisiana case of *Berry v. Ginsberg*,[2] the court was presented with an arrangement closely akin to the lay-away agreement. The buyer had agreed to purchase a diamond ring, priced at $1830. Payment was to be by weekly installments, but no fixed amount per installment or duration for payment was prescribed. The seller was to retain possession of the ring until the price was paid. After the buyer had paid $704 toward the price of the ring, the seller refused to accept further payment, contending that the weekly payments by the buyer were too small. The court permitted recovery by the plaintiff-buyer for the amount paid on the purchase price. In answering the defendant-seller's reconventional demand for recovery of federal excise taxes and certain property taxes paid,[3] the court felt compelled to decide the issue of transfer of ownership, and found that ownership in the ring transferred at the time of the agreement.

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the larger retail department stores throughout the state to determine the retail merchants' attitude toward lay-away agreements. Material gathered through this survey has made the writing of this Comment possible. Reference throughout to practices, customs, and attitude of sellers in lay-away agreements are for the most part taken from this material.

2. 98 So.2d 548 (La. App. 1957).

3. Any decision affecting transfer of ownership in lay-away agreements will of necessity raise several tax questions, i.e., questions concerning federal income and excise taxes, state sales and ad valorem taxes. It is not within the scope of this Comment to consider the ramifications of these problems. It is interesting to note, however, that Louisiana Sales Tax Regulations provide that "a sale whose delivery is conditional on payment of the price of the sale is not completed until the amount due is received by the seller and therefore not taxable until the sale is completed." Rules and Regulations Promulgated in Connection with Louisiana General Sales Tax, tit. 47, §§ 301-318, as amended, art. 2-18 (1954).

This was apparently considered as having resulted from the parties' concurrence as to thing and price.[4] The facts in this case, with the exception that no fixed amount per installment or duration for payment was prescribed, are substantially the same as those in "lay-away sales." Whether the decision in the *Berry* case should control in deciding when ownership transfers in lay-away sales should depend upon whether the *Berry* case was correctly decided under the principles of the Louisiana law of Sales.

PRINCIPLES OF LOUISIANA SALES LAW

According to the Louisiana Civil Code, a sale is defined as an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.[5] The sale is considered to be perfected between the parties and the property is of right acquired by the purchaser with regard to the seller, as soon as there exists an agreement for the object and the price, although the object has not yet been delivered, nor the price paid.[6] Thus the transfer of ownership is accomplished by operation of law as soon as there is concurrence as to thing, price, and consent. Civil Code Article 2457[7] provides, however, that a sale may be made under a suspensive condition. Such a sale, of which the condition forms a part is, like all other contracts, complete by the assent of the parties.[8] The agreement may be said to constitute a *sale* subject to a suspensive condition, if the transfer of ownership to some specific thing is involved.[9] If at the time of the agreement the thing is not specifically agreed upon, the agreement may be said to constitute *a contract*

4. While the reconventional demand was argued in the trial court, it was not pressed on appeal. The court did not elaborate on the reason for its holding, but apparently disposed of the issue only in passing, finding that any taxes paid by the defendant because of the ring were paid in error, since ownership in the ring had transferred to the buyer from the moment of the agreement. Berry v. Ginsberg, 98 So.2d 548, 551 (La. App. 1957).

5. LA. CIVIL CODE art. 2439 (1870).

6. *Id.* art. 2456.

7. "The sale may be made purely and simply, or under a condition either suspensive or resolutive. . . . In all of these cases, its effects are regulated by the principles laid down in the title: *Of Conventional Obligations.*" See also *id.* arts. 2044, 2471.

8. *Id.* art. 2028.

9. Since the parties have reached agreement as to thing, price, and consent, all of the essential elements of a sale are present; but the parties have by their intention suspended the operation of its effect. The Code itself refers to such agreements as sales subject to a suspensive condition. *Id.* art. 2460 (an agreement with provision for view and trial is referred to as a sale "with a kind of suspensive condition").

