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## COMMENTS

### The Conditional Sale in Louisiana Jurisprudence: Anatomy of a Synecdoche

#### I. INTRODUCTION

Today's ever-shrinking world has drawn many distinct legal systems closer together, both geographically and politically.<sup>1</sup> One ramification of this development is the greatly increased probability of "importing" legal rules from one jurisdiction into another.<sup>2</sup> Louisiana, even though obstinately a civilian jurisdiction among states primarily ruled by the common law, is not immune to this new reality. In the past, Louisiana's legislature and courts have imported such common-law doctrines as the duty/risk analysis in torts<sup>3</sup> and the property transferral process known as the "conditional sale" in contracts.<sup>4</sup>

Since each legal system has a more-or-less complete set of legal formants—i.e., sources and hierarchies of law—that influence the adopted legal rule, difficulties in integration may arise in the importing jurisdiction. Because the borrowed legal rule was molded in its native jurisdiction by the local operative sources of law, once imported, the rule might not work as expected in the importing jurisdiction. This likelihood is compounded by the adoptive jurisdiction's own set of legal formants, which will interact with the borrowed rule, sometimes undesirably. The implications and possible risks associated with adopting external legal rules—in light of the systems' underlying, and sometimes hidden, legal formants—have not been fully explored by Louisiana legal scholars.

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1. The almost instantaneous communication available today allows for judicial decisions to be transmitted across the globe in a matter of days, if not hours. Legal libraries and computer-assisted legal research networks make doctrinal works authored in one system readily available to jurists in other systems.

2. The likelihood that a legal rule will be imported from one jurisdiction to another is affected not only by geography but also by how closely related the two jurisdictions are. Although different names are given by individual jurists, it is generally thought that there are three distinct legal families: Romo-germanic, Socialist, and Religious, each with its own offspring. *See generally* René David & John E. C. Brierley, *Major Legal Systems in the World Today* (2d ed. 1978). *See also* Symeon C. Symeonides, *Louisiana Civil Law Systems* 199-212 (6th ed. 1991) and the sources cited therein. Thus, it would seem that the membership of two distinct legal systems within one legal family would increase the likelihood that there will be some borrowing of legal rules. On the other hand, the importation of legal rules from a member of a Socialist legal family by a member of a Romo-germanic legal family is correspondingly less likely.

3. *See, e.g.*, *Dixie Drive it Yourself Sys. New Orleans Co. v. American Beverage Co.*, 137 So. 2d 298 (La. 1962). *See generally* Wex S. Malone, *Ruminations on Dixie Drive it Yourself vs. American Beverage Co.*, 30 La. L. Rev. 363 (1970).

4. *See* La. R.S. 9:2941-2947, 3301-3342 (1991).

Because of Louisiana's unique, and at times unstable, blend of legal formants, the risks of importing rules from other systems may be even greater than elsewhere. Louisiana's membership in a nation dominated by the common law, the growth in the importance and the ease of trade with other states, the rise of technology that makes doctrines and legal rules from all jurisdictions instantly accessible, and the common background and history of the citizens of all states intensify the temptation, and perhaps the need, to import legal rules and doctrines. Too, given Louisiana's civilian tradition, there is a tendency to borrow legal principles from other civilian jurisdictions. Accordingly, Louisiana is a unique legal laboratory in which scholars are able to study the effects of borrowing legal rules from other jurisdictions.

In the case of the borrowed legal rule of the conditional sale, in addition to the essential differences between a civilian and a common-law jurisdiction, there are other, even more fundamental legal formants that attach to every law which is written or formed by judicial action.<sup>5</sup> Because these formants influence the legal rules without being an express part of them, integrating the imported rule may lead to difficulties. This comment focuses on the unexpressed, yet operative, legal formants that relate to the conditional sales contract in Louisiana, namely Louisiana's codal structure, the role of the courts in determining the true nature of a contract, and the weight afforded precedent.

While these legal formants are not express elements of the law governing conditional sales agreements, they nonetheless influence and, indeed, can be dispositive of many of the courts' decisions in this area of the law. Generally, even the most exhaustive examination of the legal rules of each jurisdiction will not disclose all of the legal operants within each system.<sup>6</sup> An example of such an unexpressed legal formant is when a law, expressed in one manner, is actually interpreted differently. This is what Rodolfo Sacco has termed the difference between the "operational rule" and the way the rule is understood.<sup>7</sup> The

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5. See generally Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, published in two installments in 39 Am. J. Comp. L. 1, 343 (1991). Examples of legal formants that almost certainly differ among the two jurisdictions are the two states' constitutions; other, non-civilian, statutes; jurisprudential and doctrinal principles; and the weight the courts of the jurisdictions afford precedent.

6. Perhaps the most influential legal formant that influences legal rules is that nebulous notion of public policy. This notion exists and affects every court decision on some level, yet it is seldom articulated. Parties to the case at bar frequently are uncertain whether the court will invoke policy considerations and what that invocation will mean to the determination of the issues before the court.

7. See Sacco, *supra* note 5, at 9. For example, in *Smith v. State Dep't of Public Safety*, 366 So. 2d 1318 (La. 1978), the Louisiana Supreme Court interpreted La. R.S. 32:1479 (1972) in quite the opposite way the express law would commonly be understood. La. R.S. 32:1479 (1972) listed three elements that were both the requirements for revocation of a habitual offender's license and the prerequisites for the restoration of a habitual offender's license after revocation. The listed elements were conjunctively joined. The court interpreted the "ands" as three "ors," citing precedent that courts are not bound by the "niceties of grammar rules" when interpreting civil statutes and attempting to discover the "true meaning of the law." *Smith*, 366 So. 2d at 1320 (citation omitted). Following *Smith*, the legislature amended the statute to make it clear that "and" meant "and." In

difference between the declaimed operational rule and the way the rule is understood and implemented is one impetus creating a *synecdoche*.<sup>8</sup>

A legal synecdoche exists when the whole of a rule of law is expressed by reference to only a part of it. The definition—drawn from the notion of the synecdoche as a literary form of ancient Greek poetry—illustrates a form of incompleteness of legal rules characterized by reliance on unspoken, yet operative, legal elements within the system. In situations of this kind, the formulation of the rule resembles (in form) the use of a synecdoche in ancient poetry, where the passage of a long period of time might be described by stating, "Many springs have passed." In this case, the whole (many years) is referred to by only a part (many springs). The unexpressed, yet essential, part of the concept remains unspoken.<sup>9</sup> The truth of the statement, "many springs have passed," is undisputed, but more than just the springs have passed—so, too, have summers, falls, and winters.

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Barron v. State Dep't of Public Safety, 397 So. 2d 29 (La. App. 2d Cir.), writ denied, 401 So. 2d 1188 (1981), the court of appeal recognized the legislative overruling of the Louisiana Supreme Court's interpretation in *Smith*.

8. The notion of a synecdoche is the product of European comparative legal scholars. See in the English language, Sacco, *supra* note 5; Francesco Parisi, Liability for Negligence and Judicial Discretion 19-22, 173-77 (1992). And, for those who read Italian, see Gino Gorla, Esperienza Scientifica: Diritto Comparato, Cinquant'Anni di Esperienza Giuridica in Italia (Acts of the Conference held in Messina-Taormina, November 3-8 (1981); P.G. Monateri, La Sinneddoche (1984); and P. Gallo, L'Elemento Oggettivo del Tort of Negligence: Indagine sui Limiti della Responsabilità Delittuale per Negligence nei Paesi di Common Law (1988). The 1979 Congress of the Italian Association of Comparative Law and the 1987 Journée of the Association Henri Capitant examine this concept in some detail.

9. For an example of a legal synecdoche in Louisiana, one can look to La. Civ. Code art. 2315, which expressly contains only three elements to establish a cause of action in tort: fault, causation, and damage. La. Civ. Code art. 2315 states, in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." There is no express legislation that imposes a duty on a tortfeasor to refrain from causing the damage through his fault. Nevertheless, duty is an integral part of a cause of action under article 2315. See generally William L. Crowe, Sr., *The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone—A Primer*, 22 Loy. L. Rev. 903 (1976). It might be argued that the synecdoche is "cured" by subsequent case-law, doctrinal works, and a consistent teaching of duty as a required element of a cause of action in tort. Even though the legislation does not require such an element, every practicing attorney is aware of the requirement through his education, reading, and practice. But, since duty was not first a part of the positive law, there are ever-conflicting opinions as to what duty is, where it comes from, and to whom it applies. The adoption of the element of duty as part of a cause of action under Article 2315 makes this cause of action seem similar to a cause of action under Germany's Bürgerliches Gesetzbuch [BGB] § 823 (Walter Loewy trans., The Boston Book Co. 1909), which enumerates which interests are protected: "One, who designedly or negligently injures life, body, health, freedom, the property or any right of another is bound to indemnify the other for the injury arising therefrom." Monateri, *supra* note 8, at 481, discusses this issue with reference to the French C. Civ. art. 1382, the forbearer of our own article 2315. See also Parisi, *supra* note 8, at 323-31 (discussing protected and unprotected interests as well as unspoken elements in the principle of fault in Louisiana).

