MATERIALS ON THE LAW OF SALES AND SECURITY DEVICES

Compiled by: Zekarias Keneaa

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PART I: INTRODUCTION*

CHAPTER I
INTRODUCTORY

A. General notion of sale. B. Historical development. C. Sale in relation to the general law of contract. D. General characteristics of Emptio Venditio.

A. GENERAL NOTION OF SALE

SALE is the exchange of a thing for money. Till money was invented, there could only be barter, as soon as money was invented, there was sale, the precise object of money being to serve as a medium of exhange. This definition is, and is meant to be, economic; a universal legal definition of sale would, even if possible, serve no useful purpose because of the wide variations in the conception of sale during the course of legal history, in the various legal system, and even in branches of the same system.

Evidently sale implies agreement but it is not always and everywhere a contract in the sense of being an agreement which generates obligations. In early law there was no such thing as an executory contract of sale, and in very early law it is believed that sale always took the form of a simple exchange of the thing against cash which left no outstanding obligations. Of course in later law, even if a sale takes place by delivery and payment made at the very moment of the agreement, as where goods exposed in a shop are taken for cash, it is only barely conceivable that the seller, at least, should not incur contraotual responsibility in regard to title, not to speak of quality, which in the event may give a cause of action. To question whether in developed law sale is a contract would be mere pedantry. But developed systems of law vary considerably in their conception of that contract. Let us consider one cardinal point.

Under the executory contract of mature law the agreement can be served from its execution, that is to say, a buyer can be sued on his promise of the price, and a seller on his promise of the thing. Here the price can be seen in one way only it can only be in obligatione; but as regards a specific thing of which future delivery has been promised the law may take one of two views:

i. That the agreement has produced only an obligation that the seller shall convey the thing to the buyer, or

ii. That the agreement of itself, or, may be, the agreement plus payment of the price, has forthwith made the buyer owner of the thing even before delivery or other conveyance.

Roman law takes the first view: the contract of sale is one thing, creating merely obligations between the praties, and the conveyance is another which it is the duty of the seller to carry out, as it is that of the buyer to pay the price.

Our own law takes the second view. Though legal ownership of land sold remains in the vendor until he shall have executed the proper conveyance, equitable ownership passes to the purchaser from the moment of the contract. In goods sold the legal property formerly remained with the seller till they were delivered, but in modern law it passes to the buyer by the contract, where that is possible. It is much the same in French law without distinction between

*F.DE. Zulueta, The Roman Law of sale, Oxford 1949, PP. 1-59.

movables and immovables. German law, however, still keeps to the Roman principle that property passes to the buyer only by conveyance.

More important from the practical point of view than the question of property is the question which of the two parties must bear losses occurring by accident before the thing has passed from the seller's to the buyer's control. It might be thought that this second question would be decided by the answer to the first, the risk passing to the buyer when he becomes owner, or at any rate that the same answer would be given to both. In fact, English and French law agree in transferring the risk to the buyer normally from the moment of the contract, that is, when they hold him to become owner. But Roman law has the same rule of risk and is thereby committed to the inelegance of separating property and risk. German law preserves the principle res perit domino, but at the cost of standing alone in leaving the risk with the seller until the requisite conveyance; this is consistent, but the problem is one of commercial convenience, not of legal logic.

B. HISTORICAL DEVELOPMENT

From primitive sale transacted by reciprocal conveyances to the modern contract of sale is a far cry. Substantially the modern contract is the product of a long and arduous Roman evolution extending from the Twelve Tables to Justinian, to which various sources contributed. Even in the Corpus Iuris the fusion of these sources into a unitary institution is not complete, at least in form. Thus a cursory review of the Roman evolution is imposed even on a work which is not primarily historical, because without a modicum of historical information Justinian's texts are not fully intelligible.

The ceremony of mancipatio shows sale in its earliest form, transacted donnant donnant, and the double name, emptio venditio, understood in the older senses of the words emere and venum dare, tells the same story. But even a fairly primitive society feels the need of credit and the propriety of imposing certain obligations on seller. The earliest developments of the law came about at Rome in two ways: the State, in certain cases of manifest injustice, intervened between buyers and sellers, and the parties themselves made use of such law of contract as existed. It was only much later that a unitary law of sale began to be developed doctrinally, with the conscious purpose of giving effect to the agreement of the parties, interpreted as a matter of good faith between man and man; even so, the effects of earlier legislation and of secular practice were never entirely obliterated.

The intervention of the State is encountered as early as the Twelve Tables. (1) It was enacted that a seller by mancipatio should be under an obligation to defend the buyer against being evicted from the thing bought until he should have had time to acquaire title by usucapio. The sanction was an action for double the price (the so-called actio auctoritatis); it was a semi-delictual obligation, imposed by statute and not avoidable even by express agreement. (2) If we may believe the principal text, it was also enacted that ownership of the thing should not pass to the buyer by traditio, unless he had either paid the price or given real or personal security for its payment. The historical accuracy of this report is more than questionable, but it seems unreasonable to doubt that it contains a kernel of truth. The bilaterality of sale lies on its surface, and if, as is likely, conveyance of the thing sold did not of itself create an actionable obligation to pay the price, it would be natural to enact that the conveyance should not be final so long as the price remained unpaid, unless indeed the seller had provided himself with legal means of recovering it.

Other notable, but later, cases of intervention by the State which left an abiding mark on the law of sale will be found in the aedilician Edict. But even more important than action from above is the use made by buyers and sellers from very early times of such law of contract as was available. Putting the evidence of the recently discovered text of Gaius 4, 17a at the lowest, it is now undeniable that from the time of the Twelve Tables a sponsio of pecunia certa was enforceable by iudicis postulatio. Even if no other kind of promise was thus enforceable, it was possible for the parties to a sale, if they were so minded, by means of a penal stipulatio to create an effective sanction for any engagement into which they desired to enten.

Comparative jurisprudence tells of various devices for meeting the problem of deferred payment of the price: it may be that the buyer gives something in earnest, whether by way of symbol, with the effect of binding himself legally, or by way of peanl part-payment; or, if a loan of money creates an enforceable debt, the buyer's debt of the price, which is not per se enforceable, may be converted by fiction into a debt of money lent to him by the seller. The precise form of this side-contract will be determined by the state of the law of contract in the given system. At Rome, as we have learnt from Inst. 2, I. 41, deferred payment of the price could, at the time of the Twelve Tables, be made enforceable by the buyer giving, by separate contract, real or personal security. For the succeeding centuries of the Republic the evidence is scanty and unsatisfactory; while utilization of pignus in sales cannot be doubted, the most authentic evidence indicates that its influence on the evolution of emptio venditio is negligible in comparison with that of stipulatio, the countless applications of which pervade Roman law to an extent not always realized.

The expromissor of the price, mentioned in Inst. 2, I, 41, seems to have been a third-party; whether by his stipulatory promise he became sole legal debtor or guarantor is a question with which we need not concern ourselves here. In later times the buyer could give his own expromissio nummorum, as is shown by Varro's advice on how to deal in sheep. This deserves special attention, as being the most authentic piece of evidence as to emptio venditio in the critical closing years of the Republic. The bargain is struck in traditional form (antiqua forma) by the buyer saying 'Tanti sunt mi emptae?' and the seller replying 'Sunt'. This is not a stipulatio, though its closeness to one shows how natural it was to the Romans to strike a bargain by clear-cut question and answer. Next the buyer gives an expromissio nummorum, presumably by sponsio for the price. Lastly, the seller by sponsio undertakes warranties for quiet enjoyment and of quality. The point to observe is that, the bargain having been made , the principal obligations of the parties are at once secured by side-contracts in the form of stipulatio. The passage ends by allowing the buyer an action for non-delivery, even though he should not have paid the price, and the seller an action for the price, presumably even though he should not have delivered. This lack of bilaterality is natural if the actions are thought of as being actions on stipulationes, but Varro speaks of them as being ex empto vendito, and we know from Cicero that bonae fidei actions ex empto and ex vendito already existed in Varro's day. If the latter are the actions referred to by Varro, one must conclude that it had not yet been recognized that bona fides implies bilaterality. It would not be unnatural that the new actions should have inherited this defect from the older stricti iuris remedies.

The existence of so powerful and elastic a method as stipulatio of making any engagement binding thus rendered possible the development of a substantial law of sale without the help of any special contract of sale. A great part of this development seems to have consisted in the gradual perfecting of formularies or precedents of stipulationes adapted to the various, but limited needs of the Roman peasant. They had the disadvantages, which would be increasingly felt, of being, even when reciprocal, unilateral and independent of each other, and of being very literally construed. From the beginning of the second century B.C. the pulse of trade began to beat too fast for the leisurely methods which had suited the cautious Roman peasant well enough. The kinds of things dealt in multiplied indefinitely and the dealers were often peregrini, men outside the native cautelary tradition. It became necessary to give effect, not merely to what the parties had had the foresight to incorporate in a formal contract, but also to the general implications of good faith. The bonae fidei actions, when introduced, enabled this to be done, but of course many more years were to pass before jurisprudence had settled what were the implications of good faith which it would recognize. It is therefore not surprising especially in view of Roman conservativism, that for centuries the traditional side-contracts continued to be made, although these stipulationes embody obligations which seem to us, the heirs of the Roman development, inherent in the relation of buyer and seller.

Exactly when, and by what agencies, the special bonae fidei actions for the enforcement of formless consensual contracts came to be established is a matter of much interesting conjecture, but the various theories are so well expounded in easily accessible books that there is no need to recount them here. Theproblem, it should be noted, concerns not only sale, but also the whole group of consensual contracts and indeed the general movement which led to the reception of principles and institutes of the ius gentium into the ius civile. But if the origins of the bonae fidei actions are obscure, the importance of their introduction is patent. The words of the formulae ex empto and ex vendito: 'quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona;' for the first time brought into full light the fundamental question between buyer and seller, and the answer of Roman jurisprudence is the classical contract of emptio venditio, from which the modern law of sale is descended.

C. RELATION OF SALE TO THE GENERAL LAW OF CONTRACT

English law, like other modern systems, has a general theory of contract; it has general rules for determining whether a given agreement is a valid contract and what, if any, effect it shall have, rules which apply to every contract irrespectively of its economic nature except in so far as certain types of contract, of which sale is one, have been subjected to special regulation. Thus, the sale of goods is governed by the common law save in so far as the express provisions of the Sale of Goods Act (and other acts) are inconsistent with the common law. To a large extent this Act is merely declaratory of the common law, so that its repeal would leave the law of the sale of goods in the main unaltered. Moreover many of its provisions are not imperative, but can be set aside by the agreement. Nevertheless, there are important statutory rules which make it necessary to define the contract of sale. A familiar illustration is that the enforceability of a contract may,

owing to s.4 of the Sale of Goods Act, depend on its not being a contract of sale, though, supposing it to be sale, it necessarily satisfies the requirement of consideration, which is our general test of actionability, and, but for the statute, would be a perfect contract.

Roman law likewise is obliged to define sale, for different reasons. Although there were general rules of contract, such as those of capacity or those relating to duress and reality of consent, which were applicable to emptio venditio as to any other contract, there was no general theory of the formation of contract. There were indeed two ways in which a promise might become actionable which have some generality. Any promise not forbidden by law could be put into stipulatory form: we have seen that workable law of sale was actually built up in this way. Again, in late law, any promise was actionable in return for which the promisor had obtained some thing or act-an unperformed counter-promise was not enough from the promisee. But outside these two cases promissory agreements were enforceable only if they were of certain types, known to us as the real and consensual contracts. The real contracts required that a thing should have been delivered under one of the recognized agreements, but the consensual, which included emptio venditio, were enforceable on the ground of mereagreement, just as a modern contract. If an agreement was emptio venditio, it could be enforced by the actiones empti and venditi; if it was not, these actions would not lie, though some other might. So long as the formulary system was in vigour, it was necessary to proceed by the correct formula, and even later the fact that the contract was not emptio venditio would render the wholebody of special law built up for emptio venditio inapplicable, except in so far as it might be extended by analogy.

Thus both English and Roman law have to define sale, though for different reasons. In both systems the question of definition depends on the substance of the agreement: an agreement does not become a sale by being expressed as such.

