

Louisiana Law Review

Volume 17 | Number 1

Survey of 1956 Louisiana Legislation

December 1956

Perfection of Public Sales

Henry R. Sachse

Repository Citation

Henry R. Sachse, *Perfection of Public Sales*, 17 La. L. Rev. (1956)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol17/iss1/28>

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

LOUISIANA LAW REVIEW

LOUISIANA STATE UNIVERSITY LAW SCHOOL
BATON ROUGE 3, LOUISIANA

Subscription per year \$5.00 (Foreign \$5.50)

Single copy \$1.25

Volume XVII

December, 1956

Number 1

STUDENT BOARD

Harry R. Sachse, *Editor-in-Chief*
Daniel J. Shea, *Managing Editor*
Thomas D. Hardeman, *Associate Editor*
Jerry G. Jones, *Associate Editor*
Jesse D. McDonald, *Associate Editor*

Edwin L. Blewer, Jr.
Burrell J. Carter
Albert L. Dietz, Jr.

Chester A. Eggleston
George W. Hardy III
John B. Hussey, Jr.

Richard F. Knight
William L. McLeod, Jr.
Thomas A. Warner, Jr.

FACULTY ADVISORY BOARD

Dale E. Bennett
Harriet S. Daggett
Joseph Dainow
Melvin G. Dakin

Milton M. Harrison
Paul M. Hebert
Henry G. McMahon
Wex S. Malone

Robert A. Pascal
Charles A. Reynard
Alvin B. Rubin
J. Denson Smith

George W. Pugh, *Faculty Editor*
Beverly D. Walker, *Editorial Assistant*

COMMENTS

Perfection of Public Sales

Provisions of the Civil Code

The Civil Code of Louisiana, following the French Civil Code, provides that a sale is perfected, that is, that the purchaser becomes the owner, when there is concurrence as to thing, price, and consent.¹ This basic concept of consensual completion of the

1. LA. CIVIL CODE art. 2439 (1870); CODE CIVIL art. 1582. However, if the parties to any sale, public or private, make specific stipulations as to when the purchaser shall become the owner of the thing sold, in the absence of a contrary public policy, their will should control. LA. CIVIL CODE arts. 11, 2471 (1870). But a provision that the ownership in a movable does not transfer until the entire price is paid, although possession goes to the purchaser prior to the final payment, is ineffective in Louisiana. This arrangement, known as a conditional sale, has been held violative of civilian principles of sale. *Byrd v. Cooper*, 166 La. 402, 117 So. 441 (1928); *Grapico Bottling Works v. Liquid Carbonic Co.*, 163 La. 1057, 113 So. 454 (1927); *Barber Asphalt Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908). *But see* Comment, 2 LOUISIANA LAW REVIEW 338 (1940) to the effect that a conditional sale should be admissible under Louisiana law as it is under French law as a valid suspensive condition.

sale applies equally to sales of movable or immovable property,² subject to the qualification that a sale of immovable property must be in writing.³ This effect, however, is confined to the parties until, in the case of immovable property, the sale has been recorded,⁴ or, if the sale is of movable property, until "actual delivery" of the object.⁵ Only after recordation or delivery is the sale perfected as to "all the world."⁶ It should be noted that, although the purchaser becomes the owner by concurrence of thing, price, and consent, the seller's duty to deliver the thing to the purchaser and the purchaser's obligation to pay the purchase price are usually yet to be performed. However, the Code makes it clear that the transfer of ownership does not await the fulfillment of these obligations.⁷

In connection with the perfection of the sale, it is well to consider the remedies given the parties if the obligations auxiliary to the transfer of ownership are not fulfilled. If the purchaser has paid the price but the thing has not been delivered, he may demand either that the sale be cancelled or that he be put into possession,⁸ and he may also claim damages when they are due.⁹ On the other hand, if the purchaser refuses to pay, the seller may sue either for dissolution of the sale,¹⁰ with damages where due,¹¹ or for specific performance of the purchaser's obligation, i.e., payment of the price.¹² Also, the seller is not obligated to deliver the thing if the price has not been paid and no term has been given for its payment.¹³ However, on the basis

2. See LA. CIVIL CODE arts. 1909, 1968, 2456 (1870); CODE CIVIL arts. 1138, 1583.

3. LA. CIVIL CODE art. 2440 (1870). But a verbal sale of immovable property is good if admitted under oath provided there has been actual delivery of the property. *Id.* art. 2275.

4. *Id.* arts. 1920, 2266.

5. *Id.* art. 1922.

6. *Id.* art. 1920.

7. "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid." *Id.* art. 2456.

8. *Id.* art. 2485.

9. *Id.* art. 2486.