to sell an indeterminate thing subject to a suspensive condition.[10] An example of such an agreement is the transaction in which the seller agrees to sell and deliver to the buyer a certain quantity of fungible goods, like so many sacks of rice, provided that the good ship Peerless arrives by the end of the month. Although the occurrence of the condition will not operate to work a transfer of ownership, it will render absolute the obligation to deliver and to pay the price; but before ownership can pass it will yet be necessary for the seller to appropriate to the contract the particular sacks of rice to be delivered thereunder. From the literal language of Article 2457,[11] it would appear that the parties may agree to suspend all of the effects of a sale, that is, the seller's obligation to deliver, the buyer's obligation to pay the price, as well as the transfer of ownership, until the occurrence of some designated event. There appears nothing elsewhere in the Code which would preclude the parties from suspending all of these effects together, or any one or more of them without at the same time suspending any other. The Code itself specifically provides that although the transfer of ownership has been effected, the seller's obligation to deliver may be suspended until the buyer pays the price.[12] The Code also provides that both the transfer of ownership and the buyer's obligation to pay the price may be suspended until the seller has performed his obligation to deliver.[13] However, no specific article of the Code declares that the parties may suspend the transfer of ownership alone, while at

10. A determinate object is an essential element to a sale. As long as the object bargained for remains indeterminate, the agreement is not a sale, but an executory contract of sale (contract to sell). State v. Shields, 110 La. 547, 34 So. 673 (1903). *Accord*, George D. Witt Shoe Co. v. J. A. Seegars Co., 122 La. 145, 47 So. 444 (1908); Consolidated Cos. v. Laws, 124 So. 775 (La. App. 1929).

11. Quoted note 7 *supra*.

12. LA. CIVIL CODE art. 2487 (1870): "The seller is not bound to make a delivery of the thing, if the buyer does not pay the price, and the seller has not granted him any time for the payment."

13. This is the relationship resulting between the parties in a sale subject to view and trial. *Id.* art. 2460: "Things, of which the buyer reserves to himself the view and trial, although the price be agreed on, are not sold, until the buyer be satisfied with the trial, which is a kind of *suspensive condition of the sale*." (Emphasis added.) De la Vergne Co. v. New Orleans & Western R.R., 51 La. Ann. 1733, 26 So. 455 (1899); Jochams v. Ong, 45 La. Ann. 1289, 14 So. 247 (1893); Hamilton Co. v. Medical Arts Bldg. Co., 17 La. App. 508, 135 So. 94 (1931). See Comment, 4 TUL. L. REV. 85 (1929).

A provision for inspection of the goods by the buyer may accomplish this same result. American Creosote Works v. Boland Machine & Mfg. Co., 213 La. 834, 35 So.2d 749 (1948); California Fruit Exchange v. John Meyer, Inc., 166 La. 9, 116 So. 575 (1928).

But not every provision for inspection by the buyer will suspend the transfer of ownership. It must be clear that the parties contemplate a sale subject to a suspensive condition. Brown-McReynolds Lumber Co. v. Commonwealth Bond and Casualty Co., 11 Orl. App. 49 (La. App. 1913).

the same time being bound to deliver and to pay the price. While the literal meaning of Article 2457 would seem to allow such an arrangement, Louisiana jurisprudence has reached a contrary result.[14]

PAYMENT OF PRICE AS SUSPENSIVE TO TRANSFER OF OWNERSHIP

French Authorities

According to the weight of French doctrinal authority the parties may agree to suspend the transfer of ownership until the price is paid, even though they have reached an agreement as to thing and price.[15] They proceed upon the premise that while the Code provides for immediate transfer of ownership as soon as there is agreement as to thing and price, this is not a matter of public policy, and the parties are free to avoid this result by manifesting an intention to do so. In such an agreement, the transfer of property is made dependent on the happening of a suspensive condition — payment of the price. The condition does not destroy the obligatory effect of the contract itself, for the buyer is bound to fulfill his contractual obligation to pay, and the seller has the right to compel him to pay the entire price; only the transfer of ownership is suspended.

Louisiana

The conclusion of the French authorities is predicated on

14. This is the result of the court's holding in the case of Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908). The effect of this case on present Louisiana law will be discussed in detail in the development of this Comment. See page 19 *infra*.

15. "*De quelque manière qu'on explique ces textes, l'idée est claire. Il y a transfert immédiat de la propriété, independant de tout fait ultérieur.*

"*Mais ce principe n'est pas absolu. La vente, quoiqu'elle implique toujours et nécessairement l'idée du transfert, ne réalise pas toujours par elle-même ce transfert . . . .*