D. GENERAL CHARACTERISTICS OF EMPTIO VENDITIO

The contract possesses the characteristics which the Institutes mention as common to the consensual group.

i. Consensuality. All contracts require consent, but consensual contracts require nothing more-neither formality nor delivery of a res corporalis - for their formation. Hence they can be concluded inter absentes, by letter or messenger.

ii. Bilaterality. The text (alter alteri obligatur) contrasts contracts, such as stipulatio and expensilatio, which impose obligations on one party only, with those which like the consensual contracts impose them on both. But emptio venditio is bilateral also in the more important sense that the liability of the one party depends on the other having discharged or being ready and willing to discharge his own liability. All modern systems make bilaterality in this sense a characteristic of sale, though it can be, and frequently is, modified by the terms of the contract. The only question is how effect is given to bilaterality in litigation. The Sale of Goods Act, adopting traditional phraseology, lays down that payment of the price and delivery of the goods are concurrent conditions, from which it used to follow that a party suing for payment or delivery had to plead expressly and prove that he himself had delivered or paid, or was ready to do so. The pleading is no

longer necessary, but the plaintiff must be able to prove the fact that he has satisfied the condition, should the defendant deny it. In Roman law Ulpian states that the buyer's cause of action is not complete unless he offers the price; it seems to follow that the burden of proving payment or offer lay on him and that the defendant need not raise the point by exceptio. But from certain text medieval and later commentators have inferred that he had to do so. Others deny the necessity of the exceptio in actions arising out of consensual sale, referring the texts in question to actions on stipulatio.

Bilaterality ought, one would think, to involve that the release of one party from his obligation will release the other. Nevertheless, under the doctrine of risk, it may happen that, though the seller is released from his obligation by the thing being destroyed without his fault after the risk has passed to the buyer, the buyer must pay the full price. On the other hand, if as may happen, a buyer is freed from liability to pay the price, a corrupt text seems to say that the seller cannot be compelled to deliver, though, if he has already delivered, he cannot recover the thing.

iii. Bona fides. The words of the formulae empti and venditi: 'quidquid dare facere oportet ex fide bona', which are the measure of the liabilities of both parties, bring in issue any dolus with which either is chargeable in the transaction. Consequently the actio doli was usually unnecessary, and therefore inadmissible, between buyer and seller, while the exceptio doli was implied by the formulae.

But bona fides is not satisfied by mere abstention from dolus, though dolus itself is wider than our deceit. One may refrain from actual dishonesty and yet fall short of the standard of conduct obtaining among decent men. The history of the seller's liability to take care of the thing till delivery is disputed, but it would have been quite possible to infer it from the duty of bona fides, for, as has been well observed, though there is nothing contrary to good faith in being on occasion careless, it is another matter whether the same can be said of refusing to make good to the other party the consequences of your carelessness.

Bona fides, like our own reasonable conduct, was not a static concpetion. It had the advantage of submitting the conduct of parties to the conscience of their own day, but, since this meant in practice the conscience of the individual iudex, it had the disadvantage of uncertainty and possible caprice. This was inevitable, but it was going very far to leave to the discretion of the iudex, as being a question of bona fides, the admissibility of set-off arising out of the transaction of sale itself. But in the application of such tests as those of bona fides and reasonableness definite rules are apt to be formed ; practice, like legislation, was probably favourable to compensatio.

Roman buyers naturally did not rely entirely on the implications of bona fides; but took express warranties. The consensuality of the mature contract enabled this to be done by means of dicta promissave, incorporated in the contract, but also the earlier habit persisted of using special stipulationes,

i.e. strictly binding and strictly construed side-contracts, the formulation and interpretation of which had been settled by long tradition. There were customary stipulationes concerning quality, eviction, and quiet enjoyment; there was even, superfluous as it may seem, a customary stipulatio against seller's dolus. The survival of these stipulationes was favoured both by Roman conservativism and by the requirements of the aedilician Edict. But in business they might easily be omitted, not necessarily out of mere carelessness, but because business can only be conducted on a footing of mutual trust. What is fair dealing is often a question of commercial usage, and bona fides was held to require that, if the customary stipulationes had been omitted they could be exacted by the bonae fidei actions on the contract, and from this it was a short step to holding that the iudex could take them as having been given. Gradually the position was reached that obligations which had been outside the consensual contract became inherent in it by implication; in other words, the consensual contract ultimately absorbed the ancient incidents of sale as transacted by means of special contracts before a consensual contract existed.

CHAPTER II

FORMATION OF THE CONTRACT

A. The res. B. The pretium. C. The consent. D. Conditional contracts.

Emptio venditio is very adaptable: it can incorporate not only the most various conditions of sale, but also agreements which in themselves have nothing to do with sale, but are merely inducements to the acceptance of a sale in a given case. But there is not sale unless there is agreement to exchange a thing against a price. The three essentials in the formation of a contract of emptio venditio are therefore: the thing (res or merx), the price, and the consent of the parties.

A. THE Res OR Merx

This might be anything that could enter the patrimonium of the buyer. Generally it would be a res corporalis, but it could be a res incorporalis, such as a praedial or a personal servitude, a debt (nomen) or an hereditas. But certain things were extra patrimonium and others could not be sold because of some legal prohibition or legal impossibility. Again, there could be no sale of a res quae in rerum natura non est aut esse non potest, such as the hereditas of a living or of a non-existent person, or a hippocentaur, and if the thing which it was purported to sell no longer existed at the time of the agreement, the sale failed for lack of a res quae veneat. But the mere fact that for the seller the thing was difficult or impossible to obtain was no objection.

i. Res extra commercium. In principle the sale of loca sacra, religiosa, or publica or of a liber homo was void, but in later law, certainly in that of Justinian, the buyer of such things was allowed an actio empti for damages, provided that he had contracted in good faith and, according to some explicit texts, provided also that the seller was in bad faith. It is a question at what date this derogation from principle waa admitted. The two practically important cases are those of the liber homo and locus religiosus, either of which might easily be bought under misapprehension.

An actio empti for damages where a man bought in the belief that he was a slave turned out to be a liber homo is probably classical, and many jurists inferred the existence of emptio venditio as a consequence. It is to be remembered that from very early days there would have been an actio auctoritatis, if the man had been mancipated. In the case of loca religiosa the classicality of the actio empti is more doubtful, in spite of its being allowed by nominally classical texts, because the praetorian Edict gave an innocent purchaser a special actio in factum.

ii. Sundry prohibitions. Most of these cases have little modern interest, but one or two which occur in the titles on sale may be mentioned. A guardian could not buy the property of his ward. Subject to an obvious qualification the sale of poison was void. A master might not sell his servus fugitivus, not because, being regarded as fur sui, the slave was a res furtiva, but in virtue of a special SC. A SC. Hosidianum (reign of Claudius), supplemented by a SC. Volusianum (reign of Nero), forbade the buying of a building for the purpose of making profit by demolishing it.

iii. Res emptoris. The sale to me of res mea is void, whether, when I bought, I knew of my ownership or not; if I did not, I can recover anything I have paid. The reason is that the seller has nothing to sell and I nothing to buy. If, however, I buy that in which my ownership is defective, for example interdictal possession or the share of my co-owner, the rule does not apply, because its ratio fails. Again, if my ownership is liable to fail, I can buy against that eventuality; or if it is subject to a condition precedent, I can buy so as to get rid of the condition, though if I bought in ignorance of my conditional right, I can, on the condition being realized, recover the price.

iv. Res aliena. What is agreed to be sold belongs to a third party. If both parties are aware of the third-party's title, the contract may be a corrupt bargain at his expense: that is void. But it may be quite honest, as where the parties believe that the seller will be able to acquire the thing lawfully from the third-party: in that case the contract is good, though it may be construed as conditional on the seller proving able to obtain the thing.

If only the buyer is aware of the third-party's title, he must pay the price if the seller performs the contract, but the seller is not bound to do so.

If the buyer is unaware of the third-party's title, then, whether the seller is aware of it or not, there is a contract, as there is in English law also. But whereas in Roman law the seller is unassailable provided that the buyer is maintained in undistrubed possession during the period required by him to acquire a prescriptive title, in our law it is an implied condition that a seller of goods has a right to sell, and a vendor of land is bound to show good title. If a seller of goods has not the right to sell, his buyer can at once repudiate the contract, if he does not prefer to sue for damages.

French law seems at first sight to differ fundamentally: 'La vente de la chose d'autrui est nulle' roundly declares CC 1599, and though this abandonment of Roman principle was caused by the alteration of the conception of vente from that of pure contract to that of conveyance, the intention seems to have been to make the sale void also as a contract, irrespectively of the good or bad faith of the parties, though the buyer in good faith was granted an action for damages. This nullity was intended to be absolute, but the Court have made it relative, i.e. a nullity was intended to be absolute, but the Courts have made it relative, i.e. a nullity that can be invoked only by the buyer. Shortly, the effect is to enable the buyer during the first ten years to anticipate his action on the warranty against against eviction by bringing an action for nullity. Without going into the subtleties which this situation has produced, the statement may be ventured that, since the buyer can, if he chooses, hold the seller to the contract, there must after all be in some sense a contract.

German law is not in the same difficulty, because it maintains the distinction between the contract and the conveyance. A seller is bound to supply the buyer with the thing free from any rights which third-parties might be able to enforce against him;otherwise, the seller will be liable to the normal consequences of failure to perform a bilateral contract.

v. Thing which has perished before the contract. The rule is universal, though variously formulated and worked out, that an agreement to sell as specific thing which at the time of the agreement had ceased to exist is a void contract.

By any law which holds that all promises which are impossible at the time of their making are void, it can be regarded as an application of general principle. But English law has no such general principle, it being perfectly possible for a man to incur liability on a promise which cannot, and could not at the time of promising, be performed. It is true that in various cases contracts have been declared void ab initio because their performance was antecedently impossible. Whatever be the principle underlying these decisions and the cognate decisions on supervening impossibility and frustration, it is at any rate well settled that, where a contract depends on the existence of some specific thing and that thing had at the moment of the contract ceased to exist, the contract is void. For the sale of goods this is laid down by s. 6 of the Act, though it should not be forgotten that the rule may be set aside by express agreement or by implication, the buyer's state of knowledge is immaterial, but the seller must have been unaware that the goods had perished. The section speaks only of specific goods, but its principle would almost certainly be held to govern a sale from a specific stock, which stock had so far perished that performance was impossible from the outset. By have perished we understand such destruction of the goods that they no longer correspond to their description by the contract.

The corresponding Roman rule may originally have been based on the rather different ground that without a res quae veneat there can be no emptio venditio. On this basis there ought to be no difference whether or not either party knew of the non-existence of the thing; but a largely interpolated text draws elaborate distinctions according to the knowledge of the parties and according as the destruction is total or partial. It is a tedious passage, but important in that it allows nullity only when the destruction is of more than half the thing. As a general principle a quantitative standard seems both impracticable and unjust; thus in the case put by the text, of a house being burnt, the text ignores the possible value of the site. A more rational test, approximating to the English, is adopted by the next text, namely, whether or not that in contemplation of which the buyer contracted has been destroyed.

The distinction between total and partial destruction has passed into French law, but without the rule of half and without the distinctions according to the knowledge of the parties. In the case of only partial destruction the buyer has the option between repudiating his purchase and maintaining it at a price to be fixed by arbitration.

vi. Sale from stock. Sale everywhere was originally of specific things. The present and the following cases (vii-ix) raise the question, which is not peculiar to Roman law, how far, if at all, the Romans advanced from this primitive limitation. The question is not whether bargains of the various types about to be considered could be concluded under Roman law --they could be, in various ways, notably by stipulatio--but how far they could be, or were as an historical fact, concluded as emptiones venditiones.

No difficulty seems to have been felt about sale from existing stock--so much wine from my vat, so much wheat from my barn. Essentially the same, though not identified with it by the texts, is sale of an alternative--Stichus or Pamphilus--the choice being presumed to lie with the seller. In English law it is by appropriation to the contract that the property and risk pass to the buyer under such contracts, in Roman law the risk, though not the property, passes in practically the same circumstances.

vii. Emptio rei speratae. Emptio spei. Whether brought under the conception of sale or not, sale of future crops is a widespread and primitive practice; at Rome it must be much older than the contract of emptio venditio, of which in classical law it was recognized to be a case, though here the departure from the principle 'nulla venditio sine re quae veneat' seems to have been felt. An agreement to sell, for example, the next crop of olives from the seller's grove or the unborn child of his ancilla was allowed to be conditional emptio venditio, the condition being realized when the res futura or sperata came into existence. But an absolute contract, in which the buyer or seller took the risk of the thing never coming into existence, was also admitted to be emptio venditio. It is true that the stock example of such bargains is the rather different case of buying the next haul of a fisherman's net and the like, the buyer paying even if nothing is caught; but a similar construction of an agreement to sell a future crop seems to be contemplated as conceivable by a difficult text. Also, provided the intention was clear, sale of one's right, if any, to an hereditas was valid, even if there proved to be no right, Modern English law has no difficulty in regarding bargains of these kinds as agreements to sell, whether or not they fall under the Sale of Goods Act.

viii. Thing to be made by the seller. If in return for money a craftsman agreed to make an article out of his customer's materials, the contract was clearly locatio conductio, but where he was to make it out of his own materials, there was doubt in early classical law whether it was not rather emptio venditio. Cassius, a Sabinian, held that in such case there was emptio venditio of the materials and locatio conductio of the work. This may be the correct economic analysss, but the law could not bring a single contract partly under the rules and formulae of emptio venditio and partly under those of locatio conductio. The majority view, adopted by Justinian, was for emptio venditio. There are nevertheless cases, as the Corpus Iuris recognizes, in which materials are supplied by the craftsman and yet one cannot say there is sale, cases in which the materials pass to the customer only by being merged in his property, as where a builder contracts to build a house on my land with his own bricks and mortar, or a tailor mends my coat with his own thread and cloth. There is not sale unless the object of the contract is to transfer a distinct thing to be made out of the craftsman's own materials.