10. *Id.* art. 2561. In the case of movable property the vendor has an absolute right to dissolution, without delay. *Id.* art. 2564. But if an immovable is sold, unless there is a danger that the seller may lose both the price and the thing, the judge may grant additional time in which the purchaser may pay. *Id.* arts. 2562, 2563.

11. *Id.* art. 2565.

12. *Id.* art. 2551.

13. *Id.* art. 2487. In sales of movables this means that the vendor may retain physical possession of the thing sold. *Id.* art. 2478. In regard to immovables, unlike the French Code (CODE CIVIL art. 1605), the Civil Code of Louisiana pro-

of the Code, he is not privileged to dissolve the sale extrajudicially.¹⁴ From these provisions it can be seen that either party is amply protected despite a transfer of ownership prior to compliance with all the obligations of the sale.

The Code does not draw any distinction in the statement of these rules between private sales on the one hand or public sales on the other, whether voluntary or forced. Presumably, therefore, the general principle of consensual perfection of the sale as between the parties by the concurrence of thing, price, and consent is as applicable to public sales as to private.¹⁵ Indeed the Civil Code contains specific provisions relating to public sales, both voluntary and forced, that seem to be entirely consistent with the basic principles applicable to sales in general.

vides that the tradition or delivery accompanies the act translatif of title, and provides that "every obstacle which the seller afterwards interposes to prevent the taking of corporeal possession by the buyer, is considered as a trespass." LA. CIVIL CODE art. 2479 (1870). Therefore it would seem that article 2487 has little applicability as to sales of immovables.

14. Interestingly enough, the idea of a right of resale without court action has, without much direct codal authority, entered the Louisiana law of private sales. See Comment, 4 TUL. L. REV. 92 (1929). See also *Shell Oil Co. v. Hogan*, 228 La. 38, 81 So.2d 761 (1955); *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Sales*, 16 LOUISIANA LAW REVIEW 242, 244 (1955).

15. In this respect it is interesting to note that, although the French have no articles specifically designating the time of completion of public sales, it would appear that, through an application of the general principles heretofore discussed, the purchaser is considered to become the owner at adjudication. 5 GLASSON, *Traité théorique et pratique d'organisation judiciaire, de compétence et de procédure civile* 161 (3d ed. 1936). "*On se bornera à rappeler ici quelques principes. Les ventes de biens de mineurs et, d'une manière générale, les ventes volontaires faites en justice produisent en principe les mêmes effets que les ventes amiables.*"

"L'adjudicataire devient propriétaire par la sentence d'adjudication."

In regard to sales under seizure, see 4 *id.* at 162: "*L'adjudicataire devient propriétaire, d'abord par l'effet même de l'adjudication qui est un véritable contrat, à la condition que la chose ait été saisie sur le propriétaire; ensuite par la mise en possession, même si la chose a été saisie sur un nonpropriétaire.*"

Translation: "One must here recall certain basic principles. Sales of the goods of minors and, in general, other voluntary public sales, produce in principle the same results as private sales. The adjudicatee becomes the owner by the judgment of adjudication."

"The adjudicatee becomes the owner, immediately, by the adjudication itself which is a veritable contract, on the condition that the thing has been seized from the hands of the owner; or through the 'mise en possession' even if the thing has been seized in the hands of a non-owner."

See also CUCHE, *PRECIS DES VOIES D'EXECUTION* 246-49 (1952).

CODE DE PROCEDURE CIVILE FRANÇAIS art. 717 does imply, although it does not specifically state, that the sale is complete at adjudication. It states "*L'adjudication ne transmet à l'adjudicataire d'autres droits à la propriété que ceux appartenant au saisi . . .*"

Translation: "The adjudication does not transmit to the adjudicatee other rights of ownership than those appertaining to the person in whose hands the property was seized."

This article is probably the source of article 690 of the Louisiana Code of Practice.

Article 2607 states that when the auctioneer is satisfied that the highest price has been offered, "he who has made the offer is publicly declared to be the purchaser, and the thing sold is adjudicated to him." This is followed by the provision in article 2608, that "this adjudication is the completion of the sale; the purchaser becomes the owner of the article adjudged, and the contract is, from that time, subjected to the same rules which govern the ordinary contract of sale." The article makes it clear that the adjudication itself makes the purchaser the owner and that nothing additional, such as an act of sale for immovables, is needed.¹⁶ This transfer of ownership is perfectly consistent with the concept of consensual perfection, for the adjudication constitutes the concurrence of thing, price, and consent which perfects the sale as between the parties.