To avoid difficulties in coordination or uncertainty in application of the imported rule in the existing legal framework, law-makers anticipating adopting the rule must carefully examine all the relevant formants to determine the two systems' compatibility in the area of the law affected by the contemplated addition. It is possible, as in the case of protected and unprotected interests in the area of torts, that what is hidden in one jurisdiction might be express in another.<sup>10</sup> Examining the jurisdictions' underlying legal formants for compatibility will greatly increase, though not guarantee, the chances for a successful incorporation of the rule.

The different, and often conflicting, legal formants in the jurisdictions have made the integration of the common-law notion of the conditional sale a difficult one in Louisiana's civilian jurisdiction. This is not to say that the existence of unspoken elements of a rule of law is the sole reason for those problems of incorporation in Louisiana, only that it is one reason.<sup>11</sup>

This comment's examination of this difficult integration will proceed as follows: (1) a brief examination of the nature of the contract of conditional sale with a comparison to the contract of sale subject to a suspensive condition and to the promise *to* sell as distinguished from the promise *of* sale; (2) a more thorough examination of some of the jurisprudence affecting the conditional sale as that contract, in an evolutionary fashion, attempted to find a home in a sometimes hostile civilian system; (3) an analysis of some of the possible reasons for the difficulties in integration; and finally, (4) a modest proposal to avoid such future problems in fully incorporating the conditional sale into our system.

## II. THE CONDITIONAL SALE IN LOUISIANA

A conditional sale is a contract in which "the purchaser pays the seller in installments, and, although he receives possession and the right to use the thing at the moment when he enters into the agreement with the seller, the seller retains title to the thing until the final payment is made."<sup>12</sup> This kind of contract is "a common law institution that has been traditionally unenforceable

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10. See *supra* text accompanying note 9.

11. Following are some of the many other reasons for uncertainty in the law: a need for judicial discretion in hard cases, the inherent imprecision of language itself, and an evolving philosophy of the purpose of law. However, since each of the above is not an express part of the law, it can be argued that each is itself a synecdoche. See generally, Parisi, *supra* note 8, for an enlightening view of judicial discretion in tort law. See also Gerald L. Bruns, *Law and Language: A Hermeneutics of the Legal Text*, in *Legal Hermeneutics* (Gregory Leyh ed., 1992) and Frederick A. Philbrick, *Language and the Law* (1951) for brief but insightful glances at law and language. See *Law and Philosophy* (Edward Allen Kent ed., 1970) for a historical look at the philosophy of law. Some would go so far as to say that law is utterly uncertain, and in fact—lawless. See generally Roberto M. Unger, *The Critical Legal Studies Movement* (1986).

12. Saúl Litvinoff, *Sale and Lease in the Louisiana Jurisprudence* 111 (2d rev. ed. 1986).

in Louisiana with regard to the sale of movable property."<sup>13</sup> The so-called "bond for deed" contract is the conditional sale of an immovable.<sup>14</sup>

For our analysis, it is first necessary to distinguish between a conditional sale and a sale subject to a suspensive condition and, later, between a conditional sale and a promise to sell. The former distinction is necessary because of some confusion occasioned by the similarity of their classification. The latter, instead, is necessary because of the confusion caused by the similarity of function and effect of the two obligations.

As to the first, the distinction between a conditional sale and a sale subject to a suspensive condition is a clear one: a sale under a suspensive condition is not enforceable until the happening of the uncertain event that the contracting parties contemplate; conversely, in the case of a conditional sale, the seller is obligated to deliver the thing, and the buyer incurs the obligation to pay the price prior to the fulfillment of the condition.<sup>15</sup> Thus, a sale under a suspensive condition is not enforceable until the occurrence of an uncertain event, while a conditional sale would be enforceable upon the consent of the parties as to the thing and the price.<sup>16</sup> As Justice Provosty concluded:

The reason why a sale under a suspensive condition does not transfer the ownership is that it is not a sale. If it was a sale, it would transfer the ownership; because a sale is a transfer of ownership, and it is nothing else. The expression "to sell" and the expression "to transfer property for a price in money," are convertible; and, as a consequence, it is no more possible to sell without transferring ownership than it is possible to sell without selling, or to transfer ownership without transferring ownership, or to do any other thing without doing it. When a sale is made under a suspensive condition, there is no sale until the

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13. *Id.*

14. It should be noted that the statutory definition of the bond for deed states that the bond for deed is a contract *to sell*. However, it has been demonstrated elsewhere that in a contract to sell, the purchaser is not entitled to possession of the object of the contract until the contract *of sale* is completed, while in the bond for deed, the purchaser is entitled to immediate possession of the immovable. See La. R.S. 9:2941 (1991). See also David Levingston, Comment, *Bond for Deed Contracts*, 31 La. L. Rev. 587, 596 (1971):

[T]he bond for deed contract is defined by statute as a contract to sell. The purchaser should thus not be entitled to possession of the property. Yet in every Louisiana decision this writer has read on the subject, . . . there was never an issue pertaining to the purchaser's right to immediate possession.

15. 2 Marcel Planiol, *Treatise on the Civil Law Part I* § 375, at 217 (Louisiana State Law Institute trans., 1959) (11th ed. 1939): "The [suspensive] condition . . . suspends even the formation of the right. As long as the condition is still pending, one may say that the obligation which it suspends does not exist; one has only the hope that some day it will come into existence." La. Civ. Code art. 1767 states, in part: "If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive."

16. See Agustin Cruz, *The Validity of the Conditional Sale in Civil Law*, 4 Tul. L. Rev., 531, 537 (Deutsch O'Neal & Agustin Cruz trans., 1930).

condition has been fulfilled. There is merely a contract that there shall be a sale when the condition is fulfilled.<sup>17</sup>

The second comparison, that of the conditional sale to the promise to sell, is somewhat more complicated.<sup>18</sup> It should first be noted that the promise of sale can be either unilateral or bilateral.<sup>19</sup> If the promise is unilateral, then the promisor will make an offer that, upon the acceptance of the offeree, forms a binding contract, though executory only.<sup>20</sup> The unilateral offer is not a completed contract of sale until the promisee consents by accepting the offer, i.e., exercising the option. If, however, the promise to sell is accompanied by a reciprocal promise to buy, then the contract is synallagmatic. In this case, as in the adage, the promise of a sale amounts to a sale (*la promesse de vente vaut vente*).<sup>21</sup> If the seller refuses to uphold the promise, the buyer can sue for specific performance.<sup>22</sup> Nonetheless, since the contract of sale is still executory, no transfer of title takes place at the time reciprocal promises are exchanged. The contract exists in only two states: as a fully executory promise of sale or as a completed sale. In the first case, the buyer is not entitled to possession of the object of the contract, nor is the seller entitled to the payment of the price. In the second case, the contract is one of sale, and ownership passes upon perfection of the agreement.

On the other hand, a conditional sale exists in a single state between the fully executory promise of sale and the perfected sale. Although transfer of ownership is contemplated, it is deferred until there has been a full payment of

17. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 162, 46 So. 193, 197 (1908).

18. J. Denson Smith, *An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money*, 20 La. L. Rev. 522, 528 (1960): "The promise of sale, irrevocable simple offers, contracts to sell, and sales have proved to be troublesome concepts [in Louisiana]."

19. The promise to sell is also called a promise of sale. *But cf.* 2 Saül Litvinoff, *Obligations* § 100, at 182, in 7 Louisiana Civil Law Treatise (1969).

20. The unilateral promise to sell is, indeed, an option.

A closer scrutiny reveals that an option is a contract that actually contains a promise to make another contract later. As that promise binds only the grantor—since the grantee remains free to accept or reject—an option is or consists of a unilateral promise to contract. When the promise is to make a contract of sale, if the grantee so wishes, then it is possible to speak of a unilateral promise of sale.

Saül Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 La. L. Rev. 699, 746 (1987) (citations omitted).

21. Ambroise Colin & Henri Capitant, 2 Cours Élémentaire de Droit Civil Français, § 516, 12 (Center of Civil Law Studies trans., 1976) (8th ed. 1935): "The truth is that the transfer of property takes place at the moment of the double promise. The legislature wanted the formulas: *I promise to sell, I promise to buy*, to be synonyms for *I sell, I buy*."

22. La. Civ. Code art. 2462 states, in part:

A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same.

the price. Until then, however, the vendee is entitled to possession of the thing and the vendor is entitled to the payment of the price.

The conditional sales contract's integration into Louisiana's civilian system has evolved in several discernable stages. During the first stage of this development, although some authority existed to the contrary, Louisiana courts considered the conditional sale of movable property to be impossible.<sup>23</sup> The jurisprudential doctrine that the conditional sale of a movable was considered to be an impossibility, while the conditional sale of an immovable was an enforceable contract, reflects an early stage of the incorporation of the conditional sale into Louisiana. The next stage in the evolution of this doctrine occurred in 1934 when the Louisiana Legislature adopted the Bond for Deed Act and thereby recognized this jurisprudential dichotomy in positive law.<sup>24</sup> The final stage which will be discussed in this comment was the passage of the Lease of Movables Act in 1985, an attempt to heal this schism by reversing the jurisprudence and making the conditional sale of some movables an enforceable contract.<sup>25</sup> Each of these stages will be briefly examined by reviewing some of the relevant jurisprudence of the period.