The Sale of Goods Act s.5 expressly recognizes a contract of sale of 'goods to be manufactured by the seller', but like the Romans we are obliged to distinguish such a sale from a contract for work and materials. The distinction is not difficult where the workman is to use his own materials on a thing belonging to the customer, but there are cases in which, although he is to make and supply a distinct thing, English law refuses to see sale. The decision in Lee v. Griffin was long thought to have transplanted the Roman solution into our law, but the doubt, always kept alive by a somewhat earlier decision, has now been shown by Robinson v. Graves to have been justified. An agreement to paint a portrait was there held not to fall under s.4 of the Sale of Goods Act. It would have been sale under Justinian's rule, for which one may perhaps claim superior certainty, but one can understand the reluctance of English law to follow it in cases where the value of the materials as compared with that of the work is so small as not really to affect the bargain. Would even Justinian have held that a solicitor sells the documents with which he supplies his clients, using his own ink and paper?

ix. Sale of non-specific or generic goods (emptio generis). Among the commonest contracts of modern commerce are agreements to sell non-specific goods, i.e. goods the nature and qualities of which are to accord with description or sample, but which the seller may provide in any way he chooses, whether from existing stock or by manufacturing or otherwise acquiring them. He promises not specific goods, but goods of a defined genus, whence the rather fantastic civilian phrase emptio generis. An explanation of the fact that the Roman texts supply no examples of such transactions being regarded as emptio venditio is not easy to find. It lies perhaps in an atavistic instinct against recognizing emptio venditio of any but supecific things, expressed by the maxim nec emptio nec venditio sine re quae veneat intellegi potest, but the cases which we have just been examining (vi-viii) show that any such difficulty could have been surmounted by jurisprudence, if there had been any practical need to do so. But the modern frequency of such sales of generic goods depends on conditions which did not exist in antiquity--mass-production, certainty and rapidity of transport, facilities for insurance. In Roman commerce such transactions seem to have been rare and confined to 'big business', the needs of which were perhaps better served by stipulatio or locatio conductio. In treating of Roman emptio venditio we shall thus be justified in taking account only of sale of specific things, with the extensions indicated above (vi-viii).

B. THE Pretium

i. The pretium must be in pecunia numerata. There must be a price, and it must be in money. The latter point is now elementary, but was established by Roman law only after controversy. The Sabinians contended that permutatio (exchange or barter) was emptio venditio, and indeed its original form; but the Proculian view, that the two contracts were distinct, was supported by the unanswerable argument that in emptio

In addition to being in pecunia numerata it is commonly said that the pretium must be certum, verum, and iustum. These are convenient headings, but they must not be taken too literally.

ii. The pretium must be certum. Here is an outstanding difference from our own law: in Roman law the contract must fix a definite price; if it does not name the actual figure, it must define it by reference to some existing fact or facts, which only require to be ascertained. But if there is this much certainty, the contract is not invalidated because it provides for an increase of the price in certain possible future events, for example by a share in profit made on resale. But if the price depends entirely on a future event there is no sale.

It should follow that the price cannot be left to be fixed by a subsequent valuation, but the point was disputed and ultimately common sense triumphed over logic: Justinian decided that an agreement to sell at the price at which the thing should be valued by a named third-party was to be reckoned a good conditional sale, the condition being that the third-party should actually make the valuation. If he could not or would not do so, the contract was to be void quasi nullo pretio statuto and was not to be construed as implying recourse in that event to the arbitrium of an unnamed bnus vir. Even a contract expressly referring the price to such an arbitrium is not validated by Justinian's enactment.

In English law there is no need for any price to be fixed by the contract: where the parties have agreed to a sale without fixing the price or the method by which it is to be fixed, the buyer must pay a reasonable price on the ground of an implied promise. Naturally an express promise to the same effect is valid, but where a valuer is named by the contractor and he fails to act, the contract is avoided as in Roman law, and recourse is not had to the doctrine of reasonable price.

iii. The pretium must be verum. The bargain must be struck with the intention that the price shall be paid; otherwise the sale is merely a disguised donatio. This does not mean that payment of the price is a condition of the validity of the contract: what is necessary is obligation to pay it, and the validity of the contract is not affected if this obligation is subsequently released by the seller.

A seller may out of liberality sell at a price well below the real value. If it is derisory, e.g. nummus unus, there is no sale, but if it is a price, though a low one, there is sale. In truth it is partly sale and partly donatio, but it is accepted to be sale except when the supposed buyer is a person to whom the seller cannot make a donatio. Thus sale between husband and wife can be impeached for inadequacy of price.

venditio it is necessary to distinguish which party is seller and which buyer, and that in permutatio such distinction is impossible. The attempt of Caelius Sabinus to parry this objection, by saying that in permutatio he is seller who has held out his thing for sale, provides no answer, because even in cases in which the proposed test could be applied any distinction between the obligations of the parties would be unfair. The Proculian view seems to have been accepted by the end of the classical period. Two passages of Paul treat it as settled law, as does a constitution of Diocletian. Another text of Paul notes the controversy, but without any real doubt as to which is the right side of it. A constitution of 238 allows only an action ad exemplum emptionis in the case put by Caelius Sabinus, though it seems to distinguish that case from permutatio.

What if, in exchange for a thing, a man promises, besides money, some thing or act or services? No text deals with the case of money plus a thing, but several allow a man who has been promised for his thing some act in addition to money, to sue for performance of the act by actio venditi, on the ground that it entered into the price. It should perhaps be taken to be Justinian's law, though he adopts the Proculian view, that there is sale wherever money enters into the consideration given for the thing, so that the buyer and seller are clearly distinguished. But it is easy to put cases in which the bargain is substantially permutatio or some other contract, although money has been thrown in as a makeweight; to see sale in them is obvious only to a Sabinian.

The distinction between exchange or barter and sale is more important in Roman law than in modern. In modern law an executory agreement to exchange is an actionable contract. In English law there are some peculiarities in exchange of lands into which we need not enter, but exchange of goods is said to be governed by the common law of sale, and it is to be remembered that much of the Sale of Goods Act is merely declaratory of the common law. Statutory provisions, such as s.4 of the Act, referring expressly to sale, do not however, apply to exhange. The German law of sale extends, so far as it is applicable to exchange, as does the French law of sale, except for the rule of lesion.

In Roman law, on the other hand, permutatio is not a consensual, but an innominate contract and, as such, is enforceable only by a party who has performed his side of the exchange. The duty of both parties is dare, i.e., to transfer dominium, another difference from emptio venditio. The result is on the one hand that a party whose own datio is defective cannot enforce the other's datio, and on the other hand that a party who has made a good datio can sue the other for a defective datio, without having to wait like a buyer to be actually evicted. But permutatio resembles sale in being bonae fidei; moreover the rules evolved as to a seller's liability for faults in the thing sold seem at some time to have been extended to permutatio.

Adequacy of price is therefore no more necessary in Roman law than in English or rather both laws leave the parties to find the right price for themselves; ius invicem se circumscribendi. Harsh bargains may result, but no principle has yet been discovered under which the law can usefully intervene in cases where there is neither fraud nor duress and the party suffering has no special claim to protection.

iv. The pretium must be iustum. In late Roman law we meet with an attempt to devise such a principle. Two rescripts, nominally of Diocletian, each addressed to a seller of land, lay down that, if the agreed price is less than half the iustum pretium, the seller may rescind, unless the buyer will come up tothe iustum pretium. It is practically certain that this doctrine, which is known as that of laesio enormis, is not due to Diocletian, Justinian himself may be its originator. There is no textual authority for extending it to sales of other things than land or for applying an analogous principle in favour of the buyer. Equally, there is no logical ground for not making both extensions; whether they are desirable must depend on economic conditions. The history of the doctrine in the countries which have received Roman law has consequently been varied: it is not followed in Scotland, but it survives in French law for the sale of immovables and in a few exceptional cases.

C. THE CONSENT

In Roman and English law alike, consent to a contract of sale is governed by the same principles as consent to any contract. Purely consensual contracts being exceptional in Roman law, the texts insist that no verbal or literal formality is needed, but of course consent would have to be proved in some way. No doubt it could be proved from conduct, but there is little, if any, authority on the point, probably because the absence of a doctrine of implied reasonable price made tacit sales rarer than with us: in Roman eyes what clinches a contract of sale is agreement on a pretium certun.

Consent inter absentes, by letter or messenger, involves that the two minds may never be at one. For the Romans the resulting problems had nothing like the importance which the excellence of modern postal services has given them to-day. For this reason they are not considered by the texts and can be passed over here.

Agency. It is a commonplace that Roman law, even in its ultimate form, did not allow a contract to be concluded through an agent. But by the time of Justinian the principle of non-representation had been largely whittled away in practice by various developments, which, since they are not peculiar to sale, need not be expounded here. They were mainly praetorian, but a benevolent interpretation, moving towards agency, was able to take advantage of certain points of civil law. Thus, a consensual contract can be concluded per nuntium, and while the theoretical line between a nuntius, who performs the merely ministerial act of communicating one party's consent to the other, and an agent,

who gives the consent, but whose contract counts as that of his principal, is perfectly clear, it may in many actual cases be shadowy enough to be disregarded by a lax practice.

Conventional formalities. There is nothing in Roman law corresponding to the English Statutes which require writing (there are some alternatives) for the legal proof of contracts for the sale of land, or of goods of the value of £10 and upwards. But the very consensuality of Roman, as of modern, sale involves that the parties may make it impossible to find a binding agreement unless certain expressly or impliedly agreed formalities have been completed. Thus, the custom of a market may practically prevent any consent from being recognized as final until the parties have shaken hands on the bargain, or one of them has given earnest; again, at an auction a bid becomes binding by the fall of the hammer, but not before. Far the most important formality of this kind is writing: parties who have substantially come to terms may reserve final agreement till the execution of a written document embodying the terms. But it is also quite possible for a memorandum in writing to be contemplated, although final and complete consent has already been given. A difficult question may thus arise, to which the answer in our law depends on whether the writing was intended to be only machinery for the simplification of proof and for reference, or to be a condition of final agreement. There has been no English legislative regulation of the question, but for Roman law it is settled by a statute of Justinian, which also regulates the effect of another conventional formality, arrarum datio or earnest.

a. Writing. The principium of the constitution of 528 enacts with regard to various contracts, perhaps all, but certainly including contracts of sale and contracts for the giving of arra, that if it has been agreed that the contract shall be put in writing, the contract shall be of no effect whatever, unless and until the writing shall have been properly executed; drafts are to be disregarded; there must be a final document (mundus). As to execution it is laid down that subscriptio is required of documents made per alium, but not of autographs of the parties; documents made through a public notary (tabellio) require completio and absolutio, completio being, according to good authority, entry of the contract by the notary in his register, absolutio his delivery of the final document to the parties.

b. Arra. This is the subject of s.2 of the constitution, but we must give a preliminary account of it. It is something, it may be money or anything else, and of great or insignificant value, given by a promisor to a promisee as some sort of security. Small arra may be presumed to be evidential, large to be penal, though it may be at the same time evidential. The importance of arra in the development of the contract of sale is well illustrated by Greek law, to which in the present connexion we have special reason to attend. There its earliest function was penal: under a law which provided no actions on

mere promises to buy and sell the buyer gave arra, which he forfeited if he failed to pay the price. Justice would seem to require that the seller should give equivalent arra, but this would have rendered the arrae nugatory, since they would cancel each other. Somehow it became settled that a defaulting seller must restore the buyer's arra and pay him alterum tantum. In spite of the influence of the Roman consensual contract, this system, [illegible], seems to have remained the real sanction of sale in the Greek East throughout the Hellenistic period. Its effectiveness would obviously depend on the arra being of more than negligible value.

