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## Is It Legal to Eat Unpaid Goods in Stores?

Shoplifting is a form of larceny legally described as “the non-consensual taking and carrying away of a merchant's property, with an intent permanently to deprive him of possession”<sup>1</sup>. But what about something in between? Nowadays, it is not uncommon to observe a customer opening and drinking a beverage while shopping, tasting some grapes from a bunch or eating a bag of chips. In 2011, Nicole Leszczynski, a pregnant lady, was doing the shopping with her husband and 2-year-old daughter. Being hungry, she opened and consumed a chicken salad sandwich before getting to the checkout. The couple had kept the wrapper but forgot to hand it over and failed to pay for it. She and her husband were stopped at the door and arrested for committing the misdemeanor. Following the standard procedure, the Child Welfare Services took away their daughter, and the couple spent 18 hours to get her back after posting bail<sup>2</sup>. This is not the only notorious example to which eating in a store might lead. Therefore, it is deemed important to draw the conclusion on the legality of these actions according to the current Russian law.

In the beginning, it is necessary to determine the legal nature of the consumer's actions in relation to goods yet not paid for. There are several typical examples that illustrate the buyer's behavior in a shop: in case of thirst, he can open a bottle of water and drink a little, and, in case of hunger, he can eat a consumable product completely. In the first instance, the item is only consumed, in the second one—it no longer exists because was destructed.

In the Russian doctrine of civil law there is no unity of opinions on the legal nature of consumption and destruction of property. Some jurists (M.M. Agarkov, A.V. Venediktov, O.S. Ioffe<sup>3</sup>, O.G. Alekseeva<sup>4</sup>) include consumption and destruction in the right of disposal (power to dispose)<sup>5</sup>. “If the owner destroys a thing, it also means determining the fate of the thing. Destruction of the thing with its consumption stops the right of ownership,” O.G. Alekseeva remarks<sup>6</sup>. Others (K.I. Sklovsky<sup>7</sup>, E.A. Sukhanov<sup>8</sup>) refer destruction of a property to the right of disposal and consumption—to the right of use (power to use) (EA Sukhanov<sup>9</sup>).

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<sup>1</sup> Shoplifting and the Law of Arrest: The Merchant's Dilemma // The Yale Law Journal. Vol. 62. № 5. P. 789.

<sup>2</sup> Hartmann M. Does Eating In The Grocery Store Count As Stealing? // Jezebel. URL: <https://jezebel.com/5856328/does-eating-in-the-grocery-store-count-as-stealing>.

<sup>3</sup> See, Рыбалов А.О. Право собственности (комментарий к ст. 209 ГК РФ). М.: М-Логос, 2017. С. 74.

<sup>4</sup> See, Гражданское право: Учебник. В 2 т. / Под ред. Б.М. Гонгало. Т. 1. 2-е изд. перераб и доп. М.: Статут, 2017. С. 332.

<sup>5</sup> In the Russian legal doctrine, the tradition to define the right of ownership through the “triad” of legal powers (possession, use, and disposition) is followed (Sukhanov E.A. The Right of Ownership in the Contemporary Civil Law of Russia // McGill Law Journal. 1999. Vol. 44. № 3. P. 307). Nonetheless, some jurists think that it is more sensible to define the right of ownership as the broadest real right without enumerating of its content.

<sup>6</sup> Гражданское право: Учебник. В 2 т. / Под ред. Б.М. Гонгало. С. 332.

<sup>7</sup> See, Склоевский К.И. Собственность в гражданском праве. 5-е изд., перераб. М.: Статут, 2010. С. 191.

<sup>8</sup> See, Sukhanov E.A. Op. cit. P. 307.

<sup>9</sup> See, *ibid.*



Consumption and destruction can be included in the content of the right of ownership or a *ius in re aliena*. The person must be the owner or legal title holder to the certain property to be able to exercise these rights. Under the contract of retail sale, the buyer is entitled to start consuming or destructing the product since he is the owner of it. Until then, he should avoid doing it.