#### A. *The Jurisprudential Bifurcation of the Conditional Sale*

Early in the incorporation of the conditional sale, Louisiana courts created the doctrine that the conditional sale of movable property was an impossibility, whereas the conditional sale of immovable property was enforceable. In the early case of *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*,<sup>26</sup> the issue was whether a conditional sale of a steam shovel was enforceable. Justice Provosty answered that question forcefully: "Such a contract appears to us to be legally impossible."<sup>27</sup>

The reasoning of the majority was that, since all of the essential elements of a contract of sale were present, the contract was nothing other than a sale.

The essentials of a sale are: A thing, the property in which is transferred from the seller to the buyer; and a price in money paid or promised. Benj. on Sales, p. 2; Civ. Code, art. 2439. It follows from this that to suppose a sale without a transfer of the property in the thing which forms the object of the sale is simply to suppose an impossibility. Either, therefore, the ownership of this shovel was transferred to Hoyt, and the stipulation of continued ownership must be disregarded, or else there was no sale made to him. The latter supposition is inadmissible;

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23. See F. Hodge O'Neal, Comment, *The Conditional Sale in Louisiana*, 2 La. L. Rev. 338, 340 (1940) and the authorities cited therein.

24. 1934 La. Acts No. 169.

25. 1985 La. Acts No. 592.

26. 121 La. 152, 154, 46 So. 193, 194 (1908).

27. *Id.*



because not only the allegation is that there was a sale made, but the plaintiff company has in its pocket a part of the price, and is not offering to restore it.<sup>28</sup>

Thus, a contract in which the transferor was obligated to deliver the object and the transferee was obligated to pay the price even while the ownership was retained by the transferor was interpreted by Justice Provosty as an impossibility.

Since the contract as drafted by the parties was considered impossible, the court examined the transaction to determine if all of the essential elements of a sale were present, i.e., an agreement as to the thing and the price.<sup>29</sup> Finding that all of those essential elements were present, the court interpreted the contract as being one of a completed credit sale.

Similarly, in the case of *Thomas v. Philip Werlein, Ltd.*,<sup>30</sup> the plaintiff alleged that the defendant had wrongfully and fraudulently removed a radio-phonograph from her home. The defendant had, through "self-help," entered the plaintiff's home and repossessed the radio pursuant to the terms of a conditional sales agreement. The court interpreted the contract as "one of sale which vested title to the article sold in the purchaser immediately upon its execution."<sup>31</sup> In accord with *Barber Asphalt*, the court clarified:

Where all the essential elements and conditions for an absolute sale are present in a contract between parties, the effects flowing legally from that particular contract follow, whether the parties foresaw and intended them or not, and though they may refer to the contract as an agreement to sell or as a conditional sale.<sup>32</sup>

These cases exemplify one jurisprudential trend adhered to when the courts were faced with interpreting a contract styled as the conditional sale of a movable. In these situations, courts, finding that all of the essential elements of a perfected sale were present, interpreted the contract as one of a completed sale.

A second set of cases demonstrates another integrational problem with this type of contract. In these cases, parties to the conditional sales contract would use language to disguise the contract as one of lease so to avoid the consequences of having the contract interpreted as a perfected sale.

For example, in *Byrd v. Cooper*,<sup>33</sup> the defendant bought thirteen mules from one Matney, who had acquired them from the plaintiff. The plaintiff contended that he had only leased the mules to Matney. Matney was under the impression that he had purchased the mules when he gave the plaintiff six notes

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28. *Id.* at 161, 46 So. at 196.

29. *See* La. Civ. Code art. 2456.

30. 181 La. 104, 158 So. 635 (1935).

31. *Id.* at 109, 158 So. at 637.

32. *Id.*

33. 166 La. 402, 117 So. 441 (1928).

which reflected the full value of the mules. The Louisiana Supreme Court, citing *Barber Asphalt*, held that the contract, although styled a lease, was a perfected sale upon the parties' agreement as to the thing and the price.<sup>34</sup>

A similar situation arose in *General Talking Pictures Corp. v. Pine Tree Amusement Co.*,<sup>35</sup> where the so-called "lease" of talking picture equipment was for a term of ten years during which the "lessee" was obligated to pay a fifty-dollar annual fee for the license to use the equipment. However, the full price of the equipment was fully paid in two years pursuant to the terms of the lease. Prior to the full payment of the price, the vendee sold the equipment to the defendants—who did not pay the annual license fee for three years. The plaintiff sued to recover possession. Here again, the court interpreted the contract as one of sale rather than of lease.<sup>36</sup>

These types of contracts resulted in the courts' adoption of a set of factors to determine whether the contract was one of sale or of lease. As one author illustrated:

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 served its usefulness during the period of the "lease"; that the contract contains a clause by virtue of which, on default of payment of an installment, the entire price of the contract becomes due.<sup>37</sup>

These cases illustrate that, while there seemed little confusion that the conditional sale of a movable was an impossible contract in Louisiana during this period, when the contract was nonetheless entered into, courts were faced with deciding its effects. Questions concerning the amount of rental allowed when the contract was canceled were not consistently answered, nor were issues of the nature of the contract fully resolved as ingenious merchants disguised the contract using language of lease. These unresolved issues again appear in the case of the conditional sale of an immovable, the so-called "bond for deed" contract.

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34. *Id.* at 405, 117 So. at 442.

35. 180 La. 529, 156 So. 812 (1934).

36. *Id.* at 533, 156 So. at 814.

37. O'Neal, *supra* note 23, at 342-43.

*B. Early Jurisprudence Affecting the Bond for Deed*

In contrast to the conditional sale of a movable, the conditional sale of an immovable, the bond for deed, was early accepted in the jurisprudence as an enforceable contract.

An early Louisiana Supreme Court decision addresses the distinction between the conditional sale of an immovable and that of a movable: "[W]ith real estate the case is different; neither consent, nor delivery, nor payment of the price suffice to transfer the ownership; there must be a *deed translative of the title*."<sup>38</sup> Commenting on the reasoning of this court, Professor Litvinoff writes:

It is extremely difficult to find any basis for this distinction in the language of the Louisiana Civil Code, and the lack of convincing support makes the distinction somewhat incongruous. If, however, the court had stressed that the reasons for refusing to recognize the sale of a movable with reservation of title in the original *Barber Asphalt Paving Co.* case were, actually, reasons of public policy, then inconsistency and incorrect reading of the code articles could have been averted. Quite clearly, there is no need to protect further either the vendee or third parties when the object of the sale is an immovable: the public records protect both. . . . Thus, policy considerations that might dictate that the reservation of title be not allowed in the sale of a movable thing do not exist when the object of sale is an immovable. This, no doubt, is the true—and therefore the more convincing—basis for the distinction.<sup>39</sup>

Admittedly, the policy considerations alluded to by Professor Litvinoff (presumably the difficulties with ostensible ownership) might well lead to the conclusion that the conditional sale of a movable is an impossible contract. However, these policy considerations provide no impetus for the courts to decide that the bond for deed is an *enforceable* contract. Other policy concerns, such

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38. *Trichel v. Home Ins. Co.*, 155 La. 459, 462, 99 So. 403, 404 (1924). See also Levingston, *supra* note 14, at 587-600.

39. Litvinoff, *supra* note 19, at 116 (citations omitted). See also Levingston, *supra* note 14, at 597 (citations omitted):

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

as the desirability of this contract to effect a transfer of wealth—which perhaps would not otherwise occur—seem to be operative in this case.<sup>40</sup> Regardless of the reasons, the doctrine was created, and its application has caused some of the same difficulties as the conditional sale of a movable.

In *Trichel v. Home Ins. Co.*,<sup>41</sup> at issue was who bore the loss of a house destroyed by fire that had been the subject of a bond for deed contract.<sup>42</sup> The court distinguished the case at bar—which concerned the conditional sale of an immovable—from *Barber Asphalt* and other cases dealing with the conditional sale of a movable by finding that the parties to the contract contemplated a future and final act, i.e., the delivery by the owner to the buyer of a deed translativ of title.<sup>43</sup> Since no such deed had passed, the owner (rather, his insurer) bore the risk of loss.

In *Pruyn v. Gay*,<sup>44</sup> the prospective purchaser under a bond for deed contract defaulted on the payments. Pursuant to a clause in the contract, the owner upon default could cancel the contract and retain all monies paid as if they were rent. The Louisiana Supreme Court supported its affirmation of the trial court's decision to annul the contract as follows: "That the payments made shall be considered as rental for the use of the property is not an inequitable or arbitrary stipulation. If defendant does not comply with his contract, he should pay a reasonable sum for his occupation of the property."<sup>45</sup> Thus, even though the contract was not enforceable, all payments made under the contract were forfeited.

In contrast, in the case of *Heeb v. Codifer & Bonnabel, Inc.*,<sup>46</sup> the prospective purchaser under a bond for deed contract defaulted on the notes. The contract provided that, in case of default, the payments made under the contract would be retained by the owner of the property as liquidated damages. Interpreting that clause, and distinguishing *Pruyn*, the court stated:

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40. For example, imagine the case of an elderly person recently widowed who needs to sell a family home. If, as is often the case, the house is an old one, the widow(er) might not be able to find a willing buyer who is able to secure traditional financing. A prospective buyer who can secure financing might well prefer to buy a newer, perhaps better, home. Imagine further that a prospective buyer is unable to secure financing through traditional banking sources, perhaps because of an earlier judgment of bankruptcy. The two needs coincide. In a case such as this, the bond for deed allows for the desirable transfer of wealth in our society, a transfer that might otherwise be impossible.