There is some, not very conclusive, evidence of a similar Roman practice as late as Plautus; but not very much later, before the end of the Republic, the consensual contract was born, actions were granted on bare promises to buy and sell; thenceforward there could be no general need to provide a sanction by arrarum datio. But to allow a contract to be concluded by mere consent orally given is to open the door to occasional doubts as to whether parties have passed beyond negotiation and have reached definite agreement. A good test is provided by customary formalities, such as shaking hands or giving and accepting a ring, a coin, or other token, and this is precisely the function which classical Roman law assigns to arra: it is argumentum emptionis et venditionis contractae, proof of the fact of consent, but not essential to the valid formation of the contract. For this evidential purpose arra did not need to be of any substantial value; a common arra seems to have been a ring. It is significant that we find no mention of a corresponding penalty for the defaulting seller. If the buyer performed his contract, he could recover the arra, unless, being in money, it had been credited, as would be natural, towards the price. He could also recover it if the contract was rescinded, but not if the seller avoided the contract under a lex commissoria.

This is about all that the classical juristic texts tell of the working of arra in their times; for the rest we must rely on inference. It is inconceivable that arra in the classical period provided a locus poenitentiae in the sense that its forfeiture superseded the actiones empti and venditi in law. On the other hand, it may be presumed that the value forfeited counted towards damages; if so, it might in some cases supersede the actiones in fact, there being no damages left to recover. But the silence of the metropolitan jurists is a clear indication that in the commercial practice with which they were concerned substantial arra hardly ever occurred. This contrasts with the evidence of the Egyptian papyri, where arra runs high, usually to half as much as the price.

The principium of the constitution of 528, by enacting, as we have related, that a contract of sale cum scriptura should have no force unless and until the scriptura should have been fully executed, created a position familiar to Greek law, but novel to Roman: parties have finally consented to a sale, but there is no sanction. The question

dealt with by s.2 of the same constitution is of the effect on this position of arra having been given. It enacts that, though there is as yet no contract, the buyer may withdraw only on pain of forfeiting the arra, and the seller only on that of making restitution of double. This is simply [illegible], the Greek solution of a Greek situation. That such is the effect of s.2 is, it is submitted, indisputable; no other interpretation would ever have been suggested but for the corresponding passage of the Institutes.

This, however, has given rise to endless controversy. The view taken here is that the constitution itself is clear and that it represents Justinian's intention. The law might have been amended by the Institutes, which have legislative force (C.Imperatoriam s.6 i.f.), but the Institutes here show no such intention; moreover, though the constitution is dated 528, the version that we have of it comes from the Codex of 534, which is later than the Institutes.

The precise difficulty is that the Institutes describe arra as affording a locus poenitentiae sive in scriptis sive sine scriptis venditio celebrata est', which is hard to interpret except as meaning that, wherever arra has been given, whether the contract be oral or cum scriptura, forfeiture of the arra is to be the sole penalty incurred by either party for withdrawing, even where the scriptura has been fully executed. This, in fact, is the interpretation of Justinian's legislation commonly accepted nowadays, but we dissent. The Institutes have begun by saying of oral contracts: 'nihil a nobis in hujusmodi venditionibus innovatum est', and what follows is clearly meant to refer only to contracts cum scriptura and to reproduce the effect of the constitution. The offending words of the Institutes correspond to 'si quae arrae supper facienda emptione ... datae sunt sive in scriptis sive sine scriptis' of L. 17, s.2, which of course is said with reference to the precontracts as to datio arrarum mentioned in the principium of the constitution. It may be admitted that the carelessness of the compilers of the Institutes in reproducing the constitution is significant as to the practice of their day. Our evidence is that in the Eastern Empire it would be rare that arra should not amply cover all damages and thus leave any scope for the actiones empti and venditi. What we deny is that Justinian made so profound a change of theory as is involved by the now generally accepted interpretation of his legislation.

Defective consent. In general both Roman and modern law leave the effects on a contract of sale of the incapacity of a party, or of fraud, duress, or mistake, to be regulated by the ordinary law of contract. But there is a development of the doctrine of mistake peculiar to the law of sale which requires attention.

The explanation of this limitation of the doctrine of nullity to mistakes as to the material may be that the doctrine was developed from that of error in corpore (i.e. in re) in consequence of some metaphysical theory as to what constitutes identity, but there is no rational ground for the law to treat as less vital mistakes as to other essential qualities, e.g., the authorship of a work of art. Later interpretation has accordingly widened the scope of the doctrine; according to a traditional formulation, adopted in the interpretation of the Code Civil, there is error in substantia when the mistake is as to any quality which determined the buyer's consent. Another formulation is that the mistake must be such as to put the thing into a different category according to the usages of trade.

Much can be said in favour of relief against mistakes of this kind, but there are objections to the form of relief which seems to be deducible from the Roman texts. If error in substantia negatives consent as do error in negotio or in re, the contract ought to be void whether the mistake is the buyer's or the seller's. But it seems to be so only where it is the buyer's. No doubt a seller's mistake in such a matter is less commonly excusable than a buyer's, but very hard cases are conceivable. Accepting that the mistake must be the buyer's, the doctrine of nullity denies him all contractual remedies against the seller, who will consequently, unless he has been fraudulent, escape all liability, even when the mistake has been caused by a misdescription given by him in the contract. Hence in French law nullity of contract on the ground of erreur sur la substance is not true nullity; we should call it voidability of the contract at the option of the buyer. But a liberal view is taken of what amounts to such mistake.

The doctrine is quite alien to English law. The buyer of a specific thing (the doctrine is concerned with no other case) must take it as it is, unless he is protected by an express or implied term in the contract. To an English lawyer 'si aes pro auro veneat', means that bronze has been sold under the description 'gold' and has been bought in reliance on that description. There is a breach of an implied condition, but, the thing being ex hypothesi specific, the buyer will not be able to treat the contract as repudiated and reject the thing, even if he could, he would have the option of upholding the contract, which therefore would not have been void ab initio. He must have recourse to the remedies for breach of warranty. Still less is the contract void when it contains no misdescription, but there is merely mistake on the buyer's part; in that case the buyer has no redress. The law is clear; it has been criticized as not giving enough protection to non-traders, and perhaps a seller ought not to be allowed to take advantage of a mistake of which he was aware; but it would not be easy for the buyer to satisfy the burden of proving this awareness.

Having stated the traditional civilian doctrine, we may spare a few words for the modern historical views. The chief question raised is whether classical law took account of mistakes other than those produced by actual misdescription; hypotheses such as 'si aes pro auro veneat' are ambiguous. Lenel maintains that though classical law may have allowed nullity in cases of misdescription, the wider doctrine is Byzantine. Thayer, if I understand him, holds the same of classical law, but acquits the Byzantine compilers of having intentionally introduced the wider doctrine; their responsibility is limited

to having made it possible by obscuring the texts, which they shorte by cutting out the statements of the facts under discussion. Yet a view is that the full doctrine, i.e., of voidness for error in subst irrespective of misdescription, was established, Marcellus dissentin by Julian and Ulpian, and that the later tendency was to extend not this doctrine, but the meagre classical doctrine of implied warranty of quality, with the result that the Byzantines sometimes allow the actio redhibitoria or the actio empti, where the later classics would have pronounced nullity.

D. CONDITIONAL CONTRACTS OF SALE

We must begin by explaining the romanistic terminology of conditi contracts, which is dominant on the continent and is not unknown in English legal literature, though our law of conditions, taken as a whole, is distinct, and even in the law of sale has notable peculiarit

By a conditional contract civilians mean a contract the existence of which, has by express or tacit agreement, been made to depend on the happening of some future event, which event is not certain to happen, and by condition they mean, according to the context, either the contractual provision or the event itself.

Promissory conditions. Both in English and Latin 'condition' often has a wider sense. Thus, in the familiar phrase 'conditions of sale' it denotes contractual provisions of all kinds, which strictly are conditions only in the sense that, unless they are accepted, there will be no sale. The fact that an offeror couches his terms in the syntactical form of conditions does not make them true conditions. Sometimes a question of construction is raised. For example, you may promise to buy my land on condition that I pay off a mortgage on it within six months. My payment of the debt may be a pure condition, which I am free to realize or not, or I may have bound myself to it. In the latter case my payment is indeed a condition of your liability, but I can be compelled to make it. For terms of this latter kind 'promissory conditions' is a convenient name.

Thus, in the Sale of Goods Act an undertaking given by one party is called a condition, if its non-fulfilment is capable of giving the other party the right to treat the contact as repudiated, although he may, if he prefers, treat it as a warranty entitling him to damages for breach. Such undertakings are promissory conditions, but not conditions in the strict romanistic sense, because their non-realization does not annul the contract, but merely, subject to certain conditions, enables one of the parties, as already explained, to annul it. Again, the Act uses the phrase 'concurrent conditions' to express the quality of bilaterality; here, too, what depends on the event is not the existence of a contract, but its enforceability by one of the parties.

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Whether a term is a condition in this sense depends on the interpretation of the contract in each case; a prima facie interpretation is, however, imposed by law in a number of important cases.

In the romanistic sense a contract may be conditional either because its operation is deferred until a future uncertain event shall have happened or because, though it operates at once, it is liable to be annulled by the event happening. In civilian language the former is suspensive condition and the latter resolutive, but the Romans themselves regard emptio venditio as condicionalis only when the condition is suspensive; if it is resolutive, the contract is absolute (pura, perfecta), and it is its resolution that is conditional the clause providing for resolution being seen rather as a distinct agreement than as a condition on the sale. This distinction between suspensive and resolutive condition is fundamental.

Suspensive condition. Pending the happening of the event the emptio is imperfecta, the risk remains with the seller, the buyer has no claim to the fruits of the thing, if it has been delivered to him he gets no title, and he cannot make title by usucapio pro emptore if the seller's title is defective.

A much discussed question is whether pendente condicione any obligation exists. There is certainly nothing enforceable, but there is a tie which cannot be renounced unilaterally and of which the benefit and burden passes to heirs: 'Tantum spes est debitum iri eamque ipsam spem transmittimus si, priusquam condicio existat, mors nobis contigerit.' This is said in contrast to dies: where an obligation will certainly become enforceable in the future, there is already obligation, 'debitum in praesenti, solvendum in futuro', so that money paid in respect of it before the day will not be recoverable as indebitum, whereas money paid in respect of an obligation subject to a suspensive condition will be.

If a suspensive condition fails, it is as if there had never been an agreement; if it is realized, the contract becomes absolute.

Resolutive condition. Pendente condicione the emptio is perfecta, the duties of the parties and the incidence of the risk being unaffected by the condition. If the condition is realized, the contract is cancelled. If nothing has been done under it, there the matter ends. Anything done will have to be undone. In the classical period there were already actions for the enforcement of this undoing, personal actions, the exact technical nature of which seems to have varied in different cases; but according to the best modern opinion ownership of the thing never reverted automatically to the seller, so as to entitle him to vindicatio. Justinian's alleged alterations of the classical texts have been thought to indicate that he intended that ownership should revert. In this matter generalizations are best avoided, the law not having developed as a general doctrine of resolutive conditions, but according to the varying practical exigencies arising from certain important clauses frequently attached to sales; these will be discussed individually later.

CHAPTER III

EFFECTS OF THE CONTRACT

A. Transfer of Risk. B. Obligations of the Seller. C. Obligations of the Buyer. D. Rights of unpaid Seller against the Thing.

A. TRANSFER OF RISK AS BETWEEN SELLER AND BUYER

If between the making of the contract and its performance the thing sold perishes or undergoes physical deterioration and neither party is to blame, which of them is to bear the loss? Is the seller to lose, or suffer reduction of, the price, or must the buyer pay the price and in return get nothing or something of less value than he bargained for? The answer of the law is the doctrine of periculum or risk, but it is important to remember that the parties can give their own answer. The legal doctrine is thus in the nature of a rule of construction. Its theory varies in different systems-there is a notable difference between the Roman and the English theory-but the practical effect tends to be uniform.

Roman doctrine. Although, as already mentioned, property in the thing never passes to the buyer by mere force of the contract, but only by conveyance, the risk passes to him from the moment of the contract; more exactly, from the moment when there is emptio perfecta. Unless the loss is due to the seller not having shown the care, of a bonus paterfamilias, the buyer must pay the full price, receiving only what may be left of the thing, including assignment by the seller of any action on the delict of a third-party which has caused the loss. Along with the risk the buyer acquires the right to all fruits severed from the thing since the contract and to any increase by accessio or otherwise: 'commodum eius esse debet cuius periculum est.'