Since article 2608 states that public sales are subject to the rules governing private sales from the time of adjudication, and after, it follows that the limitations provided in those rules as to the effect of the transfer of ownership in regard to third parties should apply. In this connection, article 2610 envisages the later delivery of a written act of sale where an immovable has been sold and article 2623 refers to the adjudication made and *recorded*. More particularly, article 2265 provides that "all sales of immovable property made by a sheriff or other officer, by virtue of any execution or other order of court . . . shall be re-recorded in the parish where the immovable property is situated."¹⁷ Finally, article 2266 provides that without this recordation, the sale "shall be utterly null and void, except between the parties thereto," and that the sale shall affect third persons "only from the time of the recording." Under the rules of private sales of movable property, the transfer of ownership is confined to the parties until delivery.¹⁸ Consequently, as in the case of private sales, the provisions of the Code presumably confine the

16. See LA. CODE OF PRACTICE art. 690 (1870): "The adjudication . . . has, of itself alone, the effect of transferring to the purchaser all the rights and claims which the party in whose hands it was seized might have had to the thing adjudged." (Emphasis added.)

It is quite reasonable that a public sale of immovables be complete as between the parties without a writing, because the acceptance, in the presence of the auctioneer, an officer of the court, and probably many witnesses, should be at least as effective as an admission to an interrogatory under article 2275 of the Civil Code. See *Landry v. Laplos*, 113 La. 697, 37 So. 606 (1904).

17. Recordation of the *procès verbal* evidently suffices. See *Etta Construction Co. v. Bruning*, 134 La. 48, 63 So. 619 (1913).

18. LA. CIVIL CODE art. 1922 (1870).

effect of the adjudication to the parties, until delivery of a movable sold or until recordation of the sale of an immovable.

Since the perfection of public sales is identical in principle to the perfection of private sales, it follows that the remedies in each for failure to perform should be similar, and they apparently are. In public sales as in private sales, the seller has the right to sue for specific performance,¹⁹ or if the sale is for cash, to refuse to deliver until the price is paid.²⁰ But while, as has been indicated, the seller in a private sale must petition the court to have the sale dissolved if the price has not been paid and cannot sell to another until the dissolution is judicially declared, the seller in a public sale is specifically empowered to effect a dissolution without a court order if the price is not paid, simply by having the thing readjudicated.²¹ Moreover, if the price in the second adjudication is smaller than in the first, in some instances the seller may hold the defaulting adjudicatee liable in damages for the difference.²² It can be seen that remedies in public sales are more expeditious than in private sales because of the right to resell, but the only basic difference is that one type of resolution and resale requires, under the Code, a judicial dissolution of the former sale, while the other does not. Furthermore, either type of dissolution seems consistent only with a system that permits perfection of the sale before the price is paid.²³

19. No article specifically gives the vendor at public sale the right to sue for specific performance, but the general provisions on sales have been applied. Municipality No. Two v. Hennen, 14 La. 559 (1840); Berthod's Heirs v. Unruh, 9 La. 180 (1836); Marigny v. Nivet, 2 La. 498 (1831). No recent case has been found litigating this point, but see in accord in dicta: *In re* Union Central Life Ins. Co., 208 La. 253, 23 So.2d 63 (1945); Capital Building and Loan v. Northern Insurance Co., 166 La. 179, 116 So. 843 (1928); Etta Construction Co. v. Bruning, 134 La. 48, 63 So. 619 (1913).

20. LA. CIVIL CODE art. 2609 (1870).

21. *Id.* art. 2611; LA. CODE OF PRACTICE art. 689 (1870). The ten-day delay of article 2611 does not apply to sales under seizure because the Code of Practice supersedes it. See LA. CIVIL CODE art. 2617 (1870); New Orleans Mutual Insurance Co. v. Ruddock, 22 La. Ann. 46 (1870); Lafon v. Smith, 3 La. 473 (1831). See also note 22 *infra*, which also concerns the applicability of article 2611.

22. The right to resell a *la folle enchere* applies not only to voluntary auctions but probate sales. Stockelback v. Bradley, 159 La. 336, 105 So. 363 (1925). However, it is not available for sales under writ of *feri facias*. Weil v. Schwartz, 49 La. Ann. 582, 21 So. 859 (1896). Orleans Parish is an exception. LA. R.S. 13:4403 (1950). Nor is it available to sales under writ of final judgment. Roussel v. Hughes, 159 La. 864, 106 So. 332 (1925). It is never available when the original owner is the second purchaser. Pennywell v. Baumann, 136 So. 100 (La. App. 1931).

23. Even the terms dissolution or resolution of a sale, or resale, imply a previous sale.

To recapitulate, the Civil Code, in regard to both public and private sales, seems to provide for:

- (1) perfection as between the parties at the first moment of concurrence as to the thing, price, and consent (which in public sales is the moment of adjudication);
 - (2) perfection as to third persons from the time of delivery of a movable or recordation of the sale of an immovable.
- The Code also provides measures to enforce the unfulfilled obligations of the parties remaining after the perfection of the sale.