41. 155 La. 459, 99 So. 403 (1924).

42. The Louisiana Supreme Court styled the contract a promise to sell rather than a bond for deed. However, since the buyer under the contract had made an unconditional promise to pay the full amount of the price and had taken possession of the property, this contract does not comport with that of a promise to sell in which the owner is not obligated to give up possession of the thing, nor the buyer obligated to pay the price. See the earlier discussion as to the difference between a promise to sell and a conditional sale at *supra* notes 21, 22.

43. *Trichel*, 155 La. at 462, 99 So. at 404.

44. 159 La. 981, 106 So. 536 (1925).

45. *Id.* at 987, 106 So. at 538.

46. 162 La. 139, 110 So. 178 (1926).

We agree with the district judge that the forfeiture clause in the agreement was null and void because not warranted in law, was arbitrary, unreasonable, and without consideration. . . .

The law does not sanction the imposition of punitive or exemplary damages by contract or otherwise, but only such as are in their nature and character compensatory.<sup>47</sup>

The court affirmed the trial court's order for the return of monies paid under the contract.

These cases illustrate that, even though the bond for deed was early accepted as an enforceable contract in Louisiana, many of the same problems of incorporation occurred as had with the conditional sale of a movable; e.g., the amount courts would allow the vendor to retain upon the default of the vendee, ingenious merchants disguising the contract in language of lease, and continuing difficulties in determining the true nature of the contract.

### C. *The Statutory Adoption of the Jurisprudential Conflict*

In 1934, the Louisiana Legislature adopted the Bond for Deed Act,<sup>48</sup> thus codifying the jurisprudential dichotomy. "A bond for deed is a contract to sell real property, in which the purchase price is to be paid by the buyer in installments and in which the seller after payment of a stipulated sum agrees to deliver title to the buyer."<sup>49</sup> Since this legislation only affected the conditional sale of immovable property, the same contract when applied to a movable was still considered an impossible agreement. Although it might seem that this legislation would have dispelled some of the uncertainties in interpretation, the confusion continued.

To illustrate, in *Hines v. Dance*,<sup>50</sup> the second circuit, in determining whether a contract which purported to be a sale but had many, if not all, of the characteristics of a bond for deed,<sup>51</sup> stated:

It [the contract] is *not* . . . a bond for deed contract under LRS 9:2941, as defendant contends, because it does not comply with the statutory provisions which require the contract to contain a provision to the effect that seller, after receiving payment of a stipulated sum, agrees to deliver title to the buyer.<sup>52</sup>

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47. *Id.* at 142, 110 So. at 179. Unlike *Pruyn*, the contract in the principal case did not contain a clause that the vendor could retain payments made as if they were rental.

48. 1934 La. Acts No. 169.

49. La. R.S. 9:2941 (1991).

50. 460 So. 2d 1152 (La. App. 2d Cir. 1984).

51. Included in the contract was a clause which allowed the vendor, upon default, to retain all payments as liquidated damages, much as in the case of a bond for deed.

52. *Hines*, 460 So. 2d at 1154.

The court determined that the contract was one of a credit sale rather than a bond for deed, even though the contracting parties had intended the contract to be a bond for deed.<sup>53</sup>

In contrast, in *Gray v. James*,<sup>54</sup> where there was also a lack of statutory compliance with the provisions of the Bond for Deed Act, the fourth circuit stated:

Appellees argue in brief that even if the agreement fits the definition of a bond for deed contract set forth in R.S. 9:2941, the parties did not intend the agreement be a bond-for-deed. In support of this argument, they cite the fact that the parties did not attempt to comply with the statutory requirement for bond-for-deed contracts provided in R.S. 9:2942, and 2943. We are not persuaded by this argument.<sup>55</sup>

Thus, in one case, statutory compliance was required; in another, it was not. In both cases, the intent of the contracting parties was disregarded by the courts.

In *Gray*, the fourth circuit decided that the contract at issue was a bond for deed, but the court treated the provision that all payments rendered to the vendor be forfeited upon default more as a provision in a contract of lease than one in a bond for deed contract—which is predicated upon just such an eventuality. In a bond for deed, title is not passed until full payment of the price, and even if all but one payment has been made, then under Louisiana Revised Statutes 9:2944, the contract is in default and the vendor can foreclose, retaining all monies.<sup>56</sup> In *Gray*, however, the fourth circuit held that “where the buyer defaults on a bond for deed contract after taking possession of the property, the seller is entitled to collect reasonable rent from the defaulting buyer for his use of the property during occupancy.”<sup>57</sup> This statement seems more applicable to a contract of lease than to a bond for deed.

These cases demonstrate that the adoption of the Bond for Deed Act did nothing to alleviate the uncertainty created in the jurisprudence relative to the conditional sale of an immovable. As in the case of the conditional sale of a movable, the question of the amount a vendor could retain as liquidated damages upon the default of the vendee remained unresolved. Even after adoption of the Act, courts were yet confused as to the true nature of the contract—sale, lease, or bond for deed. Additionally, because of the courts’ difficulties in formulating a consistent doctrine concerning the effects of compliance with the provisions of

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53. Cf. *Barber Asphalt Paving Co. v. St. Louis Cyress Co.*, 121 La. 152, 46 So. 193 (1908).

54. 503 So. 2d 598 (La. App. 4th Cir. 1987).

55. *Id.* at 600. See also *St. Landry Loan Co. v. Etienne*, 227 So. 2d 599 (La. App. 3d Cir. 1969), in which the failure to designate a bank as an escrow agent did not render invalid a bond for deed contract even though this was one of the very few requirements of the Bond for Deed Act.

56. La. R.S. 9:2944 (1991) states: “[T]he failure of the buyers to make payments as they fall due, shall secure to the holder of the notes the right to foreclose when the notes become due and are unpaid.”

57. *Gray*, 503 So. 2d at 602.

the Bond for Deed Act, after the Act was adopted, the statutory provisions themselves contributed to the uncertainty in this already gray area of the law.

*D. Recent Legislation and Jurisprudence Affecting the Conditional Sale of a Movable*

After many years of the courts' classifying the conditional sale of a movable as an impossibility, the Louisiana Legislature, in anticipation of the forthcoming adoption of Article 9 of the Uniform Commercial Code, enacted the Lease of Movables Act.<sup>58</sup> The fifth circuit interpreted the adoption of this act as rejecting prior jurisprudence.

The "Agreement to Purchase or Sell" . . . is a conditional sales agreement whereby title is maintained in the vendor . . . while vendees . . . enjoy the use of the object through the terms of the agreement. . . . Although previously prohibited in Louisiana, this agreement is now valid and enforceable under the Louisiana Lease of Movables Act, LSA-R.S. 9:3301 et seq., enacted by Act No. 592 of 1985, effective July 13, 1985.<sup>59</sup>

Considering the difficulties in integrating the bond for deed into our civilian system, even after the adoption of the Bond for Deed Act, similar difficulties seem likely to manifest themselves as the courts face problems of contractual interpretation of the conditional sale of movables after the adoption of the Lease of Movables Act. A review of some of the decisions rendered after adoption of the Act seems to verify this hypothesis.

For example, in *Andrus v. Cajun Insulation Co.*,<sup>60</sup> the third circuit decided that since the contract in question contained no provision giving the lessee the right or the option to purchase the leased property at the termination of the lease, the contract was a "lease agreement and not a conditional sales contract."<sup>61</sup>

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58. 1985 La. Acts No. 592 (eff. July 13, 1985). Later amended by 1989 La. Acts No. 137, § 20 of that act provides:

It is the intent of the Legislature in enacting this Act to amend the preexisting Louisiana security device laws to accompany and accommodate implementation of Chapter 9 of the Louisiana Commercial Laws (R.S. 10:9-101, et seq.) as previously enacted under Act 528 of 1988. It is further the intent of the legislature that these preexisting Louisiana laws, including without limitation the various statutes and code articles amended and reenacted under this Act, not be expressly or impliedly repealed by Chapter 9 of the Louisiana Commercial Laws, but that such laws remain in effect and be applied to preexisting secured transactions and, at times when so provided, be applied to secured transactions subject to Chapter 9 of the Louisiana Commercial Laws.

59. *Blackledge v. Vinet*, 543 So. 2d 935, 937 (La. App. 5th Cir. 1989).

60. 524 So. 2d 1239 (La. App. 3d Cir. 1988).