Effect of mora. If without excuse the seller fails to make due delivery, the risk of subsequent losses is thrown back on him. Pothier says that this will not be so if the loss would have occurred even if there had been delivery, a legitimate inference from a number of passages. It seems to be agreed that this exception, which has passed into modern law, was introduced by Justinian, as was the qualification that it will not avail the seller if the buyer can show that, had the thing been duly delivered, he would have sold it and so passed on the loss. On the other hand, if it is the buyer who has defaulted, in taking delivery, the seller ceases to be liable for anything but dolus (including culpa lata), he can charge expenses of keeping on the buyer, and he can, if the thing is an incumbrance, go very far in ridding himself of it, at least according to earlier jurists.

Perfection of the contract. Ordinarily the contract is perfect, and the risk passes to the buyer, from the moment of agreement, but if the contract is conditional in the Roman sense, i.e. suspensively conditioned, it will not be perfect till the condition has been realized; if the thing is undetermined, having to be taken from stock or chosen from alternatives, not till appropriation to the contract; or if the price has not yet been ascertained, the sale being, for example at so much a unit, not till it has been ascertained.

Total loss of the thing whilst the emptio is still imperfect falls on the seller: the contract cannot become perfect lacking a res quae veneat. But if between the time of agreement and of perfection the thing has merely deteriorated or been damaged, the loss appears, on the contract becoming perfect, to be transferred to the buyer. But this is not free from all doubt. It is laid down for conditional contracts almost casually by a single, but uncontradicted, passage, but it is not quite clear that the same distinction between total and partial losses is to be applied to the other cases, i.e. where the thing is undetermined or the price unascertained.

Gaius reports that Sabinus and Cassius considered that sale at a price to be ascertained by counting units might be regarded as conditional on the count being taken, and this, since no other view is mentioned (probably Justinian has expunged a controversy), must be taken to be the final law. It follows that the risk of total loss is on the seller, but not that of mere deterioration, if the distinction as to conditional contracts made in our last paragraph be accepted. The passage of Gaius continues as if the case of goods to be determined by being measured out from a stock were similar; but it does not expressly say that such a sale can be regarded as conditional; on the contrary, 'omne periculum ad venditorem pertinere', taken literally, implies that in this case there is no distinction between total and partial loss.

Effect of dies on periculum. We are even less informed on this subject. Deferred delivery may be assumed to be in the seller's interest and the risk to be on him. On deferred payment we have a text independent of Justinian which simply equates the effect of dies to that of condicio. Nevertheless, in a case where a slave had been sold and, pending payment of his price, given to the buyer on hire, a Digest text puts the risk on him without qualification, a result that would not follow from the contract of hire.

Effect of resolutive condition on risk. As explained above, a resolutive condition annexed to a contract does not, according to the Roman view, make the contract itself conditional. The contract is perfect; consequently in sale the ordinary rule of periculum applies until the event occurs. That cancels the contract, with the result that, if the contract has not been performed, no performance being any longer due from either party, any loss that has already occurred is thrown back on the seller. But so far as the contract has been performed before the occurrence of the event, the performance must in principle be reversed: the seller gets his thing back and the buyer his price. What then if the thing has been damaged or destroyed whilst in the buyer's hands? If he had paid the price, the thing will have been his when it was damaged or destroyed, and it is difficult to see how he can now be entitled to recover what he paid for it. If he has not paid, it is equally difficult to find any ground of action against him for the price. But it is impossible to cite authority for any general doctrine, because the particular resolutive conditions chiefly considered by the texts either render the occurrence of the condition extremely unlikely in a case where there has been serious loss or else themselves practically settle the question of risk.

Classical doctrine of risk. The doctrine that, once the contract is perfect, the risk of any loss not caused by the seller's failure in exacta diligentia is on the buyer, is certainly the law of Justinian, but in modern times it has been widely questioned whether it is classical. Many writers hold that classical law defined the seller's duty not as one of diligentia boni patrisfamilias, but as one of custodia in the technical sense of absolute liability for the safety of the thing except against vis maior (fire, flood, tempest, collapse of house, robbery with violence) and natural events (death of slave or animal). On the one hand, there are texts which it is difficult to reconcile with the doctrine of diligentia, and, on the other hand, that doctrine, if it is post-classical, has been interpolated into more numerous texts by an unusually thorough work of interpolation. Discussion of such a question is outside our scope, but it may be observed that there is no reason to assume that all classical jurists of every period held the same doctrine, and further that the chief practical difference in the results of the two doctrines would be as to loss by furtum without violence and not due to the seller's negligence.

Modern doctrines of risk. English, French, and German law agree in bringing the doctrine of risk under the principle res perit domino, i.e. in making the risk normally pass to the buyer when the property does. In English law legal ownership of land does not pass by virtue of the contract, but equitable ownership does, and with it the risk. Property in and risk of goods sold pass under our law when the parties intend that they respectively shall pass, but the circumstances in which, unless a different intention appears, the law presumes that they intended property to pass are, broadly speaking, the same as those in which Roman law sees a perfect contract and therefore buyer's risk, while as to risk the presumption of our law is that it goes with the property. In French law the doctrine of perfection of contract is very much the same as the Roman; a perfect contract passes property, and risk goes with it. German law resembles Roman in making conveyance necessary for the passing of property, but with superior logic (and less practical sense?) leaves the risk with the seller so long as he remains owner.

The Theoretical question. In a system which, like the Roman, defers the passing of property till conveyance, periculum emptoris offends against the principle res perit domino; but in any system it offends against the more basic principle of bilaterality in sale. For it means that the seller will get the prince in spite of his being unable to deliver the thing; yet, when the buyer, as may happen occasionally, is freed from obligation to pay the price, it seems that the Roman authors of the doctrine of periculum emptoris regarded it as against bona fides that the seller should be compelled to deliver the thing, though he could not get it back if he had already delivered it. Two consequences of periculum emptoris have given special offence: that a seller of a res aliena will get his price if the thing perishes, since eviction from a non-existent thing is impossible, and that one who has sold to two buyers successively will, if the thing perishes, be able to recover both prices. All that can be said is that he will fail in his action for the price (or the second price) if he was not bona fide, or if, where the loss is due to a third-party's delict, he is unable to transfer the actio ex delicto to the buyer.

It is an important practical attenuation of the rule of periculum emptoris that, as already mentioned, it can be set aside or varied by the contract. But this is no defence of the rule, nor is it a justification to derive it, as some, perhaps rightly, are inclined to do, from an instinct surviving from primitive sale, or to account for it as a survival from sale concluded by means of two independent stipulationes. But it has been properly observed that the very survival of the rule, if it is a survival, in Roman law and its adoption by most modern systems indicate that it corresponds to commercial convenience. There are most sophisticated ways of saying this, as that periculum emptoris expresses the economic object of sale, which is that the seller shall get a constant, but the buyer only a variable value, or that the true object of Roman sale is the thing as it is in the seller's hands at the moment when it becomes deliverable, it being the buyer's duty to come and fetch it, or again that deferred delivery of a thing ready for delivery is in the interest of the buyer.

B. OBLIGATIONS OF THE SELLER

In Roman law these are: to take care of the thing till delivery, to deliver it, to answer for eviction, to answer for latent defects. In the final state of the law all four were enforceable by actio empti, all being capable of being regarded as imposed by bona fides and so inherent in the relation of buyer and seller. But the warranties against eviction and latent defects had grown up otherwise than as deductions from bona fides, and this is reflected in the texts even of the Corpus Iuris. In continental law they still bear the special name of garantie or Gewahrleistung, which, like 'warrantly', connotes responsibility for the existence of a state of facts rather than a promise of performance.

The duty to keep the thing till delivery with the care of a bonus paterfamilias is implicit in the duty to deliver. It has already been sufficiently discussed as the limit of periculum emptoris.

1. The duty to deliver

a. Delivery and conveyance. One would expect the seller's chief duty to be to make the thing the buyer's. Thus, in English law, to execute an effective conveyance is the main obligation of a vendor of land, while in Roman, according to general modern opinion, so long as mancipatio remained a living institute, the seller of a res mancipi was under an obligation, distinct from that of delivery, to mancipate it to the buyer. Any system in which formal conveyance is necessary for the transfer of property is likely to see conveyance as a distinct duty of the seller. But in so far as ownership comes to be transferable by the mere force of the contract or by formless delivery on account of sale, the duty to convey falls into the background. Thus, in the law of Justinian, traditio having by the disappearance of mancipatio become the universal method of conveying res corporales, the seller's performance of his duty vacuam possessionem tradere operates also (subject to a reservation with regard to payment of the price) as a conveyance of ownership.

It does so on the assumption that the seller is owner. To the maxim 'nemo plus iuris ad alium transferre potest quam ipse haberet' there are some obvious exceptions, but there is nothing in Roman law resembling the cases in which, under the Sale of Goods Act, the Factors Act, and the rule of market overt or, in French law, under the principle 'en fait de meubles la possession vaut titre,' a man can give a better title than he has himself. At most the Roman seller will sometimes put the buyer in a better position than he was in himself to acquire title by long possession.

Although, so long as mancipatio existed, there may have been a special duty to mancipate, and although performance of the duty of delivery operated normally of itself as a conveyance, nevertheless one cannot affirm that it was in Roman law the seller's duty to make the buyer owner. Strictly, he need not give good title, but must warrant the buyer against being evicted, that is against disturbance of his possession by legal process, during the period necessary for usucapio or praescriptio. It comes to this, that the seller is bound to do what will transfer ownership, if he has it to transfer, but that if he can give only a defective title, he will not be held to have broken his contract, unless and until the buyer suffers thereby. The explanation of this paradox, which is theoretic rather than practical, has been said to be that it dispenses the seller from having to prove title and that business is thus facilitated. But in business one does not demand proof of title unnecessarily; we are obliged to demand it under our difficult English land-law, but we do not habitually demand proof of title to goods, in spite of the fact that the seller of goods warrants- it is a 'condition'- that he has a right to sell. An historical explanation is more porbable. To have stated as a general principle that the seller must give ownership would, in the classical period, have raised the question what sort of ownership was meant. Mancipatio was necessary for conveyance of dominium ex iure Quiritium in res mancipi, and to mancipate was probably the duty of a seller of a res mancipi, where it was possible. But it was impossible when one of the parties was a peregrinus; indeed a peregrinus buyer was incapable of receiving Quiritary ownership of even a res nec mancipi. Moreover, res mancipi did not include provincial land (not capable of being owned ex iure Quiritium) or any chattel except slaves and certain animals. Finally, even of res mancipi bonitary ownership, which except for certain purposes (notably the full manumission of a slave) was as good as Quiritary, could be acquired by traditio. One can understand that, if a general statement had to be made, it was better to deny than to affirm a general seller's duty rem emptoris facere. On the other hand, it is unbelievable that any jurist went on to the proposition that a man who expressly promises to give good title (date) is not a seller. There is a text which appears to say this, but it must be corrupt. Another text says that if the intention of the contract is that property shall not pass to the buyer, it is not sale.

Payment of price. There is an important qualification of the effect of traditio on account of sale as a conveyance of property, which is stated most fully by Inst. 2, 1, 41: ' Venditae vero (res) et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. Quod cavetur quidem etiam lege duodecim tabularum;

tamen recte dicitur et iure gentium, id est naturali, id effici. Sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri.' The practical effect of the rule clearly depends on the liberality with which the concession in the last sentence is construed. Whenever a seller delivers before being paid he may truly be said fidem emptoris sequi, but on this view the old rule has been obliterated by an ever widening series of exceptions. An interpretation which nullifies a rule solemnly laid down in a restatement of th elaw is not acceptable, and Pothier is doubtless right in holding that a giving of credit, in the sense of the exception, is not to be inferred from the mere fact of delivery before payment, but that there must be definite granting of credit, whether by the contract itself or later. The exception is still important, because it means that whether property passes or not is decided by the parties.