The Jurisprudence

Private sales. The jurisprudence concerning private sales of movable property seems to have followed the system of the Code both as to the perfection of the sale between the parties and in regard to third persons.²⁴ The same can be said for the jurisprudence on the perfection of private sales of immovable property as to third persons, for the court has assiduously followed article 2266 under the appellation of the public records doctrine, or the doctrine of *McDuffy v. Walker*.²⁵ However, in regard to the perfection of private sales of immovables as between the parties, the court seems to have developed a rule that may delay the perfection of the sale longer than the Code, presumably, contemplated. More specifically, the court seems to have established an irrefutable presumption that the parties to a transaction intend only a contract to sell if they refer to a more formal act of sale to be passed later.²⁶ It would seem, however, that if the parties to a sale make a writing descriptive of the property, stating a price, and stating that they thereby sell the property, but also referring to a formal act of sale to be passed later, it should be possible to find that they intend to transfer ownership in the property through the first act, the second being for evidentiary purposes only. Thus, if the intent to sell is present, since the thing and price are determinate

24. *Nettles v. General Accident Fire and Life Assurance Corp.*, 5th Cir., No. 15805, May 25, 1956; *Tanner v. Eagle Bag Co.*, 145 La. 502, 82 So. 682 (1919); *Marshall v. Parish of Morehouse*, 14 La. Ann. 689 (1859). *But see* the line of cases nullifying the conditional sale. See note 1 *supra*. See also Comment, 3 LOUISIANA LAW REVIEW 629 (1941).

25. 125 La. 152, 51 So. 100 (1910).

26. *Davis v. McCain*, 171 La. 1011, 132 So. 758 (1931); *Legier v. Braughn*, 123 La. 463, 49 So. 22 (1909); *Capo v. Bagdahl*, 117 La. 992, 42 So. 478 (1906). In the *Capo* case no title passed under a contract which provided that it was to certify "that I have this day sold my house . . . to Thomas Capo . . . ten percent paid cash, balance when act of sale is passed." (Emphasis added.)

and the act is in writing, there should be no bar to a transfer of ownership as between the parties. But the result of the jurisprudence is that the sale would become perfect only with the delivery of the final act of sale, and its subsequent recordation would render it effective as to third persons.

Public sales. When the question of payment of the purchase price has not been at issue, the court has found little difficulty in holding public sales complete at adjudication,²⁷ and this effect has properly been confined to the parties until recordation in sales of immovable property.²⁸ When payment of the price has been at issue, however, the resolution of problems concerning the time of completion of public sales has not been so satisfactory.

It should first be noted that for many years there was a definite conflict of jurisprudential authority as to the time of completion of public sales. One line of cases has held that the sale is complete at adjudication even if the price has not then been paid;²⁹ while another has held that the sale cannot be considered as perfected until the purchase price is paid, if the sale is for cash;³⁰ or, if the sale is for credit, until the delivery of the required evidence of the indebtedness.³¹ The position that the adjudication completes the sale only as between the parties

27. *Frank v. Magee*, 50 La. Ann. 1066, 23 So. 939 (1898); *Colligan v. Benoit*, 13 La. App. 612, 128 So. 688 (1930). See also *Goodrich v. Copley*, 6 Rob. 107 (La. 1843); *Etta Construction Co. v. Bruning*, 134 La. 48, 62, 63 So. 619, 622 (1913): "The adjudication, in the sense of the law, is the last proceeding which concerns the purchaser; it fixes his condition under it, and is the basis of his title."

28. *Doriocourt v. Lacroix*, 29 La. Ann. 286 (1877). The court apparently assumed that a public sale of immovable property was invalid as to third persons until the act of sale was recorded.

29. *Cole v. Richmond*, 156 La. 262, 100 So. 419 (1924); *Jouet v. Mortimer*, 29 La. Ann. 206 (1877); *Doll v. Kathman*, 23 La. Ann. 486 (1871) (but there is dicta in this case to the contrary); *Brown v. Union Bank*, 11 La. Ann. 543 (1856); *Succession of Boudousquie*, 9 Rob. 405 (La. 1845); *Commissioner of the Bank of Orleans v. Hodge*, 8 Rob. 450 (La. 1844); *Perkins v. Dickson*, 1 Rob. 413 (La. 1842).

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

31. Only two cases have been found deciding the time at which public sales for credit are complete: *Mazoue v. Caze*, 18 La. Ann. 31 (1866) and *Perkins v. Dickson*, 1 Rob. 413 (La. 1842). The earlier case held that under article 2591 (article 2613 of the Civil Code of 1870) the adjudicatee must be considered the owner, although he has not paid cash or presented endorsed notes as the terms of sale required, until he is put in default by being required to name his endorser. However, the 1866 case held that if a condition of the sale is that notes be furnished, the purchaser is not the owner until the condition is complied with. Since the reasoning of the 1866 case has been cited several times as authority for holding public sales for cash incomplete until the price is paid, it is likely that in future public sales for credit its reasoning will also be applied.