"*Enfin, rien n'empêche les parties de s'entendre pour ajourner le transfert de la propriété jusqu'à un moment déterminé ou jusqu'à fait ultérieur prévu. l'article 1583 ne pose pas un principe d'ordre public; donc rien n'empêche qu'on y déroge. Par exemple, il est permis de conclure une vente suivant la mode romaine et de convenir que la propriété ne sera transférée a l'acheteur que* quand il aura payè la prix. Le transfert de la propriété est en quelque sorte subordonné à une condition suspensive." (Emphasis added.) The author adds in a footnote: "*Mais la condition ne s'applique pas au contrat lui-même, car l'acheteur s'est engagé ferme à remplir ses obligations, et le vendeur a le droit de le faire condamner à s'aquitter intégralement du prix.*" 11 BEUDANT, COURS DE DROIT CIVIL FRANÇAIS nos 14, 15 (1934). See also 5 AUBRY ET RAU ET ESMEIN, DROIT CIVIL FRANÇAIS n° 349, n. 39 (1897-1922); BAUDRY-LACANTINERIE ET SAIGNAT, TRAITÉ DE DROIT CIVIL n° 11 (1900); 10 PLANIOL ET RIPERT, DROIT CIVIL FRANÇAIS nos 9, 10 (1952); 24 LAURENT, PRINCIPES DE DROIT CIVIL n° 4 (1876-1878). French decisions are in accord. Civ. 1 juillet 1947 (2 arrets), S.1950.1.97, note Tirlemont; Req. 26 juin 1935, D.H. 1935.414; Gand, 28 juin 1893, D.1894.2.477; Req. 22 juillet 1872, D.73.1.111, S.73.1.299.

articles of the *Code Civil*,[16] which are essentially identical with those to be found in the Louisiana Civil Code.[17] This being so, there is no apparent reason why in Louisiana, in theory, the parties might not effectively agree that transfer of ownership will be suspended pending payment of the price. Applying this principle to the lay-away agreement, there would appear no necessity for concluding that ownership transfers to the buyer as of the time the agreement is effectuated, even though the parties have reached an agreement involving a concurrence as to thing and price, if it is also their intention that ownership will not transfer until the price is paid in full. A recent survey[18] in this regard reveals that most sellers believe that they retain ownership in the thing until the price is paid. As far as the buyer is concerned, he may feel that he has a right to the delivery of the thing, if the price is paid; but it would appear doubtful that he considers himself clothed with complete ownership — at least not to the extent of bearing the risk of the object's loss while it remains in the seller's possession. Most buyers would probably feel greatly alarmed over the possibility of having to pay the price of the purchase, notwithstanding that the thing was destroyed while it remained in the possession of the seller. From the buyer-seller point of view it would thus appear that the parties do not intend a transfer of ownership of lay-away items while they are retained by the seller for security purposes. The agreement appears to be one in which both parties are to be bound, the one to pay the price, the other to deliver the thing; but ownership in the thing is not to pass nor possession to be surrendered until the price is paid.

The Barber Case

There would appear some question in Louisiana, nonetheless,

16. CODE CIVIL art. 1582: "*La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer.*

"*Elle peut être faite par acte authentique ou sous seing privé.*" *Id.* art. 1583: "*Elle est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur a l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.*" *Id.* art. 1584: "*La vente peut être faite purement et simplement, ou sous une condition soit suspensive, soit résolutoire . . . . Dans tous ces cas, son effet est réglé par les principes généraux des conventions.*"

17. LA. CIVIL CODE arts. 2439, 2456, 2457 (1870).

18. A questionnaire was recently addressed to many of the larger retail department stores throughout the state to determine the retail merchants' attitude toward lay-away agreements. Of those answering the great majority indicated that a particular item selected by the customer was the usual subject of "lay-away." Most felt that the item agreed upon would belong to the purchaser only when he had paid for it in full, and that during the "lay-away" the item would be covered by their existing insurance policies.

whether payment of the purchase price may thus serve to suspend the transfer of ownership in an agreement looking toward the transfer of movable property. This is the result of the case of *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*,[19] in which the court was faced with an introduction into Louisiana law of the common law conditional sale.[20] It was there said that "the supposition that the payment of the price can be made a suspensive condition, or condition precedent, to a sale, is an altogether mistaken idea."[21] The court reasoned that if payment of the price was such a suspensive condition, the agreement would be binding on neither party. If the seller did not transfer ownership in the thing, the buyer would be under no obligation to pay the price, there being no consideration to support his promise. The court further reasoned that to have a sale there must be a price, and consequently since in this case the price had been agreed upon and the buyer had contributed part payment thereto, the parties had in effect reached an agreement involving concurrence as to thing and price. In result, ownership transferred to the buyer even though the parties had expressed a contrary intention. The agreement was in fact a sale, that is, a transfer of ownership, the two terms being treated as interchangeable. The court's argument overlooks the fact that the parties should be able validly to agree that one would pay the price and the other would transfer ownership only when the price is paid, with the result that, although the obligation of the parties are fixed by the contract, the transfer of ownership will be suspended. Under the Louisiana doctrine of consent, the parties' promise alone should constitute a binding contract.[22] In any event the

19. 121 La. 152, 46 So. 193 (1908).