61. *Id.* at 1241. Note that the fifth circuit in *Blackledge*, 543 So. 2d at 937, stated that a financed lease is a conditional sales contract sanctioned by the Lease of Movables Act. How the court in *Andrus* came to the conclusion that a financed lease is not a conditional sale of a movable

Nonetheless, the court decided that the provisions of the Lease of Movables Act applied to the contract since the contract was a financed lease.<sup>62</sup> This reasoning is suspect because the definition of a financed lease includes the requirement that "[t]he lessee is obligated to become, or has the option of becoming, the owner of the leased property upon termination of the lease for no additional consideration or for nominal consideration."<sup>63</sup> Since no such provision was found in the lease, the contract could not be a financed lease. Later in the opinion, the court notes that Louisiana Revised Statutes 9:3309 provides that "[e]xcept as specifically provided in this Chapter, true leases are subject to Title IX of Book III of the Civil Code entitled 'Of Lease.'"<sup>64</sup> While this is so, if this is a true lease, then why did the court expend its energy deciding whether the contract was a financed lease? It seems that this court may be confused as to the true nature of the contract, i.e., whether the obligation is one of a financed lease or a true lease, the very problem discussed earlier in the context of the bond for deed contract. As we have seen, this problem continued to trouble courts even after the passage of the Bond for Deed Act, and courts faced similar difficulties in like contracts affecting movables prior to the adoption of the Lease of Movables Act.<sup>65</sup>

In another set of cases, the question of liquidated damages presented itself to the courts. In *Blackledge v. Vinet*,<sup>66</sup> the fifth circuit held that liquidated damages, if provided for in the contract, were allowed under the Lease of Movables Act. However, the lessor could only sue for accelerated payments or cancel the lease, recover the property, and collect any liquidated damages provided for in the contract.<sup>67</sup> The lessor could not collect both accelerated

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is problematic. On the face of the act, it would seem, at least when the contract is a conditional sale disguised as a lease, that the two concepts are indistinguishable.

It is declared to be the policy of this state to encourage and foster the leasing of movable property to individuals and businesses, thus promoting economic growth and development. To this end, financed leases, *which have previously been construed as conditional sales transactions*, are hereby recognized as valid and enforceable in this state.

La. R.S. 9:3302 (1991) (emphasis added).

62. La. R.S. 9:3302 (1991) states: "[F]inanced leases, which have previously construed as conditional sales transactions, are hereby recognized as valid and enforceable in this state. . . ."

63. La. R.S. 9:3306(12)(a)(ii) (1991). This lease was entered into before Chapter 9 of the Louisiana Commercial Laws became effective (La. R.S. 10:9-101 et seq.); thus, those provisions of securities law would not apply.

64. *Andrus*, 524 So. 2d at 1242 n.2.

65. See, e.g., *Byrd v. Cooper*, 166 La. 402, 117 So. 441 (1928); *General Talking Pictures Corp. v. Pine Tree Amusement Co.*, 180 La. 529, 156 So. 812 (1934); see generally *O'Neal*, *supra* note 23, relative to the conditional sale of movables. See, e.g., *Pruyn v. Gay*, 159 La. 981, 106 So. 536 (1925); *Gray v. James*, 503 So. 2d 598 (La. App. 4th Cir. 1987); and *Levingston*, *supra* note 14, at 591, concerning the case of the bond for deed.

66. 543 So. 2d 935 (La. App. 5th Cir. 1989).

67. See La. R.S. 9:3318 (1991).



payments *and* recover the property.<sup>68</sup> This is so because Louisiana Revised Statutes 9:3319(C) provides that “[i]f the lessee pays accelerated future rental payments to the lessor, the lessor must permit the lessee to remain in peaceable possession of the leased equipment over the remaining lease term subject to the lessor’s rights under R.S. 9:3319(D).”<sup>69</sup> The court’s reasoning seems unimpeachable: if the lessor accelerates future payments, then the lessee must be allowed the peaceable enjoyment of the property during the time for which he has paid.

This, however, is apparently not the conclusion reached by the first circuit in *AT&T Information Systems, Inc. v. Smith*,<sup>70</sup> at least in a case where the acceleration clause only required the lessee to pay part of the future monthly rental payments. In this case, the contract provided for liquidated damages calculated by the time remaining on the lease. In the event of default, the lessee would be obligated to pay either seventy percent of the sum of all remaining monthly payments or one-half of the total monthly payments from the origination of the contract, whichever was less. The court held that the lessor could sue for both the “liquidated damages” and for repossession, as long as the amount of the liquidated damages, even if expressed as a percentage of accelerated future rental payments, was reasonable.<sup>71</sup>

The third circuit appears to have arrived at an even more drastic solution. In a case in which the parties stipulated that future rentals would be considered as liquidated damages in case of default, that court found “that the parties to a lease may stipulate that future rentals may be included as liquidated damages under the new act for default in carrying out the obligations of the lease, and such damages are subject to review only for reasonableness.”<sup>72</sup>

It seems, then, that if the acceleration clause is for less than the full amount of the remaining term of the lease and is styled as liquidation damages, rather than accelerated future payments, then, at least in the first circuit, the lessor can sue for both accelerated future payments and for repossession of the property. This result contravenes Louisiana Revised Statutes 9:3319(C), which, as noted above, requires that if the lessor elects to sue for accelerated future rental payments, the lessee must be allowed the peaceable possession of the movable. And in the third circuit, if the court finds that the liquidated damages are reasonable, the lessor can sue for the full amount of unpaid future rental payments. As noted in the case of the bond for deed, the question of the contracting parties’ ability to provide for liquidated damages seems to have

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68. See also *Campbell v. Pipe Technology, Inc.*, 499 So. 2d 111, 114 (La. App. 1st Cir. 1986), writ denied, 502 So. 2d 117 (1987).

69. La. R.S. 9:3319(C) (1991).

70. 593 So. 2d 673 (La. App. 1st Cir. 1991). But see *Campbell v. Pipe Technology, Inc.*, 499 So. 2d 111, 114 (La. App. 1st Cir. 1986) (citations omitted): “[T]he Louisiana Lease of Movables Act does not allow a lessor to recover both the leased property and future rentals.”

71. *AT&T*, 593 So. 2d. at 676.

72. *Ouachita Equip. Rental Co. v. Simons*, 443 So. 2d 762, 765 (La. App. 3d Cir. 1983).

proved troublesome for the courts when applied to the conditional sale of a movable.

Regarding a related issue, whether liquidated damages must be stipulated in the contract before the lessor can sue for them, the court in *Blackledge* noted that liquidated damages "provided for in the lease agreement" shall be awarded if the amount is "found to be reasonable."<sup>73</sup> This seems to be in accord with section 3325 of the Lease of Movables Act.<sup>74</sup> That court went further, however, stating, "When 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."<sup>75</sup>

This conclusion seems supported by the language of Louisiana Revised Statutes 9:3325, but is not the position that the second circuit adopted in *American Leasing Company of Monroe, Inc. v. Lannon E. Miller & Son General Contracting, Inc.*<sup>76</sup> In that case, the court stated that the lessor is entitled to "recovery of only such damages as are found reasonable by the court, whether or not those damages are stipulated."<sup>77</sup>

The fifth and third circuits seem to be at odds over whether a financed lease is a conditional sales contract, and, if so, whether a conditional sales contract is enforceable in Louisiana.<sup>78</sup> The third, first, and fifth circuits seem to disagree whether, and to what extent, liquidated damages may be sued for if the lessor also wishes to repossess the property.<sup>79</sup>

These few cases exemplify some of the problems that have arisen since the adoption of the Lease of Movables Act. These cases raise issues similar to those that continue to trouble the courts in the case of the bond for deed.<sup>80</sup> For example, difficulties in determining the amount of damages allowable under the Act parallel similar problems in bond for deed cases. Perhaps confusion remains as to the true nature of the contract. Since the underlying obligation is the same

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73. 543 So. 2d 935, 938 (La. App. 5th Cir. 1989).

74. La. R.S. 9:3325(B) (1991) states:

The court shall award liquidated damages to the lessor only if it finds the amount thereof to be reasonable. If the court finds the amount of liquidated damages to be unreasonable, or if there is no such stipulation, then the court may, in its discretion, award liquidated damages to the lessor.

75. *Blackledge*, 543 So. 2d at 938.

76. 493 So. 2d 764 (La. App. 2d Cir. 1986).

77. *Id.* at 765.

78. See *Andrus v. Cajun Insulation Co.*, 524 So. 2d 1239 (La. App. 3d Cir. 1988) and *Blackledge v. Vinet*, 543 So. 2d 935 (La. App. 5th Cir. 1989), discussed *supra* at text accompanying notes 60 and 66.

79. See *Ouachita Equip. Rental Co. v. Simons*, 443 So. 2d 762 (La. App. 3d Cir. 1983); *Blackledge*, 543 So. 2d 935; *AT&T Info. Sys., Inc. v. Smith*, 593 So. 2d 673 (La. App. 1st Cir. 1991). For similar problems relative to the bond for deed, see *Hines v. Dance*, 460 So. 2d 1152 (La. App. 2d Cir. 1984) and *Gray v. James*, 503 So. 2d 598 (La. App. 4th Cir. 1987), discussed *supra* at text accompanying notes 50 and 54.

80. Cf. *Heeb v. Codifer & Bonnabel, Inc.*, 162 La. 139, 110 So. 178 (La. 1926) and *Gray*, 503 So. 2d 598, discussed *supra* at text accompanying notes 46 and 54.

for both contracts, i.e., the transfer of ownership of a thing upon full payment of the price, it is understandable that the same types of problems of integration would arise upon adoption of both acts.