(recordation or delivery marking the completion as to third persons) seems hardly to have been considered under either line of cases.³²

Almost immediately after the promulgation of the present articles on public sales in the Civil Code of 1825, there appeared dicta to the effect that the adjudication made the purchaser the owner even if he had not paid the purchase price,³³ and as early as 1842 a case squarely so held.³⁴ A number of cases followed, at rather great intervals, holding the sale perfect at adjudication, and, although many of them concern only completion as between the parties, the distinction between this and completion as to third persons was not made.³⁵ However, since 1924³⁶ the idea that a sale can be complete at adjudication before the price has been paid has been consistently rejected by the courts.³⁷

The position that the sale cannot be complete until the price is paid, as has been indicated, is generally accepted by the court today.³⁸ Cases upholding this position, moreover, are found at an earlier date than those upholding the contrary view,³⁹ and have been more numerous throughout Louisiana's judicial history. Under these cases, the adjudication alone neither com-

32. But see *Erath v. Dorville*, Manning Unreported Cases 365 (La. 1880).

33. *Marigny v. Nivet*, 2 La. 498 (1831); *Canal Bank v. Copeland*, 6 La. 543 (1834); *Berthod's Heirs v. Unruh*, 9 La. 180 (1836).

34. *Perkins v. Dickson*, 1 Rob. 413 (La. 1842). See note 31 *supra*. See also *Succession of Boudousquie*, 9 Rob. 405 (La. 1845). The adjudicatee at a probate sale was adjudged bankrupt before he had paid the purchase price. It was held that he acquired ownership in the property before his bankruptcy and that it therefore had to be included in the bankruptcy settlement. The court said: "The bidder to whom the property is adjudicated, becomes *eo instanti* the owner of it [2608], C.P. 690, 695 . . . the property vests in the bidder by the adjudication. It is clear that it is not then in abeyance, and that it must remain vested in him, until it be legally divested. The mere neglect of a compliance with conditions of the sale, does not re-vest property in the vendor."

35. See note 29 *supra*.

36. *Cole v. Richmond*, 156 La. 262, 100 So. 419 (1924). In this case the adjudicatee did not pay the purchase price, although the public record showed that it had been paid. The adjudicatee sold portions of the property to third persons. Later the adjudicatee admitted that she had not paid the purchase price. The third parties were held to have acquired good title on the theory that the adjudicatee was owner until divested of title and being the owner could convey title. No mention was made of the public record doctrine.

37. See note 30 *supra*.

38. See note 30 *supra*. Since most of the cases had been in regard to cash sales, continual reference will not be made in the text to the application of the theory to credit sales.

39. See *Mercier v. Sterlin*, 5 La. 472 (1833). An executor attempted to ratify a sale made by the noncomplying adjudicatee to a third party. The court held that there was no sale to ratify. "[The adjudicatee] had died without complying with his contract, and could not have claimed the property. Not being the owner of the property, it is not seen how he could transfer that property to a third person."

pletes the sale as between the parties nor as to third persons. To the contrary, it has been held to create a relationship between seller and adjudicatee similar to a contract to sell, giving either party the right to demand specific performance, but not transferring the property.⁴⁰ It gives rise to a defeasible right that becomes ownership when the price is paid.⁴¹

The question naturally arises as to why, despite article 2608, the courts have held that the purchaser can in no respect become the owner until the purchase price is paid. As early as 1833 the court unequivocally applied this theory, but without any citation of authority and with little explanation.⁴² Subsequent decisions have formulated two major rationalizations for similar holdings.

One rationalization offered by the court is that the right to resell precludes a prior transfer of ownership.⁴³ The court has stated that if title passed to the adjudicatee at the time of adjudication and the right to resell was subsequently exercised, the sale would have to be, theoretically at least, from the first adjudicatee to the second. The court reasoned that this would mean that the second adjudicatee of necessity would acquire the property subject to any encumbrances that might have attached to it while it belonged to the original adjudicatee. Such a result, it has been argued, would be clearly undesirable and should not be permitted. To prevent this, the court has interpreted article 2608 to mean that the sale is complete at adjudication, *if the price is paid*.

The problem that confronted the court could have been more easily resolved through an application of the analysis of the perfection of sales previously presented, that is, by differentiating between perfection confined to the parties and perfection as to third persons. The resale under this analysis presents no serious problems. In sales of immovables prior to the recording of an act of sale, the creditors of the adjudicatee, being third persons to the sale, can acquire no right under it; and

40. *Capital Building and Loan Ass'n v. Northern Insurance Co.*, 166 La. 179, 116 So. 843 (1928).