20. Under such an agreement the buyer is given possession of the thing, while the seller retains title until the price is paid. Bice v. Harold L. Arnold, Inc., 75 Cal. App. 629, 243 Pac. 468 (1925); Young v. Phillips, 203 Mich. 566, 169 N.W. 822 (1918). *Cf.* City of Boscobel v. Muscoda Mfg. Co., 175 Wis. 62, 183 N.W. 963 (1921).

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

22. LA. CIVIL CODE art. 1761 (1870): "A contract is an agreement by which one person obligates himself to another, to give, or to do or permit, or not to do something, expressed or implied by such agreement."

Id. art. 1766: "No contract is complete without the consent of both parties. In reciprocal contracts it must be expressed. In some unilateral contracts the law provides that under certain circumstances it shall be presumed."

Id. art. 1798: "As there must be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; the will of both parties must unite on the same point."

See generally, *id.* bk. III, tit. IV, c. 2, § 2, *Of the Consent Necessary To Give Validity to a Contract.*

seller's promise to transfer ownership and deliver should be valid legal support for the buyer's promise to pay the price.[23] While it may be true in Louisiana that transfer of ownership is essential to a "sale," that is not to say that the parties are forbidden to enter into a binding agreement looking toward the transfer of ownership to occur when the buyer has fulfilled his obligation to pay the price. As observed by the French, the code provision stating that transfer of ownership is effectuated the moment the parties have reached an agreement as to thing and price is not predicated on a principle of public order from which the parties cannot deviate.[24] There would appear nothing in the Civil Code itself which would preclude the parties from suspending the transfer of ownership until the price is paid, if this intention is properly manifested. Such an agreement would seem to be, it is suggested, not a perfected sale, but rather a sale subject to a suspensive condition.[25] However, in those instances where the object of the lay-away agreement is not specific and the seller has agreed to deliver, when the price is paid, something identified only by description as one of a certain class or kind, the agreement would properly appear to be called a contract to sell subject to a suspensive condition. In such agreements the buyer would be bound to pay the agreed price, and the seller would be bound to select and deliver a thing of the kind called for when the price has been paid.

The real reason underlying the decision in the *Barber* case would appear to be a matter of policy. The court apparently was concerned with the fact that the buyer was given possession of the thing, although he was not to be the owner until the price was paid. Such an arrangement would be detrimental to innocent third parties dealing with the buyer who, though he had possession, could not transfer ownership. For this reason the court apparently found it necessary to call the transaction a sale, with the resulting transfer of ownership, contrary to the intention of the parties. But the basic difference between the usual lay-away sale and the attempted conditional sale of the *Barber* case is that in the former possession is not given to the buyer and there is no opportunity for third parties to be misled by the appearance of ownership, derived from the fact of possession. To

23. See *id.* bk. III, tit. IV, c. 2, § 4, *Of the Cause or Consideration of Contracts.* See also Smith, *A Refresher Course in Cause*, 12 LOUISIANA LAW REVIEW 2 (1951).

24. See note 15 *supra* and accompanying text.

25. See note 9 *supra* and accompanying text.

hold, because of the reasoning of the *Barber* case, that ownership in "lay-away sales" is transferred as of the time of the agreement will serve but to accomplish what was there sought to be avoided — possession in one party with ownership in the other. This might work an undesirable hardship on the buyer, for not only would it result in imposing on him the incidents of ownership, such as risk of loss, but the buyer might stand to lose his property in the goods if they should be sold by the seller while they are in his possession.[26] Policy considerations underlying the *Barber* case being absent in "lay-away sales," there would appear no necessity to conclude that ownership transfers to the buyer at the time of agreement. The intention of the parties to suspend transfer of ownership until the price is paid as long as the seller retains possession should be effective. There being no immediate transfer of ownership, the agreement may properly be called a sale subject to a suspensive condition, or if the object agreed upon is not specific, a contract to sell subject to a suspensive condition, rather than a perfected sale.