History of the rule. A restrictive interpretation of the exception seems undeniably correct from the purely dogmatic point of view, but the rule and its exceptions raise an historical problem, one solution of which would make it understandable that Justinian should have preserved or revived a rule of the Twelve Tables, while rendering it nugatory in practice. It had long seemed incredible to many that the Twelve Tables should have made such a rule for traditio at all, or at least for traditio and not for mancipatio, and more likely that it was made for mancipatio and extended by jurisprudence to traditio. Various views were held; at length the revolutionary thesis was advanced that the rule is due to Justinian himself, being a reception of Hellenistic law. Since then every variety of opinion has been maintained, perhaps the most attractive is Albertario's, that the rule is classical for mancipatio, but not for traditio. If that be the truth, it is conceivable that Justinian, wishing to preserve all that he could, and being unable to preserve this old rule except by transferring it to traditio, intentionally rendered it of little practical effect by means of the exception as to fidem sequi, which consequently should be taken liberally. This historical question lies outside our scope; it would be easier to decide it if we really knew the Hellenistic law. For our purposes the traditional interpretation suffices.

b. The duty 'vacuam possessionem tradere'. Whatever be his duty as to conveyance, it is everywhere the seller's duty to put the thing under the control of the buyer, and everywhere this duty is, unless otherwise agreed, concurrent with the buyer's duty of payment: the seller need not part with his thing unless he get the price, nor the buyer pay the price unless he gets the thing. The delivery must in Roman law have the effect of giving the buyer true possession, not defeasible by interdict or, later, possessory action.

Place and time. In all systems the place of delivery is that expressly or impliedly agreed. In the absence of agreement it will by Roman and French law be where the thing is at the moment of the contract; in English law it may be the seller's place of business, if he has one, or his residence. It is the buyer's duty to fetch the thing, not the seller's to send it, unless otherwise agreed; the thing is querable, not portable, the costs of putting it into a deliverable state being on the seller and those of removing it on the buyer. As to time, subject to agreement, the seller must be ready and willing to deliver at once, but a reasonable interval for putting the thing into a deliverable state will be implied.

The act of traditio is sufficiently explained in the manuals. It varies with the circumstances: there are, besides the primary form passing from hand to hand, traditio longa manu, traditio brevi manu, and constitutum possessorium. Sometimes classified as traditio longa manu is what Buckland calls approximate delivery, that is giving the buyer the means of control, e.g. the keys of the warehouse where the goods are. A text of Papinian requires this to be done at the warehouse, but the requirement is omitted elsewhere. In the latest law traditio by delivery of documents of title begins to appear, but there is nothing comparable to modern commercial practice in this matter. Delivery by attornment of conductores would be possible under the Roman doctrine of possession and was doubtless common when large estates were sold; but it must be borne in mind that the legal position of a colonus or inquilinus was very different from that of a modern tenant, and that, in order to produce the results which follow [illegible] from the assignment of a reversion, complicated assignments and novations of contracts would be necessary.

With the thing sold must be delivered all accessories, i,e, everything expressly or impliedly sold along with it. The Roman texts as to what was included by implication are of little interest to us. Hardly anything not fixed to land was accessory to it, though dung and straw could be, if intended for use on it. But many kinds of movables might be accessory to a house, e.g. keys and bolts, the apparatus of the permanent water-supply, materials taken down for replacement. The aedilician Edict ordained that the trappings in which a beast of burden (iumentum) was shown for sale must be delivered along with it, and it appears to have ordained similarly with regard to slaves. A slave's peculium was not accessory to him for the purposes of sale, being taken to be exceptum, a way of putting the matter which points to the opposite implication having existed earlier. Crops already severed from the land were clearly not included in its sale, but from the moment of the perfection of the contract all fructus, partus ancillae, and other accessions went to the buyer as an offset to periculum emptori.

Servitudes. The sale of a dominant praedium carried with it the right to existing servitudes in its favour, but both praedial and personal servitudes could be sold separately. In classical law there were formal methods of conveying these rights, except those over provincial land. If it be true that the seller of a res mancipi was bound to mancipate, it would be consistent that the seller of a servitude should have been bound to execute a formal conveyance, where such existed. Under Justinian the old forms no longer existed, their place having been taken, according to the official accout, by pacta et stipulationes, the classical expedient for creating servitudes over provincial land. But there are in the Digest a number of texts, which treat the de facto enjoyment of servitudes as quasi-possession, and some of them allow servitudes to be created iure praetorio by traditio and patientia. We are not concerned with the doubtful question how far this so called traditio (true traditio could only be of res corporales) was effective in classical law, but it may be that under Justinian a seller of a servitude satisfied his duty by making this equivalent of delivery, remaining, of course, answerable for eviction. There are, however, texts which make it the duty of the seller of a right of way to engage by stipulatio not to interfere with the buyer's user. Unless the requirement is an anachronism, it suggests that the seller, besides having to make quasi-traditio, was bound to execute what in the law of Justinian passed for a conveyance.

Obligations. On sale of obligations (nomina) it is only necessary to refer the reader to the development of the system of assignment.

Subsidiary duties. The seller of land was bound to inform the buyer of its boundaries; he might do so by description or by demonstration on the ground. He must also hand over documents of title, or at least allow the buyer to inspect them. The same probably applies to sale of slaves.

Damages for non-delivery. The measure of damages in the actio empti is id quod rem habere interest emptoris. Naturally the buyer will not have to pay the price or will get back what he has paid, but his loss may well be greater. Ordinary damages, due to the market having risen or the buyer having made a good bargain, are straightforward, but consequential damages are, as always, a thorny subject. Justinian enacted that the interesse should never be assessed at more than double the price and, in general, that unduly speculative damages must not be allowed. It is precisely on this latter point that we need guidance, but the Digest gives us little, probably because the jurists differed and Justinian has cut out their controversies. The most explicit text makes the measure of damages' omnis utilitas quae modo circa ipsam rem contingit'; strictly. Other authority is meagre, even if the texts on damages for eviction are brought in and if analogies are drawn from those on the seller's right to be compensated for being kept out of the price. The clearest case of allowable consequential damages is that of loss of an hereditas left to a slave, if indeed this damage is to be regarded as consequential: throughout the law an hereditas offered to a slave is treated as an accession to his value.

English law. A purchaser of land normally prefers to use the remedy of an action for specific performance, so that his indisputable common law right to damages is not prominent; moreover, by an exceptional rule, said to be due to the difficulty of showing title to land, his damages will be only nominal, if the vendor's breach of contract is caused by his inability, without his fault, to make good title. For non-delivery of goods it is the action for damages that is normal and that for specific performance that is exceptional. Damages are assessed under the general principles of the law of contract: where there is an available market, the prima facie measure is the difference between the contract price and the market price at the time of breach. But the common law right to special damages is expressly saved.

2. The warrantly against eviction.

In the law of Justinian the remedy of a buyer who has been deprived of the thing owing to a defect in the seller's title may be either an actio empti for unliquidated damages or an action on a stipulatio, express or implied, for double the price. The first looks like the natural and universal result of a sale, and the second has all the appearance of a conventional stiffening of that result in particular cases. But the impression is unhistorical. In the beginning Roman law put the seller under no liability on account of viction, or at least no contractual liability: a semi-delictual iability arising from receipt of the price is a primitive henomenon and was imposed on sellers by mancipatio by the Twelve

Tables. True contractual liability first arose not out of any development of the theory of sale, but from a special contract voluntarily added to sale by the parties, a verbal promise given by the seller to the buyer, which was actionable by its own form (stipulatio). The promise might be to pay a definite sum-usually double the price (stipulatio duplae, i.e. duplae pecuniae qua mercatus est emptor) - to the buyer in the event of his being evicted, or simply a waarantly of quiet enjoyment (stipulatio habere licere), producing liability for unliquidated damages. Such stipulationes, being felt to be just, became customary. Then, in course of time, it was established that to give whatever stipulatio was usual in the particular case was the seller's duty as a matter of bona fides and that therefore he could be compelled by actio empti to give it. When finally he could be held liable in the same action as though he had given it, the evolution was complete: a duty of the seller to warrant the buyer against eviction was now recognized to be implied by the very nature of sale.

The stage of evolution, in which the liability of a seller for title exists only in virtue of a promise distinct from the contract of sale itself, has a parallel in English law. A vendor of land is bound to show good title, but for defects which appear only after conveyance has been accepted he is, in general, liable only under express covenants included in the conveyance. He is indeed bound to enter into the usual covenants, but his liability such as it is-the usual covenants between vendor and purchaser are not absolute-rests on them, and only indirectly on the contract of sale. The parallel is, of course, formal: before the conveyance the vendor has to show title.

a. The 'actio auctoritatis'. The Twelve Tables made a seller by mancipatio liable to pay the buyer double the price, should the buyer be evicted within the period of usucapio by action brought by a third-party, provided that the buyer had given the seller notice (denuntiatio) of the action, so that he could defend it. The oldest procedure, to which there are parallels in Greek and Germanic law, seems to have been that the buyer brought the seller before the court by the ordinary process (in ius vocatio) and vouched him to warrantly (auctorem laudare). If the seller failed to defend (auctoritatem defugere) or if, having become auctor in iure and so substituted for the buyer as defendant, he lost the action brought by the third-party (perhaps auctoritatis nomine vinci), he became liable to the actio auctoritatis in duplum. This procedure was still in use, unaltered in essentials, at the end of the classical period, but is not mentioned in the Digest, because in the interval it had disappeared along with mancipatio. The only way to avoid this statutory liability in duplum was to name a fictitious nominal price in the mancipatio.

b. The 'stipulationes'. There might be no mancipatio: it would be impossible if the thing was a res nec mancipi or one of the parties a peregrinus, -and might be thought by some superfluous in any case after the development of bonitary ownership. Without mancipatio, no actio auctoritatis. But from the time of the Twelve Tables at latest it was easy for the parties to impose a similar liability on the seller contractually, not of course by the contract of sale, which did not exist till much later, but by a stipulatio, by which the seller promised the buyer a sum of money

'si res vel pars eius evicta fuerit quo minus uti frui habere possidereque recte liceat!' The lack of distinction in early times between breach of contract and delict, together with the influence of the actio auctoritatis, made it natural and customary that this sum should be double the price, but another customary stipulatio, doubtless of later origin, since it shows a more advanced conception of the proper consequences of breach of contract, was the stipulatio habere licere praestare, traditional formulations of which, current at the end of the Republic, are given by Varro. In this case the measure of the seller's liability is the damage suffered by the buyer and has to be assessed by the iudex.

The dependence of the seller's liability for eviction on his either having mancipated or specially accepted liability by stipulatio appears to have lasted a long time, during which such acceptance gradually became a customary duty. In classical times the general custom seems to have been to take the stipulatio duplae in the case of res mancipi when the mancipatio was questionable or had been omitted, and in the case of res nec mancipi of considerable value. In other cases the stipulatio habere licere might be bargained for.

c. The customary 'stipulationes' become compulsory. The doctrine took root that bona fides obliged the seller to give whatever stipulatio was usual, according to the case; it followed that the buyer could by means of the actio empti compel him to give it. The earliest evidence of this development, apart from the aedilician Edict, is in the case of the stipulatio habere licere tha reign of Trajan, and in that of the stipulatio duplae the time of Ulpian; but the developments may have occurred earlier. The effect was to make it a normal duty of a seller ob evictionem se obligare.

d. Coalescence with the contract of sale. From holding the customary stipulatio to be compellable by actio empti it was a very short step, also taken before the end of the classical period, to treating the defendant as if he had given it. Thenceforward an obligation of a seller to warrant against eviction was implicit in the contract of sale itself.

e. The law of Justinian. Justinian, more suo, left it to future ages to unify the law, so that, in order to understand his texts, it is still necessary to distinguish according as the buyer's remedy is on, or as on, a stipulatio duplae, or is for 'id quod emptoris interest rem habere'. This latter being the measure of damages whether the action is regarded as being on a stipulatio habere licere or on the natural duty of a seller to answer for eviction, even the implication of the stipulatio habere licere became superflous. In an actio on, or as on, a stipulatio duplae the question of consequential damages cannot arise, since the contract gives the maximum damages allowed by a constitution of Justinian, but it arises in the action for unliquidated damages where the same principles obtain as in an action for non-delivery.

There were other differences between the two remedies besides that of the amount recoverable. The action for duplum depended on the terms of a strictly construed traditional cautio: there had to have been an actual eviction of the buyer by a lawsuit from the thing or a part of it, but eviction from an accessio was not covered. The action for unliquidated damages, on the other hand, lay even where the buyer had kept the thing, but only because entitled otherwise than through the seller, and covered eviction from an accessio. Moreover, where the seller had sold sciens rem alienam esse, the buyer had the actio empti immediately, whereas, in order to proceed for the duplum, he must wait till he had been evicted.

The fundamental ground of both remedies is, however, the same, namely that by reason of the seller's lack of title the buyer has lost something he was bought. Thus neither lies if the loss would have occurred apart from the defect of title, for example by the slave having died, or if the eviction is the buyer's own fault, as by his neglect to complete usucapio, or his failure to defend against the third-party's action properly, or in particular if he did not give the seller notice of the claim.