41. *Ibid.*

42. See note 39 *supra*.

43. *Washburn v. Green*, 13 La. Ann. 332 (1858) contains this argument. However, all that it was necessary for the court to decide was whether or not the vendor could resell for nonpayment twelve years after the sale. Just what this case held seems open to some doubt, but it has become one of the leading authorities for considering the adjudication as completing no more than a contract to sell.

after recordation, if the act stated that the price had been paid, it would be conclusive proof of its content⁴⁴ and no resale would be possible. If the act showed that the price had not been paid, the creditors of the adjudicatee would be forewarned, and if the property were resold, their rights would fall with the rights of their debtor, the adjudicatee, just as in a resolatory action in a private sale.⁴⁵ Thus it can be seen that the right to resell presents no obstacle to perfection of sale of immovables between the parties, that is to say, a transfer of ownership, prior to payment of the purchase price. As to movable property, under this analysis, there is no possibility of the adjudicatee's creditors encumbering the property prior to delivery because the sale is not complete as to third parties. After delivery it would seem the rights of the adjudicatee's creditors would have to fall with the rights of the adjudicatee.⁴⁶ As to movable or immovable property, then, the right to resell appears to be only a right to resolution, and does not make payment of the purchase price the critical factor in perfection of the sale.

A second reason that has been given for holding a public sale incomplete until the price is paid is that until payment, if the sale is for cash, the adjudicatee has no right to possession.⁴⁷ The premise is soundly based on article 2609 of the Civil Code in the chapter on public sales, which states: "If the adjudication be made on condition that the price shall be paid in cash, the auctioneer may require the price immediately, before delivering

44. LA. CIVIL CODE arts. 2234, 2236, 2238 (1870); LA. CODE OF PRACTICE art. 690 (1870).

45. Cappel v. Meeker Sugar Refining Co., 169 La. 1170, 126 So. 695 (1930); Succession of Phillips, 49 La. Ann. 1019, 22 So. 202 (1897). See Stevenson v. Brown, 32 La. Ann. 461 (1880).

46. See Mazoue v. Caze, 18 La. Ann. 31 (1866). But the property could not be reached if sold by the creditor since he would have possession and title (and no problem of public records is involved). Jeffrey Motor Co. v. Higgins, 89 So.2d 369 (La. 1956).

47. Mazoue v. Caze, 18 La. Ann. 31 (1866) and Lapene v. Badeaux, 36 La. Ann. 195 (1844) are the leading cases of this rationale. In the *Mazoue* case the adjudicatee had not yet paid for several cows when he surreptitiously removed them from his vendor's farm and sold them to a third party. The case was decided on the basis that "the sale was not complete . . . and the defendant having no ownership in the cows, could transfer none to his co-defendant." In the *Lapene* case the adjudicatee of a probate sale neither paid the price nor gained possession of the adjudicated land for eight years. When he finally did pay he demanded not only possession but the fruits of the land from the time of adjudication. The court held for the vendor. "[I]t is the contract which is perfected by the agreement of competent parties to the thing and price; but . . . title to the property is really transferred from vendor to vendee only when the terms of sale have been complied with. It is only when the buyer can demand delivery that he is full owner and the purchaser has no right to demand delivery until he has paid the price."

possession of thing sold."⁴⁸ But the conclusion that, without possession, the sale is not complete seems only applicable to the effect of a sale of movable property in regard to third persons. However, the statement that without payment of the purchase price the sale is not perfected does not seem accurate even in this limited application, because it is delivery, not the right to delivery, that perfects the sale of movable property as to third persons.⁴⁹ If the price is not paid, but the seller nonetheless delivers, the sale should be considered perfected as to all the world, at least until something is done to dissolve it.

The argument that the purchaser cannot be owner without a right to possession would seem to have its least validity when applied to the perfection between the parties of the sale of property, whether movable or immovable. As has been indicated, the general provisions as to the perfection of sales make it clear that a sale may be perfect between the parties although the price has not been paid and the thing has not been delivered.⁵⁰ Furthermore, articles 2608, 2609 itself, and 2610 of the chapter on public sales continue the differentiation between possession and ownership,⁵¹ article 2608 speaks of ownership and the perfection of the sale, while the others treat only of the reciprocal duties of delivery, payment, and passing an act of sale.

The applicability of the reasoning to the perfection of sales of immovable property as to third persons seems equally dubious. The writer has been able to find no authority in the Code for holding that a public sale of immovables can have no effect as against third parties until the price is paid, either on the ground of no right of possession, or on any other ground. It is not possession that perfects such a sale as to third parties, but recordation of the act of sale.⁵² Of course, once the act is recorded, no argument remains as to possession. The recorded act would be full proof that the price has been paid or that terms had been given for the payment of the price,⁵³ and in either case article 2609 on the retention of possession would no longer be applicable.⁵⁴ Additionally, it is probable that the sheriff's act of

48. LA. CIVIL CODE art. 2609 (1870). The article is virtually identical with article 2487 under the general provisions on sales.