Cash Sales

This same problem of whether payment of the purchase price may be a suspensive condition to transfer of ownership is encountered in the use of the term "cash sale" in Louisiana. At common law this is an agreement by which the transfer of ownership and possession is to take place concurrently, that is, only upon payment of the price in cash.[27] An early Louisiana decision took the position that transfer of ownership was *not* suspended in a "cash sale" until payment of the price.[28] However, in *Clarke Warehouse & Implement Co. v. Jacques & Edmond Weil*,[29] the court reached an opposite result, holding that terms of payment, usually mere accidental stipulations in contracts of sale, may assume in particular agreements the importance of suspensive con-

26. As far as third persons are concerned, this is not important because as long as the seller has possession he is in a position to transfer to a bona fide purchaser. LA. CIVIL CODE art. 1922 (1870): "If the vendor, being in possession, should, by a second contract, transfer the ownership of the property to another person, who gets the possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part bona fide, and without notice of the former contract."

27. Winter v. Miller, 183 F.2d 151 (10th Cir. 1950); *In re* Liebig, 255 Fed. 458 (2d Cir. 1918); Koman v. Holtgreve, 207 Md. 151, 113 A.2d 419 (1955); E. L. Welch Co. v. Lahart, 122 Minn. 432, 142 N.W. 828 (1913); Tri-County Fin. Inc. v. Miller, 267 Wis. 174, 65 N.W.2d 39 (1954). See WILLISTON, SALES § 341 (*Cash Sales — Meaning of the Term*) (1948).

28. Hill v. Morgan, 4 Mart. (N.S.) 475 (La. 1826).

29. 152 La. 707, 94 So. 326 (1922).

ditions, upon the happening of which alone the contract is to be perfected and enforced. In *Packard Florida Motors Co. v. Malone*[30] the Supreme Court held that "complete title of ownership does not pass to the purchaser at a cash sale until he has paid the purchase price." Two more recent decisions[31] further indicate that ownership is suspended in a cash sale until the price is paid. There it was reasoned that where parties have agreed that payment is to be in cash, no time being allowed for payment, and the seller accepts in lieu thereof a check or draft, the transaction is converted into a credit sale.[32] The sale is then complete by reason of agreement as to thing and price, title passing to the buyer. The logical implication of these decisions is that no transfer of ownership is effected in a cash sale until the price is paid, while in a credit sale title passes on mere agreement. This can only be because the parties, though they have reached an agreement as to thing and price, intend that the transfer of ownership shall be suspended pending payment.

The lay-away plan of buying and selling is in many respects similar to a cash sale. Under both arrangements it seems reasonable to believe that the parties understand that transfer of ownership and surrender of possession are suspended until the price is paid. The two are distinguished in the time allowed for payment — the cash sale requires an immediate payment of the entire amount, while the "lay-away sale" provides for payment by installment, but in each the seller is apparently seeking to retain his ownership in the thing pending full payment of the price. The court's attitude toward the suspension of transfer of ownership in cash sales lends authority for a similar conclusion in lay-away transactions.

Immovable Property

In this same regard, it is interesting to note that the Louisiana court has experienced little difficulty in permitting the parties to suspend transfer of ownership in contracts to sell immovable

30. 208 La. 1055, 1058, 1063, 24 So.2d 75, 77 (1945).

31. Flatte v. Nichols, 233 La. 171, 96 So.2d 477 (1957); Jeffrey Motor Co. v. Higgins, 230 La. 857, 89 So.2d 369 (1956). Both of these decisions, as well as Packard Florida Motors Co. v. Malone, 208 La. 1055, 24 So.2d 75 (1945), involved agreements entered into outside of Louisiana. The court did not specifically indicate that it was applying Louisiana law, but it did cite Louisiana Civil Code articles as authority for its conclusion.

32. With regard to cash sales being converted into credit sales, Louisiana seems to have adopted the minority view of the common law. See 31 A.L.R. 578 (1924), Supplemented in 54 A.L.R. 526 (1928). *But see* WILLISTON, SALES § 346(a) (1948), where the minority position is approved.