### III. UNEXPRESSED LEGAL FORMANTS AFFECTING THE INTEGRATION OF THE CONDITIONAL SALE IN LOUISIANA

As shown by the review of the cases above, there has been a great deal of difficulty integrating the common-law doctrine of the conditional sale into Louisiana's civilian system. It was earlier suggested that some of the problems of integration have been caused by unexpressed, yet operative legal formants in Louisiana's system that are incompatible with the notion of the contract of the conditional sale. This section will attempt to delineate some of those formants that have caused the uncertainty in this area of the law. The comment will single out three elements as operative in causing the uncertainty in the jurisprudence: the Louisiana Civil Code and the underlying notion of codification itself, the jurisprudential doctrine that determining the true nature of a contract is the sovereign province of the courts, and an uncivilian reliance on precedent. Each of these legal formants differs from the common law in greater or lesser degree and has contributed, along with other legal formants,<sup>81</sup> to the integrational difficulties reflected in the cases.

#### A. *The Impregnable Barrier*

The first and perhaps most important of the legal formants making the integration of the conditional sale into our system problematic is the nature of codification itself. Codifying the rules of law within a system assumes that the lawmakers of that jurisdiction are able to state, as far as possible or practicable, all of the general principles of the law. Once these principles are discovered and

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81. Some of the operative legal formants that have not been mentioned are Louisiana's allocation of risks between the buyer and seller, which differs from the common-law theory. See La. Civ. Code art. 2467, which contains the civilian doctrine of *res perit domino*: "As soon as the contract of sale is completed, the thing sold is at the risk of the buyer, but with the following modifications." Contrast to U.C.C. § 2-303 (1990): "Where this Article allocates a risk or a burden as between the parties 'unless otherwise agreed,' the agreement may not only shift the allocation but may also divide the risk or burden." In the case of the conditional sale, part of the reason for finding the conditional sale of a movable impossible was the inability of the contracting parties to divide the incidents of ownership. See O'Neal, *supra* note 23, at 340. A second possibility is Louisiana's overriding requirement of good faith in the performance of all obligations. La. Civ. Code art. 1983. Contrast this to the common-law notion of *caveat emptor*. In the case of the conditional sale, it explains somewhat the courts' disallowance of liquidated damages in excess of a reasonable rent when the buyer defaults on a conditional sales agreement. While the Lease of Movables Act contains this requirement, the Bond for Deed Act does not. In the common law, unless the damages are unconscionable, the intent of the contracting parties, in accord with the doctrine of *caveat emptor*, will be given effect. See U.C.C. § 2-302 (1990) and comments.

articulated, those general principles are applied to the specifics of the case at bar. However, once the general principles are written down, judges are forced to apply them to new situations not conceived of when those rules of law were first codified. The redactors of the French Code Civil, in describing how they approached their work, explained this interplay of forces as follows:

A code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge. Because the laws, once written, remain as they were written. Man, on the contrary, never remains the same, he changes constantly; and this change, which never stops, and the effects of which are so diversely modified by circumstances, produces at every instant some new combination, some new fact, some new result. . . .

The function of the law (*loi*) is to fix, in broad outline, the general maxims of justice (*droit*), to establish principles rich in suggestiveness (*conséquences*), and not to descend into the details of the questions that can arise in each subject.<sup>82</sup>

Unlike common-law jurisdictions where the law of sales developed from individual cases, here the articles concerning obligations were positively articulated from the inception of Louisiana's legal system. As the essential elements of each nominate contract solidified in the jurisprudence through adjudication of individual cases, a judicial theory similar to the theory earlier advocated by Planiol began to emerge: all possible obligations have already been named in the code; thus little or no room remains for the formation of new, innominate contracts. As Planiol noted:

According to traditional opinion, apparently universally received because it is accepted without examination, the different special contracts, which are distinguished the one from the other by their object (sale, lease, partnership, partition, mandate, etc.), are of an unlimited number and it is always permissible for individuals to invent new ones whenever they find the occasion. That belief is not defensible, because the specific elements which serve to distinguish the different contracts

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82. Jean E. Portalis et al., *La Législation Civile, Commerciale et Criminelle de la France 255-72* (1827), reprinted in Arthur T. von Mehren & James R. Gordley, *The Civil Law System, An Introduction to the Comparative Study of Law 54* (2d ed. 1977). See also O'Neal & Cruz, *supra* note 16, at 539 (citations omitted):

If the common law changes day by day, as new and different cases are presented to the consideration of the judges, what happens with the codified civil law? Does it also change gradually or is it halted until, being so unjust, it provokes a new codification?

The latter is without a doubt, the greatest defect of codes; that is, they fail in their attempt to "establish a permanent state of law." Legislators are unable to predict all the situations which may arise in the future, the customs change, society is transformed, new interests arise and the code becomes an obstacle to the progress of juridical science.

are not numerous and cannot be formed except in a definite number of combinations.<sup>83</sup>

Perhaps Planiol's notion that there is only limited room for innominate contracts in French law has influenced Louisiana jurisprudence. The underlying reasoning is not so far from the truth, in that the special contracts were so numerous, covering seemingly all manner of possible contracts, that any agreement must somehow fit within one of the established categories.<sup>84</sup>

As a result of this legal formant, one that does not exist in the common law, Louisiana courts formed the doctrine that a conditional sale must be either a sale or not a sale, without considering the possibility allowed for in the code that a conditional sale was, in fact, a distinct, innominate obligation subject only to the rules of obligations in general and conventional obligations.<sup>85</sup>

Because of this outlook, the Civil Code as interpreted by the judges in individual cases became an impediment to the incorporation of this common-law agreement. As one author noted:

In the common law, when the practice of merchants creates new forms of contracts, the law will sanction them. However, in Civil Law the situation seems different. The transmission of the title on perfection of the contract, which creates the sale under contemporary codes, arises like an impregnable barrier to the conditional sale.<sup>86</sup>

The Civil Code need not be an impediment to the adoption of the conditional sale. Rather, the Code embraces the notion.

### *B. The Search for the True Nature of the Conditional Sale*

The problems surrounding the integration of the Bond for Deed and the Lease of Movables Acts persisted because of the courts' insistence that it was their sovereign province to determine the true nature of a contract.<sup>87</sup> This

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83. Planiol, *supra* note 15, § 1352A, at 767. In a footnote to this section, Planiol states that "there are no innominate contracts in French law and there cannot be any." *Id.* at 769 n.2.

84. Some of the established nominate contracts are sale (La. Civ. Code arts. 2438-2659), exchange (La. Civ. Code arts. 2660-2666), lease (La. Civ. Code arts. 2668-2777), rent (La. Civ. Code arts. 2778-2792), annuity (La. Civ. Code arts. 2793-2800), partnership (La. Civ. Code arts. 2801-2890), loan (La. Civ. Code arts. 2891-2925), deposit (La. Civ. Code arts. 2926-2981), mandate (La. Civ. Code arts. 2985-3034), and suretyship (La. Civ. Code arts. 3035-3070).

85. "Nominate contracts are those given a special designation such as sale, lease, loan, or insurance. Innominate contracts are those with no special designation." La. Civ. Code art. 1914. "All contracts, nominate and innominate, are subject to the rules of this title." La. Civ. Code art. 1915. "Nominate contracts are subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of this title." La. Civ. Code art. 1916.

86. O'Neal & Cruz, *supra* note 16, at 535.

87. Saúl Litvinoff, *Still Another Look at Cause*, 48 La. L. Rev. 3, 12 (1987). While these two elements seem quite similar, the "code as an impregnable barrier" refers to a judicial outlook that the

doctrine exists in the common law, but somewhat differently than in our system—at least in this area of the law. In common-law systems, this doctrine is used to determine the true *intent* of the contracting parties. If their intent is clearly to enter into a conditional sales agreement, then the courts will give effect to that intent. Only when the contract is disguised as a conditional sale, but intended to be truly a lease, are the courts required to determine the true intent of the parties by interpreting the contract.

In contrast, Louisiana courts, because of the codal structure and the judicial outlook that few, if any, innominate contracts exist, begin their inquiry into the nature of the conditional sales agreement by examining the essential elements of the contract itself rather than the intent of the contracting parties. Where all of the essential elements of the nominate contract of sale appear in a conditional sales agreement, then, in the case of the conditional sale of a movable, courts, irrespective of the intent of the contracting parties, have held that the contract must be one of sale. If, on the other hand, all of the elements are not present, courts have held that the contract is an impossibility.

Unquestionably, the redactors of the Louisiana Civil Code did not attempt to establish general principles that could encompass all eventualities any more than did the redactors of the French Code Civil. On the other hand, judges are not free to depart from the clear language of the Code.<sup>88</sup> In the case of obligations, Article 1916 provides that “[n]ominate contracts are subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of this title.”<sup>89</sup> Thus, where a contract has all of the essential elements of one of the “special” categories of obligations (i.e., sales or lease, etc.), the judge must treat the contract as such, and bring to bear all of the provisions that apply to those special obligations.

The distinction between the essential, natural, and accidental elements of a contract is an old notion.<sup>90</sup> Essential elements are those without which the contract could not be formed. Natural elements are those that flow naturally from the contract unless otherwise agreed by the parties, i.e., elements that are supplemental rather than mandatory. Accidental elements are those that the parties may add to the contract at their will.<sup>91</sup> In the case of the contract of sale, in addition to the elements essential to any contract, such as consent, object, and cause, are the essential elements of a determined or determinable thing and

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codal structure *excludes* the conditional sale as an innominate contract. Conversely, the doctrine that it is the sovereign province of the courts to determine the true nature of a contract does not exclude the determination that the conditional sale is an enforceable innominate contract.