49. *Id.* art. 1922: ". . . This effect is strictly confined to the parties until actual delivery of the object."

50. See page 198 *supra*.

51. LA. CIVIL CODE arts. 2608, 2609, 2610 (1870).

52. *Id.* arts. 2265, 2266.

53. See note 13 *supra*.

54. See LA. CIVIL CODE art. 2609 (1870).

sale is a public act and therefore constitutes a legal surrender of possession to the adjudicatee under article 2479.⁵⁵

The reasons for holding public sales incomplete prior to payment of the purchase price or presentation of evidence of indebtedness were formulated many years ago. When formulated, they may have been applied only to the perfection of the sale in regard to third persons, and thus, while producing inaccurate statements of law, often may not have produced unwarranted results. However, this theoretical inaccuracy in stating the law has led in later cases to a disregard for the distinction between perfection as between the parties and as to third persons.⁵⁶ The court has in effect held that the sale is not complete towards anyone until it is complete towards everyone and that this completion is contingent upon payment of the price — not adjudication, recordation, or delivery.

Applications

Third persons. In line with its theory that the sale is not complete until the price is paid, the court has held that prior to payment the creditors of the adjudicatee cannot seize the property that has been adjudicated to him.⁵⁷ However, there is also authority for holding that if, in a sale of an immovable for cash, part of the price is paid and the purchaser takes possession of the property, his creditors may seize it.⁵⁸ The court apparently has not decided whether the creditors of the adjudicatee can seize the property after he has paid the price but before the sheriff's act of sale has been recorded. It has also been the consistent position of the court that third persons, acquiring property through an adjudicatee before he has paid the purchase price, acquire only a defeasible title that is lost if the terms of the adjudication are not complied with.⁵⁹ It is submitted that the disposition of these cases has been proper, because the rights to be determined were those of third per-

55. *Id.* art. 2479: "The law considers the tradition or delivery of immovables, as always accompanying the public act which transfers the property."

56. See, e.g., *Capital Building and Loan Ass'n v. Northern Insurance Co.*, 166 La. 179, 116 So. 843 (1928).

57. *In re Union Central Life Insurance Co.*, 208 La. 253, 23 So.2d 63 (1945); *Lossee v. Sauton*, 24 La. Ann. 370 (1872); *First National Bank v. Coreil*, 145 So. 393 (La. App. 1933).

58. *Commissioners of the Bank of Orleans v. Hodge*, 8 Rob. 450 (La. 1844). See also *Haynes v. Breaux*, 16 La. Ann. 142 (1861).

59. *In re Union Central Life Insurance Co.*, 208 La. 253, 23 So.2d 64 (1945); *Lossee v. Sauton*, 24 La. Ann. 370 (1872).

sons, and the sale should not be held to be perfected as to third persons prior to delivery of a movable or recordation of the sale of an immovable. In none of the cases had there been such delivery or recordation.

Between the parties. Since it has been held that the adjudicatee does not become the owner until he has performed his obligation to pay, the court has held that he has no right to the revenues of the property that accrued prior to his payment of the price.⁶⁰ It would appear that the adjudicatee at a credit sale, in a like manner, would have no right to the revenues that accrued before he presented proper evidence of indebtedness, but there are no cases in point. On the other hand, it has been held, in cases in which the price was not at issue, that the adjudicatee becomes the owner of the natural fruits of the property that accrued not only from the time of adjudication but from the time of seizure.⁶¹ These cases, however, seem to turn upon what the purchaser has bought,⁶² and not the revenues from the thing after he has bought it, and are thus not in conflict with the previously discussed cases.

In two cases decided in 1913 and 1935 the court modified its position as to completion, holding that once the price is paid, the sale is considered as having been complete from the time of adjudication.⁶³ This retrospective notion was used to hold the adjudicatee responsible for a paving expense in one case and a tort liability in another, when the cause of action arose after the adjudication but before the adjudicatee had paid the purchase price. It should be noted that if this same reasoning were applied to the right to the revenues of the property, once the adjudicatee complies with his obligation to pay or presents securities, he should become entitled to the revenues that accrued from the time of adjudication. The Louisiana court has not had to determine the effect of these "retrospective" cases on the pre-

60. *Lapene v. Badeaux*, 36 La. Ann. 195 (1844); *International Shoe Co. v. Picard*, 30 F. Supp. 570 (E.D. La. 1939), *affirmed*, 116 F.2d 233 (5th Cir. 1940).

61. *Frank v. Magee*, 50 La. Ann. 1066, 23 So. 939 (1898); *Colligan v. Benoit*, 13 La. App. 612, 128 So. 688 (1930).