Exclusion of the obligation by agreement. It was possible for the seller, as it is under English and French law, to reduce or exclude the warranty by an express proviso (pactum de non praestanda evictione), exceptionally its exclusion might be implied. But in neither case is the seller protected if he knew and concealed the defect in his title. A good example of this is the liability ex empto of a seller of land burdened, as he knew, with an undisclosed servitude; he is liable in spite of not having sold the land 'uti optimus maximus' or of an express pact against such liability. Moreover, neither the pact nor the implication de non praestanda evictione will justify him in himself evicting his buyer, should the superior title later come to him. On the other hand, Julian's suggestion, seems to be rejected by Ulpian, that in the event of eviction he must in all cases return the price, though if he is free from dolus, he need not make good the buyer's further damages.

3. The warranty against latent defects.

Patent defects. At no time was there any liability for defects known to the buyer or so obvious that he ought to have known them, and even express warranties were construed, if possible as not applying to them.

Express warranty. Express warranties or descriptions of the thing sold (dicta promissave) are terms of the contract equally in developed Roman and in modern English law. In both a difficulty may arise in deciding whether a statement made before or at the time of contracting is part of the bargain or merely puffery. The difficulty is inherent in any system which allows a contract to be concluded without formality, even that of writing; but before the consensual contract emerged, so long as even express agreements were devoid of legal effect unless clothed in some binding form, Roman law had no such difficulty. In two cases the form was mancipatio: if in a mancipation of land it was described

as optimus maximus and then it turned out to be burdened with a servitude, the seller was liable in duplum under the so-called actio de modo agri. Apart from these two cases, recourse must be had to stipulatio, the elasticity of which enabled any undertaking to be made actionable. In practice warranties of quality were combined in one stipulatory formula with the warrantly against eviction, but liability for quality was not normally undertaken beyond the buyer's interesse, even when duplum was promised for eviction. Forms of stipulatio suitable for the common articles of agricultural commerce became traditional, but the variety of the cases prevented universal forms, like those of the stipulationes against eviction, from becoming established.

Implied warrantly under Justinian. Clarity may be served by beginning at the end. In the law of Justinian the seller is held impliedly to warrant the thing free from serious defect existing at the time of the contract. His knowledge of its is immaterial, except as regards the measure of damages; but of course he is not answerable if the defect is patent. The buyer's remedy is either an action for rescission (actio redhibitoria, involving restitutio in integrum), which must be brought within six months (tempus utile), or an action (quanti minoris aestimatoria), which must be brought within an annus utilis, for reduction of the price to what it would have been, had the defect been known to the buyer; consequential damages are allowed if the seller had known of it. Both these remedies, which are derived from actions granted by the aedilician Edict, may, in the law of Justinian, when forms of action were obsolete, be regarded as covered by the actio empti.

Modern law. The implication of a general warrantly against defects rendering the thing unfit for its ordinary purpose has been taken over from the Corpus Iuris by both French and German law, The fundamental principle of our own law is, on the contrary, caveat emptor, which means that before agreeing to buy a thing purchasers must discover its defects for themselves or guard themselves by taking express warranties. But implied warrantly of quality is far from unimportant; it arises in sale of goods in the cases defined by statute; in sale of land it depends on common law and equity.

In law, defects in land bought can be complained of (provided, of course, that they were neither disclosed by the vendor nor discoverable by the purchaser on reasonable inspection or inquiry) only if they materially interfere with the enjoyment promised by the contract. But this means that, apart from special warrantly or representation, only such defects are covered as amount to a breach of the vendor's presumed obligation to show good title: the illustrations given are an easement of way in favour of a neighbouring landowner over a pathway across a field adjoining a private dwelling-house, an underground culvert crossing the land, or a public footpath not obviously apparent to be such. A defect which does not amount to such a breach is no ground of complaint, unless the vendor expressly or impliedly warranted that the property should have the quality in which it is deficient. Thus by the mere sale of a house no warrantly is implied that it is in good repair or well drained, or fit for human habitation or any particular purpose. At law it makes no difference that such latent defects were known to the vendor, but it

The aedilician Edict. From the time of Cicero and probably earlier, perhaps before the first appearance of the bonae fidei actions, the curule aediles took measures to repress the sharp practices of sellers of slaves and cattle in the City markets. Aulus Gellius preserves part of an earlier form of their Edict, but we need only consider, and that summarily, its form as settled by Salvius Iulianus. With regard to slaves its chief provision was that the seller must, at the time of sale, declare certain faults (mostly physical); if he failed to do so or to make good any express assurance given at the time of sale, the buyer was to have during six months (utiles) an actio redhibitoria for the reversal of the sale and all its effects. It was also provided that the buyer might, alternatively, during an annus utilis, bring an actio quanti minoris aestimatoria for reduction of the price. There were similar provisions regarding the sale of iumenta, and these were extended in course of time to all pecora. It was established by jurisprudence that these provisions did not apply to patent defects and that all warrantly could be excluded by express agreement.

A text, the meaning and classicality of which have been much discussed, appears to say that in the actio redhibitoria simple damages were given against the seller if he complied with the order for redhibitio, double if he did not. Girard, for one, accepts this, but it is difficult to believe that in classical law a seller who complied with the order was penalized, and only a little easier to believe that one who disobeyed was penalized so highly. Hence attempts have been made to explain the text otherwise.

Of the other aedilician provisions concerning sale of slaves only that de cavendo need be mentioned. It obliged the seller, under pain of liability to the same two actions, to give the stipulatio duplae against eviction and (in the same formulary) stipulationes against the existence of the edictal defects. These stipulationes may seem unnecessary, that against eviction because mancipatio of the slave would of itself create liability in duplum, those against defects because of the aedilician actions. But mancipatio might be omitted or be invalid, stipulatio was open to peregrini, and only an obligation created verbis could be supported by guarantee in the form of sponsio. As to the stipulationes against defects, it may be that in early days the aediles could more effectively compel a seller to make himself liable by stipulatio than ensure an efficacious aedilician action against him; at all times the stipulatio would give a better remedy, because it would be enforceable outside the special aedilician jurisdiction and would not be subject to the short time-limitations of the aedilician actions.

e. OBLIGATIONS OF THE BUYER

I. Payment of price.

The buyer's chief duty is to pay the price at the time agreed or, if no time has been agreed, concurrently with delivery; in contrast with the seller's corresponding duty, he must transfer ownership of the money. As in English law, it is a good defence to an action for the price, apart from special terms, that the

is required under Roman law, because property in the thing cannot pass till delivery, and will not pass even then, unless either the price has been paid or the seller has agreed to give credit, and even if he gives credit, it is open to him to make the operation of the traditio as a conveyance conditional (suspensively) on payment of the price. More commonly he secured himself by means of a clause in the contract, generally framed as a resolutive condition, giving him the option of cancelling the contract if he were not duly paid. It is, however, very doubtful whether the seller's exercise of this option would, even under Justinian, cause the property to result ipso facto to himself, supposing it to have passed to the buyer. In English law a seller can reserve property in goods sold even after their delivery, but though this will make some difference to his remedies against the buyer, it will not protect him against a bona fide third-party to whom the buyer has alienated for value and delivered the goods.

CHAPTER IV

RESCISSION AND VARIATION BY SUBSEQUENT AGREEMENT

I. Rescission. Emptio venditio can be discharged in the usual ways. Thus, a complete release of both parties can be effected by two novationes followed by two acceptilationes, or complete defences to any action can be supplied by pacta de non petendo. This may be taken as known, but a few words are needed on the method of discharge peculiar to the consensual contracts, contrarius consensus.

The principle is that the contract is completely cancelled if, before any performance (re integra, omnibus integris manentibus, re nondum secuta), buyer and seller so agree. Their contrarius consensus or dissensus reverses the effect of the consensus from which the contract arose, just as solutio per aes et libram undoes an obligation created by that method and an acceptilatio one created verbis. The contrarius consensus is not to be analysed as an exchange of two comprehensive pacta de non petendo, for it extinguishes the contract ipso iure and is conditional on no performance, even partial, having taken place. The explanation of this condition may be that on performance the contract passes out of the consensual sphere, or the more practical consideration that, once something has been given, an action will be needed for its recover, and no action could arise from the contrarious consensus, though one does not see why a condictio sine causa should not be allowed. Aristo was for allowing extinction by contrarius consensus to have effect where, though the seller had delivered the thing, it had in fact been returned. The actions admitted by Ulpian in the case of redhibitio sine iudice come near to being actions to enforce a contrarius consensus. A way out would be to construe the contrarius consensus, where necessary, as a resale.

2. Variation by subsequent agreement. The traditional doctrine is as follows. Pacta in continenti facta, that is side-terms agreed at the time of the contract, are part of the contract and enforceable by the actiones empti and venditi; there is not the difficulty in incorporating them in a consensual contract that exists in the case of a formal contract. But pacta ex intervallo facta are nuda

and therefore operative only by way of defence, though, since they do not in a bonae fidei action need to be raised by exceptio, this amounts to virtual incorporation for defensive purposes. The broad result is that subsequent pacts reducing a party's obligation are, and those increasing it are not, effective.

This traditional system, if not very edifying, is at any rate straightforward, which the texts are not, as may be illustrated by a consideration of the leading passage in the titles on sale. It begins by saying that subsequent pacts can be incorporated in the contract provided that they reduce an obligation and deal with only subsidiary matters. From what follows it is clear that the limitation to reducing pacts is based on the fact that subsequent pacts were not adducible except by way of defence, but both this limitation and that to pacts relating to subsidiary matters are disregarded in the illustrations given. What is subsidiary is illustrated not only by a buyer's waiver of his right to the stipulatio duplae (a reducing pact), but also by a seller's promise to support the stipulatio by a fideiussor (an increasing pact). One has to explain that the latter is not intended as an example of an effective subsequent pact. But the passage goes on to make it a reasonable question whether the same cannot be said of subsequent pacts raising or lowering the price. What exactly can have been in question is not obvious. A pact lowering the price is unquestionably a good defence: it is an ordinary pactum de non petendo. A pact raising the price is as clearly not actionable, though the suggestion may perhaps be that it might on occasion be available as a defence to an action for non-delivery. Both pacts deal with what no one can have regarded as subsidiary. The truth is that the distinction between subsidiary and non-subsidiary pacts is irrelevant to a discussion of the effect of pacts according as they increase or reduce an obligation. The obscurity of the passage may be due to its having been shortened. It is a bold, but tempting, conjecture that what Papinian was discussing was the possibility of incorporating into a contract of sale subsequent pacts as being evidence of the real intention of the parties; if so, it might well be that subsidiary pacts were considered admissible on this ground and non-subsidiary inadmissible. To such a discussion the distinction between reducing and increasing pacts would be irrelevant, and its presence in the passage as it stands must, on this view, be attributed to interpolation.

CHAPTER V

CERTAIN SPECIAL LEGES CONTRACTUS

A. Pacts in favour of the Seller. I. Addictio in diem. 2. Lex commissoria. 3. Pactum protimeseos. 4. Pactum de retrovendendo.
B. Pacts in favour of the Buyer. L. Pactum de retroemendo.
2. Emptio ad gustum. 3. Pactum displicentiae.

An endless variety of terms may be included in a contract of sale; so long as they are not inconsistent with the contract being one of sale, they are enforceable by the actiones empti and venditi, even if in themselves they would fall under other actions, such as locati conducti. That is all that can be said of them in general, but certain common and important clauses intimately affecting the essential operation of the sale require brief attention.

A. PACTS IN FAVOUR OF THE SELLER

I. Addictio in diem. This is a clause reserving to the seller up to a certain date the right to accept a better offer. A text, which shows no sign of being interpolated, makes it a question of the intention of the parties whether the condition involved shall have suspensive or resolutive effect; on the assumption that the clause might be variously formulated no other view is tenable. The consequences of construing suspensively are obvious, but those of construing resolutively (probably the commoner case) raise some difficulties.

If the condition is resolutive, we have at the outset emptio pura, commodum and periculum rei passing to the buyer, he may, if the thing is delivered to him, become owner (or be in a position to become such by continued possession), but usually he will not, because he is unlikely to have paid the price pending the condition. By accepting a better offer the seller annuls the contract and secures the right to reclaim the thing, with its fruits and accessories, against which the buyer obtains reimbursement of his necessary expenditure on it. A point which is doubtful, as it is in regard to some of the other pacts we are to consider, is whether in cases where ownership had passed to the buyer the occurrence of the condition operated in rem, so that ownership resulted automatically to the seller. Under addictio in diem it did not do so in classical law, but it is possible that under Justinian it did, for we read that the buyer no longer has the power to vindicate the thing and that a right of pignus granted by him to a third party is annulled. The question of interim periculum is unpractical, since the acceptance of a better offer would be inoperative after the thing had been destroyed, while a better offer for a seriously damaged thing would not be made.