Thus, to draw a conclusion on the legality or illegality of the buyer's actions aimed at consuming or destroying the product, it is necessary to define the moment of the acquisition of the right of ownership.

According to the art. 223(1) of the Civil Code of the Russian Federation<sup>10</sup> (hereinafter referred to as CCRF), the right of ownership shall arise for the acquirer of a thing by contract from the moment of the transfer thereof unless otherwise provided by a law or contract. Particularly, the delivery of a thing to the acquirer shall be deemed to be the transfer<sup>11</sup>. In this case, the thing shall be considered handed in to the acquirer from the moment of its actual receipt in the possession of the acquirer or person specified by him<sup>12</sup>.

Interpretation of these norms may lead to a hasty conclusion that the right of ownership shall directly arise for the acquirer of a thing since the moment when the good was taken from a store's shelves.

This is erroneous, and the right of ownership for the acquirer does not arise at this very moment, because the transaction concerning the alienation of the property is needed<sup>13</sup>. The transfer of the thing is not deemed the one<sup>14</sup>, and the contract of retail sale is not concluded yet. This is the causality of *traditio* in the Russian law; the right of the ownership does not arise from *nuda traditio*<sup>15</sup>. Consequently, in this case the right of ownership shall arise for the consumer of the product by contract from the moment of the transfer thereof, but not earlier than the contract of retail sale is concluded.

Being consensual, the contract of retail sale shall be considered concluded if agreement between the parties regarding all material conditions of the contract has been reached in the form required in appropriate instances, *i.e.* the clauses relating to the goods (the name and quantity of the goods<sup>16</sup>) and price<sup>17</sup>.

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<sup>10</sup> Гражданский кодекс Российской Федерации (часть первая) от 30.11.1994 г. № 51-ФЗ (ред. от 29.07.2017 г.) // Собрание законодательства РФ. 05.12.1994. № 32. Ст. 3301. The English translation is provided by Federal Web Portal for Small and Medium Sized Enterprises (See URL: <http://en.smb.gov.ru/support/regulation/ccpart1/>).

<sup>11</sup> Art. 224(1) of the CCRF. Likewise, the handing over to a carrier for despatch to the acquirer or to a communications organization for the sending to the acquirer of things alienated without the obligation of delivery shall be deemed to be the transfer (art. 224(1) of the CCRF).

<sup>12</sup> Art. 224(1) of the CCRF.

<sup>13</sup> Art. 218(1), (2) of the CCRF.

<sup>14</sup> See, e.g., Постановление ФАС Волго-Вятского округа от 20.07.2010 г. по делу № А39-931/2009.

<sup>15</sup> Склоковский К.И. *Op cit.* С. 389.

<sup>16</sup> Art. 455(3) of the CCRF

<sup>17</sup> Art. 500(1) of the CCRF.



Furthermore, the CCRF contains a special rule that the contract of retail sale shall be deemed to have been duly concluded from the moment when the seller has given the buyer a cash or sale receipt or another document confirming payment for the goods (art. 493).

In the doctrine and practice, two approaches to understand this norm have developed. According to the first of them, the moment when the seller has given the document confirming payment for the goods to the buyer coincides with the moment of the conclusion of the contract<sup>18</sup>. The second one suggests that the art. 493 of the CCRF does not determine the moment of the conclusion of the contract of retail sale; it defines the moment from which the contract of retail sale shall be deemed to have been *duly concluded*<sup>19</sup>.