property, even though they have concurred as to thing and price.[33] The court seems to have established an irrefutable presumption that the parties intend only a contract to sell, especially where they refer to a more formal act of sale to be passed later.[34] The policy underlying the decision in the *Barber* case is not applicable when immovables are involved, since the code provision,[35] that every sale of immovable property is null as to third parties until it is recorded, protects third persons against injury. This being so the parties remain free to postpone transfer of ownership until the delivery of the final act of sale. This they are held to intend, unless they manifest a contrary intention.[36] The attitude of the court toward the transfer of ownership in the sale of immovable property is further reflected in the decisions dealing with public sales.[37] Although the Civil Code itself provides that such sales are perfect at the moment of adjudication,[38] the court has reached a contrary result. Such sales will be perfect at adjudication only if the price is paid. Thus if the sale is for cash, transfer of ownership is suspended until the price is paid;[39] if the sale is for credit, transfer is suspended until the instrument representing the indebtedness is delivered.[40] By their decisions concerning private and public sales of immovable property, the courts have actually eliminated the application of the

33. Cerami v. Haas, 195 La. 1048, 197 So. 752 (1940); Bandel v. Sabine Lumber Co., 194 La. 31, 193 So. 359 (1940); McMillan v. Lorimer, 160 La. 400, 107 So. 239 (1926); Smith v. Hussey, 119 La. 32, 43 So. 902 (1907); Peck v. Bemiss, 10 La. Ann. 160 (1855); McDonald v. Aubert, 17 La. 448 (1841); Noto v. Blasco, 198 So. 429 (La. App. 1940); Succession of Premeaux, 17 La. App. 360 (1931).

By virtue of LA. CIVIL CODE art. 2462 (1870), the parties have a right to specific performance, and are not restricted to damages. Cerami v. Haas, 195 La. 1048, 197 So. 752 (1940); Bandel v. Sabine Lumber Co., 194 La. 31, 193 So. 359 (1940); Nosacka v. McKenzie, 127 La. 1063, 54 So. 351 (1911); Lehman v. Rice, 118 La. 975, 43 So. 639 (1907); Girault v. Feucht, 117 La. 276, 41 So. 572 (1906). See Comment, 3 LOUISIANA LAW REVIEW 629 (1941).

34. Davis v. McCain, 171 La. 1011, 132 So. 758 (1931); Trichel v. Home Ins. Co., 155 La. 459, 99 So. 403 (1924); Legier v. Braughn, 123 La. 463, 49 So. 22 (1909); Capo v. Bugdahl, 117 La. 992, 42 So. 478 (1906). In the *Capo* case no title passed under a contract which provided that it was to certify "that I have this day sold my house . . . to Thomas Capo . . . ten percent paid, balance when act of sale is passed."

35. LA. CIVIL CODE art. 2442 (1870).

36. See note 34 *supra.*

37. For a thorough discussion of the public sale in Louisiana law, see Comment, 17 LOUISIANA LAW REVIEW 197 (1956).

38. LA. CIVIL CODE art. 2608 (1870).

39. *In re* Union Central Life Insurance Co., 208 La. 253, 23 So.2d 63 (1945); Capital Building and Loan Ass'n v. Northern Insurance Co., 166 La. 179, 116 So. 843 (1928); First National Bank v. Coriel, 145 So. 393 (La. App. 1933).

40. Mazoue v. Caze, 18 La. Ann. 31 (1866); Perkins v. Dickson, 1 Rob. 413 (La. 1842).

rule of immediate transfer of ownership.[41] This is further indication that the rule that ownership transfers immediately, as soon as the parties have concurred as to thing and price, is not absolute. The court, when presented with agreements involving transfer of immovable property, has itself deviated from it. If it be said that decisions of this kind merely reflect the intentions of the parties, it yet remains true that these intentions are considered controlling and that the only evidence thereof which is required is the mention of a final act of sale to be passed at a later date. Nothing should preclude the parties themselves from doing likewise in the sale of movable property, if they manifest such intention, at least where no danger to third parties is involved, as in lay-away sales.

RISK OF LOSS

If ownership does transfer in the "lay-away sale" as of the time of agreement, the risk of loss is immediately shifted to the buyer.[42] Presumably the parties may themselves expressly agree to the contrary.[43] If the parties do not so agree, the seller is still obliged to guard the thing as a faithful administrator until it is delivered to the buyer.[44] This raises the question of the insurable interest in the parties — whether the buyer or seller alone, or whether both together possess such an interest. Most buyers do not think to insure items while they are in lay-away.[45] Many could not afford to purchase such insurance. Sellers, on the other hand, express the opinion that the thing while remaining in their possession would be covered by their insurance.[46] This position

41. LA. CIVIL CODE art. 2456 (1870): "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."

42. *Id.* art. 2467.

43. Kelham & Co. v. Carroll, Hoy & Co., 20 La. Ann. 111 (1868); Clark & Thieneman v. Norwood, 19 La. Ann. 116 (1867); Goodwyn v. Pritchard, 10 La. Ann. 249 (1855) (dictum).