88. “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.” La. Civ. Code art. 9.

89. La. Civ. Code art. 1916.

90. See O’Neal & Cruz, *supra* note 16, at 545-55 and the sources cited therein.

91. Accidentals would include such elements as the addition of a resolutive or suspensive condition. See O’Neal & Cruz, *supra* note 16, at 545-55.

a certain price—required by the special provisions contained in the chapter on sales.<sup>92</sup> Natural elements would be such consequences as the time of delivery or the warranty of the thing. Thus, the central inquiry would be whether the transfer of title is an essential, natural, or accidental element of a contract of sale.<sup>93</sup>

With this in mind, the Louisiana Civil Code establishes that a contract of sale is perfected as soon as three things concur: "the thing sold, the price and the consent."<sup>94</sup> Therefore, the sale is perfect "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."<sup>95</sup> In the case of an immovable, "[a]ll sales of immovable property shall be made by authentic act or under private signature."<sup>96</sup>

Accordingly, the conditional sale appears to have all of the essential elements of a perfected sale. There is a written agreement as to the thing and the price, although the price has not been fully paid. Upon perfection of the sale, ownership passes, regardless of whether the parties intend to reserve title until the price is fully paid. This explains much of the resistance to the conditional sale as anything other than a perfected sale. As one writer noted:

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. Where all the essential elements of a sale are present, the effects of an absolute sale follow whether the parties intended them or not. 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.<sup>97</sup>

Professor Litvinoff clarifies: "[I]t is the sovereign prerogative of courts to declare the true nature of a contract irrespective of the name given to it by the parties."<sup>98</sup> Thus, when a court is called upon to determine the true nature of a

92. La. Civ. Code art. 2464 states, in part: "The price of the sale must be certain, that is to say, fixed and determined by the parties." La. Civ. Code art. 1971 states: "Parties are free to contract for any object that is lawful, possible, and determined or determinable."

93. It has been argued elsewhere that the "form and time of paying the price, as the form and time of transmitting the property" comprise "the accidental elements." O'Neal & Cruz, *supra* note 16, at 565.

94. La. Civ. Code art. 2439.

95. La. Civ. Code art. 2456.

96. La. Civ. Code art. 2440.

97. O'Neal, *supra* note 23, at 340-41 (citations omitted) (in part, quoting California Fruit Exchange v. Meyer, Inc., 8 La. App. 198 (Orl. 1927), *aff'd*, 166 La. 9, 116 So. 575 (1928)). "[I]t 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." *Id.* at 340.

98. Litvinoff, *supra* note 87, at 12 (citations omitted). See also O'Neal, *supra* note 23, at 341

contract in the case of a conditional sale, they are faced with a contract that appears to have all of the essential elements of a perfected sale. Faced with this quandary, it is understandable that the conditional sale would be rejected in Louisiana as "impossible." It does not, however, explain why the courts rejected the conditional sale of a movable while accepting the conditional sale of an immovable, the so-called "bond for deed."<sup>99</sup>

### C. Jurisprudence Constante as an Operative Legal Formant

A third legal formant operative in the case of the conditional sale is the uncivilian reliance by Louisiana courts on precedent. This operant largely explains the courts' adherence to the dichotomy created by the courts (i.e., the conditional sale of a movable as an impossible contract and the conditional sale, or bond for deed, of an immovable as an enforceable contract). While this legal formant is present, perhaps with even greater force, in common-law jurisdictions, the approach is in disharmony with the underlying notion of codification and constitutes a failure by the courts to adhere to the fundamental civilian notion of deductive reasoning rather than the inductive reasoning prevalent in the common-law courts. In Louisiana, legislation is a primary source of law, while jurisprudence is a secondary source.<sup>100</sup> Thus, only after a search of the Code should a court avail itself of precedent to help in determining the outcome of the case at bar.

In a common-law jurisdiction, adherence to precedent lends certainty to the law. In contrast, such adherence in a civilian system, especially if contrary or unnecessary to the provisions of the Code, can have the opposite effect.<sup>101</sup> Such rigid *jurisprudence constante* forces contracting parties to search judicial opinions to understand the full ramifications of the obligation they are entering into, rather than being able to fully rely on the applicable code or supplemental

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(citations omitted): "But, the form of the instrument is of little import in determining the nature of the contract; nor does the name which the parties give the transaction fix its character. The law goes behind the descriptive terms used and looks to the substance of the transaction." See also O'Neal & Cruz, *supra* note 16, at 559 (citations omitted): "If there exists a determined thing and a certain price (or in money) and the consent of the contracting parties in regard to the exchange of one for the other, the sale will be perfect as established by the Civil Code, and the requisites which the law requires for the formation of contracts will be complied with."

99. Professor Litvinoff alludes to policy considerations for the dichotomy. See *supra* text accompanying note 39.

100. "The sources of law are legislation and custom." La. Civ. Code art. 1. Comment (b) clarifies: "According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide a court in reaching a decision in the absence of legislation and custom."

101. See *Duffie v. Southern Pac. Transp. Co.*, 563 So. 2d 933, 936 (La. App. 1st Cir. 1990) (Watkins, J., concurring): "To stray from the clear codal provisions, as the majority has done, invites unnecessary uncertainty into this already gray area . . ." Although a procedural case, the comments of Judge Watkins are directed at the court's reliance on precedent rather than codal provisions.



articles. In the case of the conditional sale, even a complete search of the Code and the jurisprudence cannot fully reveal the effects or enforceability of their contract.

This common-law methodology begins in the law schools, where students take their first steps toward understanding legal issues by reading cases. The practice continues as the students graduate and begin to prepare their cases for court. Trained in the inductive method, it is not surprising that the first step in the research process is a search of the reporter. From the cases, the lawyers search for the rules of law the courts have pronounced and compare those rules to those passed by the legislature. Once in the courtroom, lawyers argue their cases before judges who listen sharply for precedent from their own circuit for guideposts in judgment. The cycle perpetuates itself, becoming barely distinguishable from the methodology used in any common-law jurisdiction.<sup>102</sup>

The early jurisprudence decided that the conditional sale of a movable was an impossible contract. Rather than taking a fresh look at that obligation as a distinct, innominate contract, or accepting the French view that the transfer of title is not an essential element of a contract of sale,<sup>103</sup> Louisiana courts followed those early decisions as deferentially as would any common-law court. Likewise, when the court in *Trichel v. Home Ins. Co.*<sup>104</sup> announced that the bond for deed contract was *not* a completed sale because there was no delivery of a deed translatif of title, the court did not explain how that distinction arose from the Code, but rather began and ended its analysis of the law with a discussion of prior cases. Subsequent courts have followed these judicial decisions with little or no fresh evaluation of the Code's provisions.

#### IV. TOWARDS A RECONCILIATION

Analysis of these few cases illustrates some of the evolving problems that have arisen since the importation of the common-law conditional sale—problems similar in kind whether arising from the conditional sale of a movable or an immovable.

With this in mind, if, as in the case of the bond for deed, the courts take the position that determining the true nature of a contract is their sovereign province, then similar problems will inevitably arise as did in the interpretation of the bond for deed contract. For example, the fifth circuit's decision in *Louisiana Power & Light Co. v. Parish School Board of the Parish of St. Charles*<sup>105</sup> indicates just such an eventuality. In this case, at issue was whether a financed lease under the Lease of Movables Act was a lease for purposes of the lease tax imposed by Louisiana Revised Statutes 47:302(B). Stating that "Louisiana

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102. For a discussion of this notion, as it relates to torts in Louisiana, see Parisi, *supra* note 8, at 336-38.

103. See, e.g., O'Neal & Cruz, *supra* note 16, at 575; O'Neal, *supra* note 23, at 339-40.

104. 155 La. 459, 99 So. 403 (1924).

105. 597 So. 2d 578 (La. App. 5th Cir.), writ denied, 604 So. 2d 1316 (1992).

generally recognizes the substance of a transaction over the form,"<sup>106</sup> the court held that for purposes of Louisiana Revised Statutes 47:302(B) a financed lease was not a lease.<sup>107</sup> The question that determination begs is, if the contract is not a lease, then what is its classification? It cannot be a sale because ownership did not pass by virtue of the act. The contract, then, must be a conditional sale, an eventuality not provided for when Louisiana Revised Statutes 47:302(B) was adopted.

Neither will the difficulties in determining whether a contract is one of lease or one of a financed lease be solved by Louisiana's adoption of Article 9 of the Uniform Commercial Code. As a result of its adoption, a security interest (including one created by the retention or reservation of title by a seller of goods) is to be determined by the "facts of each case." This section of the Uniform Commercial Code lists several factors for courts to examine to determine if a particular transaction is a lease or only creates a security interest. These factors are similar to the judicially created factors Louisiana courts used for essentially the same purpose.<sup>108</sup> This determination, using the guidelines provided in Louisiana Revised Statutes 10:1-201(37), might well militate toward a similar uncertainty in the law as demonstrated in the case of the bond for deed.

The contracts most likely to engender uncertainty are those the parties term a conditional sale rather than a financed lease. The Lease of Movables Act concerns only those leases considered to be true leases or financed leases "which have previously been construed as conditional sales transactions."<sup>109</sup> What about the case of a true conditional sale, one in which the parties do not attempt to disguise the transaction in language of lease? Will the courts continue to hold that this type of contract is an impossibility? Here, as in the case of the bond for deed, this need not occur because of a fundamental precept of the Louisiana

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106. *Id.* at 588.