Nevertheless, both approaches are unconvincing. Since under the contract the buyer is obliged to pay for the goods and receives the document confirming the payment after the obligation is fulfilled, it is obvious that, by the time the receipt is given, the contract has already been concluded, which proves the wrong of the first approach. If it were correct, it would also acknowledge the truth of the fact that the buyer does not have the right to demand the fulfillment of the seller's duty to transfer the ownership of the goods to the buyer, which, in its turn, would contradict the provisions of the current legislation<sup>20</sup>. The second approach takes into account the aforementioned remark and contains the simple and unerring premise that, since the consumer receives the document confirming the payment, there might not be the failure to comply with the form of the transaction<sup>21,22</sup>. However, the interpretation of the norm in accordance with the second approach leads to the absurd conclusion that the same contract might be concluded twice. Probably this is not a defect in the approach itself, but in the lawmaking technique.

Thus, art. 493 of the CCRF does not give the answer when the contract of retail sale should be considered concluded.

As it is known, the contract of retail sale is a public contract<sup>23</sup>, and displaying goods at the place of sale (on counters, in shop windows, etc.) shall be deemed to be a public offer<sup>24</sup>.

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<sup>18</sup> See, e.g., Брагинский М.И., Витрянский В.В. Договорное право. Книга вторая: Договоры о передаче имущества. М.: Статут, 2000. Гл. 1; Постановление ФАС Волго-Вятского округа от 23.11.2012 г. по делу № А31-10199/2011; Постановление Суда по интеллектуальным правам от 21.11.2016 г. № С01-994/2016 по делу № А75-1483/2016; Постановление Четвертого арбитражного апелляционного суда от 23.11.2017 г. № 04АП-2314/2017 по делу № А78-16444/2016.

<sup>19</sup> See, Соломина Н.Г. Письменная форма как единственно возможная форма договора розничной купли-продажи // Право и экономика. 2014. № 12. С. 38–41.

<sup>20</sup> Ibid.

<sup>21</sup> However, there is the widespread view that the contract of retail sale is concluded orally, because the moments of conclusion and execution of the transaction coincide (art. 159 of the CCRF). See, Брагинский М.И., Витрянский В.В. Указ. соч. Гл. 1; Российское гражданское право: Учебник: В 2 т. Т. II: Обязательственное право / Отв. ред. Е.А. Суханов. 2-е изд., стереотип. М.: Статут, 2011. С. 191. (The chapter's author – А.Е. Шерстобитов).

<sup>22</sup> See, Соломина Н.Г. Op. cit.

<sup>23</sup> Art. 426(2) of the CCRF.

<sup>24</sup> Art. 494(2) of the CCRF.



Therefore, the fact of receiving by the person who has made an offer of its acceptance shall entail the conclusion of the contract<sup>25</sup>.

According to G.S. Vasilyev, the buyer reveals his intention to purchase some goods when he transfers it to the cashier for the subsequent payment<sup>26</sup>. Until then, the seller is incapable of knowing for sure what the decision of the buyer is. When the things are purchased in self-service shops, the contract shall be concluded at the moment of the payment<sup>27</sup>. This decision seems to be the most adequate<sup>28</sup>.

The typical sequence of the moment of a thing's transfer and the moment of the conclusion of the contract are: 1) *nuda traditio* → *nuda traditio*, the conclusion of the contract → the transfer of the thing (e.g., the purchaser takes goods from a counter, gives it to the cashier and pays for it, then the cashier transfers thing to the purchaser); 2) the conclusion of the contract → the transfer of the thing (e.g., if the goods are purchased directly at the checkout); 3) *nuda traditio* → the conclusion of the contract (e.g., the acquirer has possessed the thing by the time of the transaction concerning the alienation of the property is concluded). In the first two instances, the right of the ownership shall arise for the acquirer at the moment of the transfer of the thing<sup>29</sup>; in the latter one—at the moment of the conclusion of the contract<sup>30</sup>.

So, the consumer allowing himself to prematurely consume the goods does not exercise the owner's powers. Not only does he not use and dispose but also damages and destroys another's property. As a consequence, under the Russian law, these actions constitute the *actus reus* of the administrative<sup>31</sup> or criminal offense<sup>32</sup>, the distinction between which is made by the criterion of the significance of the damage.