62. LA. CIVIL CODE art. 466 (1870): "The fruits of an immovable, gathered or produced while it is under seizure, are considered as making part thereof, and inure to the benefit of the person making the seizure."

63. *Etta Construction Co. v. Bruning*, 134 La. 48, 63 So. 619 (1913) (the adjudicatee was held chargeable for paving done after the adjudication but before payment of the purchase price); *Heath v. Suburban Loan Co.*, 163, So. 546 (La. App. 1935) (adjudicatee held liable for injury to lessee when such injury occurred after adjudication but prior to payment).

vious jurisprudence, but in 1939 a federal case reiterated the proposition that the sale is not complete until the price is paid and that the adjudicatee has no right to revenues that accrued before he paid.⁶⁴

When, after the thing is adjudicated, a cause of action arises, and the price is never paid, the court has held that the adjudicatee has never become the owner.⁶⁵ Thus, in a case decided in 1928⁶⁶ a fire insurance company claimed that it was not liable for the destruction of the insured property because the insured, a mortgage company, had not notified it of a change of ownership as was required in the policy. The house and lot in question had been adjudicated under a writ of fieri facias but burned before the adjudicatee paid the purchase price. After the fire the adjudicatee refused to pay. The court held that no notification to the company had been necessary, for there had been no transfer of ownership.

In reference to completion as between the parties, it is submitted that giving a retrospective effect to the payment of the purchase price is undesirable in that it allows the adjudicatee to avoid the liabilities of ownership by refusing to pay the purchase price. Also, under the Civil Code the adjudicatee apparently becomes the owner, as to the seller, at the time of adjudication and must remain the owner until something is done to divest him of ownership.⁶⁷ Thus, unless he brings an action to rescind the sale, the purchaser should have a right to the revenues of the property and should be responsible for the property as owner, whether it is advantageous to him or not, until the seller in some way dissolves the sale.

It is further submitted, that if a contract refers to a change of ownership, since the adjudication should make the purchaser the owner as to the seller, the change of ownership should be deemed to occur as of the time of adjudication.⁶⁸

64. *International Shoe Co. v. Picard*, 30 F. Supp. 570 (E.D. La. 1939), *affirmed*, 116 F.2d 233 (5th Cir. 1940).

65. *In re Union Central Life Insurance Co.*, 208 La. 253, 23 So.2d 63 (1945); *Lossee v. Sauton*, 24 La. Ann. 370 (1872).

66. *Capital Building and Loan Ass'n v. Northern Insurance Co.*, 166 La. 179, 116 So. 843 (1928).

67. See page 201 *supra*.

68. See page 200 *supra*.

Conclusion

The effect given to conformance with the obligation to pay in public sales under the Louisiana jurisprudence is, perhaps, unique. The French, with the same basic system of sales, have apparently reached a different result.⁶⁹ The common law, at least at the present, seems to be more in accord with the French solution than the Louisiana solution.⁷⁰ However, there would appear to be no innate injustice or violation of public policy in a consistent and carefully worked out system that would not permit of a transfer of ownership before all the obligations of the purchaser have been met. However, the Louisiana jurisprudence does not provide this consistent system. Perhaps the most undesirable feature of the jurisprudence is not its own inconsistency, but the logical difficulty involved in interpreting the Civil Code to mean that the purchaser in no respect becomes owner at adjudication unless he has paid the purchase price, despite the provisions of articles 2456, 2608, and others which seem clearly to make the purchaser the owner at the time of adjudication, at least as between the parties.

Harry R. Sachse

The Trial Court's Duty To Instruct On Responsive Verdicts

If it be conceded that on a criminal trial, the judge, in instructing the jury as to what verdicts it may find, is limited to verdicts of the crime charged in the indictment and of such lesser

69. See note 15 *supra*.

70. 2 WILLISTON, SALES 201-02 (1948), and authority cited therein. "Not only is the contract complete when the hammer falls, but the property in the goods passes then, unless some term of the bargain makes it impossible that it should do so. It is of course possible that such conditions may be imposed by the terms of the sale as to make immediate transfer of the property in the goods impossible. The condition that the sale is for cash is, however, not such a condition as will prevent immediate transfer of the property, since this condition may be satisfied by construing it as meaning that possession shall not be delivered until payment. Such a condition is indeed implied in every sale by auction, as well as in other sales, unless there is agreement for credit.

"Though the contract is complete and the property has passed to the buyer, if the transaction is within the Statute of Frauds it is unenforceable until a memorandum has been signed by the auctioneer or his clerk who are the agents of both parties for this purpose. Until then either party still may prevent the bargain from becoming enforceable by withdrawing from it, and the owner of the property may revoke the auctioneer's authority prior to that time."