107. In a civilian jurisdiction, since most areas of the law are subject to a highly developed codal scheme, it is not unlikely that a law imported from another system will interact with the laws governing another codal scheme. While the principal case reflects the interaction of the financed lease with the laws relating to tax, it is reasonable to suppose that in the future these kinds of contracts will come into conflict with other provisions in the codal scheme. In *Cosey v. Cosey*, 376 So. 2d 486 (La. 1979), a bond for deed contract came into conflict with the provisions governing matrimonial regimes. In this case, immovable property, pursuant to a bond for deed contract, was fully paid for during the defendant's father's first marriage. However, because of some difficulties not material here, the actual title was not delivered to the new owners until the father's second marriage. Since, in terms of community property, the time of acquisition of the property is often determinative of whether the property is community or separate (La. Civ. Code arts. 2338 and 2341), and since ownership of an immovable does not pass until delivery of the title (*Trichel v. Home Ins. Co.*, 155 La. 459, 99 So. 408 (1924)), the property should have been classified as belonging to the second community. The court, on rehearing, decided otherwise. *Id.* at 492.

108. *See supra* text accompanying note 37. La. R.S. 10:1-201(37) (1993) lists several factors similar to those adopted by Louisiana courts to distinguish, "determined by the facts of each case," between a contract that creates only a security interest and one that creates a lease.

109. La. R.S. 9:3302 (1991).

Civil Code: the recognized individual freedom to forge new types of contractual agreements, the so-called "freedom of type."<sup>110</sup>

Although a conditional sale has all of the elements of a perfected sale, a modification makes it distinguishable from the perfected sale: the parties' intent that the ownership of the thing not pass until the full payment of the price. To this end, the Civil Code states that the "[i]nterpretation of a contract is the determination of the common intent of the parties."<sup>111</sup> Since the parties intended for the obligation to be a conditional sale, the court need not inquire into the true nature of the contract because "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."<sup>112</sup>

Considering this, prior to the adoption of the Bond for Deed Act, the conditional sale of an immovable or of a movable could have readily been designated an innominate contract.<sup>113</sup> As an innominate contract, a conditional sale, whether of a movable or an immovable, would be governed by the articles applying to all obligations, but the articles of sale would not apply. This is because a *conditional* sale is not a sale and was never *intended* to be a sale,<sup>114</sup> thus this contract is not subject to the special provisions governing sales.<sup>115</sup> Rather, a conditional sale is a distinct obligation, where the parties' intent is not to transfer ownership of the thing until the full payment of the price. Nothing in the Code seems to prevent this type of contract.<sup>116</sup>

On the other hand, the requirement that an obligation "cannot exist without a lawful cause" cannot be ignored.<sup>117</sup> It is, in fact, the inquiry into cause that has led the courts to search for the "true nature" of the obligation. Professor Litvinoff comments as follows:

It is noteworthy that, in most instances, cause is the criterion for the detailed classification of contracts contained in the Louisiana Civil Code. Indeed, a contract is onerous because the reason that prompts the

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110. Whereas the Louisiana Civil Code does not expressly state that such a freedom exists, as the following discussion makes clear, the implications of several articles, read in *pari materia*, lead inescapably to such a conclusion.

111. La. Civ. Code art. 2045.

112. La. Civ. Code art. 2046.

113. La. Civ. Code art. 1914 states, in part: "Innominate contracts are those with no special designation."

114. The parties intend that a sale occur upon the full payment of the price, but do not intend at the time of contracting that a sale be perfected at the moment of agreement as to the thing and the price. Instead, they intend that ownership be retained by the vendor until the price is fully paid.

115. La. Civ. Code art. 1916.

116. See *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 166, 46 So. 193, 198 (1908), in which the Louisiana Supreme Court curiously stated, "Nothing that is said in this opinion abridges in the slightest degree the liberty of the parties to make such contracts as they please. But parties can not make impossible contracts." See also *O'Neal & Cruz*, *supra* note 16, at 571-73 (remarking on this dictum).

117. La. Civ. Code art. 1966.

parties to bind themselves is to obtain an advantage in return. . . . Although the function of cause as a criterion for classification can be more readily perceived in distinguishing onerous from gratuitous contracts, it also operates in other categories.<sup>118</sup>

Even so, the Civil Code provides for the formation of innominate contracts.

Perhaps the reason there is so little discussion of the conditional sale as an innominate contract is Planiol's notion that there is little or no room for innominate contracts in a fully developed codal scheme.<sup>119</sup> However, even if a conditional sale was not jurisprudentially considered to be an innominate contract, upon the adoption of the Bond for Deed and the Lease of Movables Acts, there seems no reason to deny those contracts status as *nominate* contracts. In this case, the rules drafted to apply to those special obligation would apply. When those rules do not respond to the issues under consideration in the case at bar, the general rules of conventional obligations would apply.<sup>120</sup> Thus, unless the general rules of conventional obligations and the special rules of the nominate contract of the Bond for Deed or Lease of Movables Acts could not resolve the issue before the court, there would be no need to refer to the provisions of sale or lease, which, according to general civilian methodology, are excluded from consideration of a distinct nominate obligation.<sup>121</sup> In contrast, rather than rely on a fresh interpretation of the code articles in light of accepted civilian methodology, courts seem unable to depart from their reliance on old cases to interpret and classify the nature of the contract at issue.

If conditional sales were instead appraised according to civilian frameworks, the inquiry would proceed by way of comparing the agreement forged by the parties with the general provisions on conventional obligations and, descending deductively, with the preestablished nominate models of the Civil Code. The analysis would thus begin by examining the Civil Code obligations articles to determine if anything about the contract conflicts with those provisions. The articles concerning conventional obligations or contracts would next be examined to determine whether they prohibited the conditional sale. Finally, if nothing in the two general schemes prohibited the contract, the parties' intent would be scrutinized to determine whether they wished to form one of the nominate contracts listed in the code and supplemental statutes. If the contract does not contain the essential features of any nominate contract, the court should abandon that inquiry. Then, unless anything about the contract violates public policy, the court would find the agreement to be an innominate contract and give effect to

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118. Litvinoff, *supra* note 87, at 11-12 (citations omitted).

119. Planiol, *supra* note 15, § 1352A, at 767-69.

120. La. Civ. Code art. 1915 states, "All contracts, nominate and innominate, are subject to the rules of this title." *See also* La. Civ. Code art. 1916: "Nominate contracts are subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of this title."

121. *See* La. Civ. Code art. 1916.

the intent of the contracting parties. This methodology, while avoiding many of the problems that have plagued the courts in the past relative to the conditional sale, may help courts in their efforts to implement the Bond for Deed and the Lease of Movables Acts.

#### V. CONCLUSION

Each of the legal formants noted above—the codal structure, the doctrine that determining the true nature of a contract is the province of the courts, Louisiana courts' uncivilian reliance on precedent, and others—are operative whenever a court is called upon to adjudicate a conditional sales contract.<sup>122</sup> Each of these legal formants are synecdoches in that they operate on that obligation even though they are not an express part of the law of obligations.

Thus considered, as different legal systems are brought closer together both in ideology and distance and as an increasing number of legal rules are imported from one jurisdiction into another,<sup>123</sup> it has become more important that the decision-makers in the importing jurisdiction carefully examine the legal formants in both systems to discover unspoken legal formants operative in both jurisdictions. Such scrutiny might help avoid such uncertainty in the law as has been demonstrated in the cases and doctrine discussed here.

Comparative law scholars would be particularly fitted for this endeavor by their unique vantage point achieved through study of distinct legal systems. As Professor Parisi states:

The thesis [that there are unexpressed elements of the law which operate on the court] put forward by Gino Gorla and soon elaborated by Rodolfo Sacco (and now thoroughly analyzed by a number of comparative legal scholars) stresses the existence of unspoken—and yet operative and, at times, immensely important—legal formants. Sacco describes them as cryptotypes, implicit rules or unspoken patterns that have outward effects. On the same theme, Gorla's analysis had stressed the existence of a deep variance between the real ratio decidendi of a case and the legal formula enunciated by the court in its decision. It is the task of legal analysis—in this, comparative analysis enjoys an advantaged viewpoint—to discover and reveal these latent patterns. . . .<sup>124</sup>

In short, it is the province of the comparative legal scholar to analyze other legal systems to determine whether what is implicit in one system is explicit in another and whether what is unexpressed in one is expressed elsewhere.

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122. See *supra* text accompanying note 81.

123. For anyone who is not yet convinced of this, witness Louisiana's final capitulation to the adoption of most of the Uniform Commercial Code.

124. Parisi, *supra* note 8, at 19-20, (citations omitted).

With the knowledge of the possibility of the existence of synecdoches and unspoken legal formants, jurists will be better able to confront the problems inherent in the adoption of legal rules derived from different legal traditions. Careful examination of the legal formants in both systems makes it possible to identify and avoid the problems caused by unspoken yet operative elements of the borrowed model. Such study could also reveal in the importing jurisdiction a legal formant that would interact with the borrowed rule adversely. In either case, this examination would facilitate the transition of the new rule into the adoptive jurisdiction.

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