44. LA. CIVIL CODE art. 2468 (1870).

45. This attitude of the buyer is reflected in the Uniform Commercial Code, § 2-509, Risk of Loss in the Absence of Breach, Comment, para. 3 (1957): "Whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal . . . The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is *extremely unlikely that he will carry insurance on goods not yet in his possession.*" (Emphasis added.)

46. See note 18 *supra.*

would appear questionable, if ownership in the thing has already transferred to the buyer, unless the seller's policy covers not only his own interest in the thing sold, but the buyer's also. On the contrary, if ownership does not transfer until the price is paid, the thing, while remaining in the seller's possession, will be protected by a simple policy covering his interest alone.

REMEDIES FOR BREACH

Whether the lay-away agreement be called a perfected sale, or a sale subject to a suspensive condition, or a contract to sell, ownership having transferred or not, the same judicial[47] remedies will be available to either party in the face of a breach. In case of perfected sale, the Code itself provides for either specific performance[48] or dissolution with damages, where such are appropriate.[49] If the agreement is a sale subject to a suspensive condition, specific performance should be available as a remedy, since the obligation of the seller is an obligation to give or deliver.[50]

It is sometimes provided in the lay-away agreement that upon default by the buyer, the amount paid toward the purchase price will be forfeited to the seller and the thing returned to stock for resale. This provision, whether the agreement is a perfected sale or not, should entitle the seller in a suit for dissolution to retain the amount paid toward the purchase price as stipulated damages,[51] unless the forfeiture would amount to an illegal award of damages.[52] In theory, the seller would not be privileged to resell

47. Whether the agreement is a perfected sale, or sale subject to a suspensive condition, or contract to sell, it will have to be judicially dissolved or enforced. See LA. CIVIL CODE arts. 2046, 2047, 2485, 2561 (1870). See Comment, 4 TUL. L. REV. 92 (1929).

48. LA. CIVIL CODE arts. 2485, 2551 (1870).

49. *Id.* arts. 2485, 2486, 2561, 2565.

50. *Id.* art. 1905: "The term to give . . . is applied only to corporeal objects, that may be actually delivered from one to another; and it includes the payment of money as well as the delivery of any other article." Of course the buyer's obligation to pay the price is specifically enforceable. The French authorities have reached the same conclusion in reference to such agreements. See note 15 *supra*. See also Note, 4 TUL. L. REV. 147 (1929).

51. Where the parties, by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. See LA. CIVIL CODE art. 1934(5) (1870). *Id.* art. 1935: "The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more."

52. The court's attitude toward forfeiture provisions in *bond for deed* arrangements should warrant such a conclusion. Where the object of a contract is anything but the payment of money, the parties may determine the sum to be paid as damages. But where the obligation is to pay a sum of money, the law has provided that no damages exceeding 8% per annum on the amount to be paid can be stipulated. Ekman v. Vallery, 185 La. 488, 169 So. 521 (1936); Heeb v. Codifer

the thing without at least notifying the buyer of his intention to do so.[53] If the lay-away agreement is a perfected sale, resale by the seller, before suit for dissolution, will be on an agency basis or *negotiorum gestio*, since ownership in the thing has transferred to the buyer.[54] If ownership has not transferred, the seller may resell in his own name, as he is still the owner. Of course, if the seller should resell, without notice to the buyer or suit for dissolution and the buyer be not at fault, he may subject himself to damages for breach of contract.[55] Innocent third

& Bonnabel, 162 La. 139, 110 So. 178 (1926); Griffin v. His Creditors, 6 Rob. 216 (La. 1843).