In the Russian legal doctrine, the damage is understood as an action effecting changes in property that entails the significant decrease in its economic value and a partial loss of its intended use<sup>33</sup>, and the destruction is understood as an action expressed in external influ-

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<sup>25</sup> Art. 433(1) of the CCRF.

<sup>26</sup> Васильев Г.С. Переход права собственности на движимые вещи по договору. Дис. ... канд. юрид. наук. СПб., 2006. С. 178–179.

<sup>27</sup> See, *ibid.* P. 185.

<sup>28</sup> Recognition of picking up of the good by the buyer from the place of sale as the acceptance of the public offer is considered incorrect for the following reasons. First, at this moment buyer might only get acquainted with the information about the good and not be interested in buying it; the internal desire of the consumer is not objectified outside. Second, what are the legal consequences of a buyer's lack of funds if he fails to pay for the goods? The right of ownership to the goods shall return to the seller? It makes no sense.

<sup>29</sup> Art. 433(1) and art. 224(1) of the CCRF.

<sup>30</sup> Art. 224(2) of the CCRF. See also, абз. 4 п. 5 Постановления Пленума ВАС РФ от 17.11.2011 г. № 73 (ред. от 25.12.2013 г.) «Об отдельных вопросах практики применения правил Гражданского кодекса Российской Федерации о договоре аренды» // Вестник ВАС РФ. 2012. № 1; Постановление Пятого арбитражного апелляционного суда от 13.04.2012 г. № 05АП-2225/2012 по делу № А59-4182/2011.

<sup>31</sup> Art. 7.17 of the Code of Administrative Offences of the Russian Federation.

<sup>32</sup> Art. 167 of the Criminal Code of the Russian Federation.

<sup>33</sup> Уголовное право России. Особенная часть: Учебник / Под. ред. Ф.П. Сундурова, М.В. Талан. М.: Статут, 2012. С. 246–247.



ence on property leading to losing its economic value and impossibility to use the thing for the intended purpose<sup>34</sup>.

It is noteworthy that the good is excluded from economic circulation or no longer even exists if it is destroyed.

What are the legal consequences of the buyer's attempt to pay the price for the destroyed goods? It seems that in practice the seller would accept the payment and give him a document confirming payment, but this does not cohere with the theory and legislation. The purpose of concluding the contract of retail sale is to transfer the right of ownership to the goods from the seller to the buyer. Obviously, it is not going to happen since the "alienable" thing no longer exists by the time the contract is concluded. Therefore, it can be imagined that, if the seller accepts the payment for the good, the buyer may require transferring "the paid product" to him inasmuch as the contract has induced the mutual and sinalagmatic obligations. Moreover, if the buyer does not intend to voluntarily compensate for the damage of the seller's property, the seller still has the right to sue "the purchaser" and demand that the losses inflicted on him be compensated for (including actual damage and lost profit)<sup>35</sup>.

All of this together means that the buyer cannot consume, destroy, unwrap the packages of goods, and other such actions until getting the right of ownership to the good. So, if he does, it may constitute the *actus reus* of the administrative or criminal offense. Under the contract of retail sale the right of ownership shall arise for the acquirer of a thing at the moment of the transfer thereof, *nuda traditio* does not transfer the title of ownership, hence this right does not arise until the contract is concluded, *i.e.* until the consumer accepts the public offer of the seller. The offer shall be deemed to be accepted at the moment when the buyer transfers the good to the cashier for the subsequent payment, or, if the transaction is made in a self-service shop, at the moment of the payment.

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<sup>34</sup> *Ibid.* P. 246.

<sup>35</sup> Art. 1064(1), 1082, and (2) of the CCRF. Resolved similarly is the situation in which the seller forces the buyer to pay the cost of the goods accidentally broken by the buyer, unless the buyer proves that the harm has not been caused through his fault (See, Терешко Ю. Убыточный шопинг // ЭЖ-Юрист. 2007. № 43).