It is interesting to note recent developments in the common law concerning forfeiture of payment where the buyer is in default. "The position of the defaulting buyer of goods is now in the process of change. Although there are still decisions following the common-law rule forfeiting all of the buyer's executed performance, the last quarter century reveals a modified view. The impetus for this change originated with Corbin's article in 1931 [Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 YALE L.J. 1013 (1931)], suggesting that a defaulting vendee should be allowed restitution of installments paid. . . . This unjustified distinction [between the restitution rights of defaulting seller and buyer] has created a severe hardship upon the buyer in recent years with the increased use of the 'lay-away' plan of purchasing goods. Exemplifying the harshness of the strict forfeiture rule is the recent case of *Bisner v. Mantell* (197 Misc. 807, 92 N.Y.S.2d 825 (City Ct. 1949), aff'd, 95 N.Y.S.2d 793 (City Ct. 1950)) where the purchaser of furniture on the 'lay-away' plan forfeited payments amounting to fifty percent of the purchase price, the court commenting that 'it was entirely immaterial whether the defendant suffered actual damages or not.' The harshness of such decisions and the increasing use of the so-called lay-away plan were suggested by the 1952 New York Law Revision Commission as grounds for legislative change in the law of New York (N.Y. Law Rev. Comm'n, 1952 Leg. Doc. No. 65(c), p. 5). Maryland enacted a statute in 1941 protecting the buyer in installment sales provided the default occurs before the seller is obligated to deliver the goods sold. (Md. Ann. Code Gen. Laws art. 83, sec. 121 (1951))." (Footnotes have been added to the quote where cited by the author.) Corman, *Restitution for Benefits Conferred by Party in Default under Sales Contracts*, 34 TEXAS L. REV. 582, 595, 598 (1956).

53. "The rule of law is that, when a vendee refuses to accept delivery of the goods and pay the price, the vendor, after reasonable notice to vendee, may sell the goods to best advantage, at auction or at private sale, and hold the vendee for the difference in price." H. T. Cottam & Co. v. Moises, 149 La. 305, 308, 88 So. 916, 917 (1921); Searcy v. Gulf Motor Co., 37 So.2d 445 (La. App. 1948) (seller should give express and unequivocal notice putting the vendee in default and setting forth an intention to resell the article). See Comment, 23 TUL. L. REV. 559 (1949).

54. The right of resale, even though ownership has transferred to the buyer, has (without much direct code authority) entered Louisiana law of sales. Henderson v. United States Sheet and Window Glass Co., 168 La. 66, 121 So. 576 (1929); Mutual Rice Co. v. Star Bottling Works, 163 La. 159, 111 So. 661 (1927); H. T. Cottam & Co. v. Moises, 149 La. 305, 88 So. 916 (1921); Judd Linseed and Sperm Oil Co. v. Kearney, 14 La. Ann. 352 (1859); Gilly v. Henry, 8 Mart. (O.S.) 402 (La. 1820); Leon Godchaux Clothing Co. v. DeBuys, 120 So. 539 (La. App. 1929) (if the vendee refuses to accept delivery, the vendor becomes the *negotiorum gestor* of the vendee, and must administer the thing sold like a good administrator). See Comment, 4 TUL. L. REV. 92 (1929).

55. "A contract may be violated, either actively by doing something inconsistent with the obligation it has proposed or passively by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated or implied from the nature of the contract." LA. CIVIL CODE art. 1931 (1870).

parties buying from the seller will be protected in a claim by the buyer, whether the agreement is a perfected sale or not, since the seller has retained possession.[56] It is evident from the above analysis that both buyer and seller in the lay-away agreement will be amply protected against a breach of obligation by the other.

CONCLUSION

Several Louisiana cases would seem to furnish authority for holding that ownership might transfer in "lay-away sales" as of the time of agreement as to thing, price, and consent. Such does not appear, however, to be consonant with the probable intention of the parties. Nor is such a conclusion necessitated by the present Louisiana Code system. Payment of the purchase price should serve as a suspensive condition to the transfer of ownership, if the parties so intend, at least where the seller retains possession. The court's attitude toward the cash sale and contracts to sell immovable property supports this position. If ownership is not suspended in the lay-away agreement, risk of loss will be shifted to the buyer, although the seller retains possession and is in a better position to protect himself by a regular insurance policy. As regards remedies available, both buyer and seller will be amply protected in the face of a breach, whether ownership has transferred immediately or not. In the final analysis the lay-away plan of purchasing goods is but a modern security device, serving the needs of contemporary credit buying. As in any contractual arrangement, absent contrary public policy, the intention of the parties should be controlling.

Stephen J. Ledet, Jr.

A Comparison of Redhibition in Louisiana And the Uniform Commercial Code

The Uniform Commercial Code,[1] which has now been adopted in three states,[2] attempts to cover the entire field of commercial

56. *Id.* art. 1922.

1. All references in this Comment to the Uniform Commercial Code (hereafter abbreviated UCC) are to the UNIFORM COMMERCIAL CODE, OFFICIAL TEXT WITH COMMENTS (1957).

2. Ky. Law 1958, c. 77; MASS. ANN. LAWS c. 106 (1957); PA. STAT. ANN. tit. 12A (1954).