The offer must be a genuine offer by a third party and better in some respect, though not necessarily in the amount of the money-price than the original buyer's. Sabinus is said to have held that an offer which itself was subject to addictio in diem could not be accepted, but Julian's dissent seems common sense. In general the seller has the right to judge between the two offers; if he decides for the second, the buyer has the right to raise his own offer, though whether he must better the second offer or need only come up to it seems uncertain. If he keeps the thing in this way, it is by a new emptio venditie.

2. Les commissoria. This clause reserves to the seller the right to call the sale off if the price is not paid in full by a certain date; he need not demand payment, but the buyer can cover himself by tender. Here, too, the question whether the condition is suspensive or resolutive is one of construction, but the formulation 'si ad diem pecunia soluta non sit' (or 'nisi intra certum diem pretium sit exsolutum') 'ut fundus inemptus sit' seems to have been pretty stable and to have been construed by the classical jurists resolutively. We shall assume this construction, which raises the greater difficulty.

The clause meant that the seller had the option of declaring the sale off, not that it was ipso facto void. This makes the question of interim periculum unpractical. The seller must exercise his right at once and, having chosen, must abide by his choice. If after the default he sues for the price; he is held impliedly to have affirmed the contract. Having opted for annulment, he cannot afterwards sue for the price, but his remedy for the recovery of the thing and its fruits, and of compensation for damage caused to it by the buyer, remains nevertheless the actio venditi. This action covers his loss, if any, on resale, at any rate if the contract so provides.

The clause seems designed for cases where the buyer is to have the thing at once and pay for it later. This means a traditio on credit, by which normally property would pass to the buyer, but an appropriate pact could prevent this; moreover, in the classical period delivery might not suffice to convey full ownership. Supposing property to have passed, the question arises, as with addictio in diem, whether the annulment of the contract of itself caused property to result to the seller. In the present case the better opinion is that even under Justinian it did not.

3. Pactum protimeseos. The contract can provide that, should the buyer resell, the seller shall have the right of pre-emption. It would be natural to stipulate that he must give as good terms as those obtainable elsewhere, but there seems to be no legal objecttion to other agreement. The pact operated in personam, being enforceable by actio venditi. A similar right might be created by will, and in certain cases existed by law. A constitution of the later Empire indicates a more widely spread Oriental custom, but as a general institution protimesis is un-Roman.

4. Pactum de retrovendendo. Such a clause entitled the seller in certain events-it might be on demand within a certain period-to buy back at an agreed price. There is no ground for regarding it as creating a condition affecting the principal contract or as operating in rem; it was enforceable by action on the contract.

B. FACTS IN FAVOUR OF THE BUYER

I. Pactum de retroemendo. This is a clause entitling the buyer to make the seller take the thing back in certain events. Its operation was similar to that of a pactum de retrovendendo.

2. Emptio ad gustum. In sales of wine a proviso that the buyer should have the right to taste (and reject) was usual, so usual that Ulpian perhaps held it to be tacitly implied; but it could be excluded. The words might be 'boni viri arbitratu degustato', but if the reference to the bonus vir was omitted, it is most unlikely that it was implied.

In this case there is no question but that the condition is suspensive. The risk of destruction thus remains with the seller until the buyer has approved the wine; that of deterioration is disposed of by the buyer's right to reject. It is therefore in the seller's interest that the degustatio shall take place as soon as

possible. Cato recommends him to stipulate that it shall take place in triduo proximo and that, if the buyer should neglect to taste within the time, the wine shall be taken as tasted (and approved). Where there is no named date, the buyer, we read, may taste at any time; but it is hardly credible that he could prolong the seller's risk indefinitely. Probably the seller could put him in the wrong by giving him notice to taste within a reasonable time.

3. Pactum displicentiae. This gives the buyer the right to reject the thing if, after trial, he finds it unsatisfactory, an absolute right, without question of boni viri arbitratus. The clause might be formulated so as to create either a suspensive or a resolutive condition. In either case the question of risk of interim deterioration will not arise, because the buyer can reject, but if the condition is suspensive, the risk of destruction remains with the seller, because the emptio is imperfecta.

Under a resolutive formulation, which seems to have been the more usual, the occurrence of the condition did not operate in rem, since pignus granted by the buyer was not affected. (The buyer's remedy was in personam, by actio empti or in factum (praescriptis verbis); he must exercise his right to reject within the time named or, if none is named, within sixty dies utiles, though Ulpian is of opinion that, if the agreement expressly said in perpetuum, there would be no limit. The risk of interim deterioration, as already observed, is covered by the right to reject; that of destruction is, in the case of resolutive formulation, put by one text on the buyer, but if the principles of the actio redhibitoria are applied, it will be on the seller. The buyer must account for all profits.

By French law, a sale on approval is presumed to be suspensively conditioned. In English law it is open to the parties to make their own bargain, but the general presumption, when goods have been delivered on approval or on sale or return, is that property and therefore risk remain with the seller until the buyer either expressly or impliedly adopts the sale.

FUNDAMENTALS

OF SOVIET CIVIL LEGISLATION

AND

CIVIL PROCEDURE

P A R T III

LAW OF OBLIGATION

Chapter 1

GENERAL

Article 33. Obligations and Their Performance

By virtue of an obligation, one person (the debtor) must perform for the benefit of another (the creditor) a specific act, such as, deliver property, do work, pay money, etc., or abstain from performing a specific act, and the creditor shall have the right to claim from the debtor the performance of his duty.

Obligations arise from contract or from the other grounds specified in Article 4 of the present Fundamentals.

Obligations must be performed in the proper manner and at the specified time, as stated in law, planning act, or contract and, in the absence of such indications, in accordance with the usual requirements.

Unilateral refusal to perform an obligation and unilateral alteration of the terms of the contract shall not be permitted, except in the cases provided for by law.

Article 34. Conclusion of Contracts

A contract shall be deemed concluded when the parties have reached agreement, in the form required by law for the various cases, on all the essential points thereof. The essential points are those which are specified by law or are necessary to the given type of contract, and also all other particulars on which, according to the declaration of either party, agreement is to be reached.

The content of a contract concluded on the basis of a planned assignment must correspond to that assignment.

Disputes between state, co-operative (with the exception of kilkhozes) and other mass organisations arising at the making of a contract based on a planned assignment which is binding on either party shall be decided by the appropriate arbitration (mediation) board, unless the law provides otherwise.

Disputes between the said organisations arising at the making of a contract not based on a planned assignment which is binding on either party may be decided by an arbitration board, where this is specifically provided for by law or agreement between the parties.

Article 35. Securing Performance of Obligations

Performance of obligations may be secured in according with law or contract by means of penalty (fine, penal interest), pledge and surety. In addition, obligations between citizens or with their participation may be secured by means of earnest, and obligations between socialist organisations, by means of gurantee.

Article 36. Liability for Breach of Obligations

In the event of non-performance or improper performance of the obligation by the debtor he must compensate the creditor for the damages caused thereby. Damages are deemed to be the expenses incurred by the creditor, the damage to, or loss of, his property, and also the income which the creditor did not receive but which he would have received had the obligation been performed by the debtor.

Where a penalty (fine, penal interest) is stipulated for non-performance or improper performance of the obligation, damages shall be paid in the amount not covered by the penalty (fine, penal interest).

The law or contract may provide for cases in which only penalty (fine, penal interest) but not damages may be collected; in which damages may be collected in the full amount over and above the penalty (fine, penal interest); in which the creditor may choose to collect either penalty (fine, penal interest) or damages.

The legislation of the U.S.S.R. and the Union Republics may establish limited liability for non-performance or improper performance of some types of obligations.

Socialist organisations shall make no agreement limiting their liability where the extent of liability for obligations of the given type is specifically stated by law.

Payment of penalty (fine, penal interest) fixed for delay or other improper performance of obligations and payment of damages caused by improper performance shall not relieve the debtor from the specific performance of the obligation, except in cases where the planned assignment on which the obligation between socialist organisations is based has become inoperative.

Article 37. Fault as the Condition of Liability for Breach of Obligations

A person failing to perform an obligation or performing it improperly shall incur material liability for damages (Article 36 of the present Fundamentals) only in the presence of fault (intent or negligence), except in the cases provided for by law or contract. Onus of proving absence of fault shall fall on the person violating the obligation.

Where non-performance or improper performance of an obligation occurs through the fault of both parties, the court, or arbitration or mediation board shall reduce the amount of the debtor's liability accordingly.

Article 38. Assigning Performance of Obligation to a third Party

Performance of an obligation arising from contract may be assigned, in whole or in part, to a third party, where this is provided for by the establishe rules or where the third party is connected with one of the parties through ad adminstrative subordination or relevant contract.

In that event, liability for non-performance or improper performance of the obligation shall fall on the party to the contract from which it has arisen, provided the legislation of the U.S.S.R. and the Union Republics does not impose liability on the actual performer.

Chapter 2

SALE

Article 39. Contract for Sale

By contract for sale, the seller shall undertake to convey the goods to the ownership of the buyer, and the buyer to accept the goods and to pay a definite amount of money therefor.

Where the buyer is a state organisation it shall acquire the right of operative management of the property (Article 21 of the present Fundamentals).

Article 40. Price

State, co-operative and mass organisations shall sell goods at the established state prices, except in the cases provided for by the legislation of the U.S.S.R. and, within the limits prescribed by it, by the legislation of the Union Republics.

The sale by kolkhozes of their surplus agricultural produce which is not bought by the state, and also the sale by citizens of their property, shall be effected at prices fixed by agreement of the parties.

Article 41. Liability of the Seller for Improper Quality of the Things Sold

The quality of the thing sold must be in keeping with the terms of the contract, and in the absence of any stipulation in the contract, with the usual requirements. The thing sold by a trading organisation must correspond to the state standard, technical specifications or samples established for things of this type, unless the contrary follows from the nature of the given sale.

The buyer who has been sold a thing of improper quality, where its defects had not been specified by the seller, may elect to demand either substitution of a thing of proper quality for the thing determined in the contract by generic characteristics or proportionate reduction in the purchase price, or gratuitous removal of the defects of the thing by the seller, or compensation for the expenses incurred by the buyer in repairing them, or rescission of the contract and payment of damages to the buyer.

The manner in which these rights are exercised by a person buying a thing in a retail trading enterprise shall be determined by the legislation of the Union Republics.

Article 42. Periods for Filing Claims and Periods of Limitation for Actions over Defects of Things Sold

The periods within which claims may be filed over the defects of a thing sold and also the periods of limitation for action on claims connected with such defects shall be established by the legislation of the Union Republics.

Where, in accordance with Article 48 of the present Fundamentals, guarantee periods are established for things sold through retail trading organisations, such periods shall run from the day of the retail sale. Within the guarantee period, the buyer may file a claim with the seller over the defects of the thing sold hindering its normal use. The seller must ensure gratuitous removal of the defects of the thing or substitute for it a thing of proper quality, or accept it back with repayment to the buyer of the amount paid for it, where he fails to prove that the defects are due to the buyer's breach of the rules governing the use or safe-keeping of the thing.

Article 43. Sale of Goods on Instalment

Durable goods may be sold to citizens by retail trading enterprises on credit (with payment by instalments) in the cases and in the order established by the legislation of the Union Republics.

Title to goods sold on instalment arises for the buyer in accordance with the rules of Article 30 of the present Fundamentals.

Chapter 3

DELIVRY

Article 44. Contract for Delivery

By contract for delivery, the supplier organisation shall undertake to convey by a definit date or dates to the ownership of the buyer-organisation (customer) or, in conformity with Articles 21 and 30 of the present Fundamental into its operative management, specified goods in accordance with the planning act of distribution of goods which is binding on both organisations; the customer shall undertake to accept the goods and to pay for them at the established prices. A contract concluded between the organisations at their discretion by which the supplier undertakes to convey to the buyer goods which are not subject to planned distribution within a period not coincident with the moment of the making of the contract shall also be deemed to be contract fo delivery.

Delivery of goods without the making of a contract shall be effected only in the cases established by the Council of Ministers of the U.S.S.R. or the Council of Ministers of a Union Republic.

Article 45. Short Delivery or Short Collection

The quantity of goods short delivered by the supplier or short collected by the customer within the stipulated time must be delivered (collected) in the manner and within the periods specified in the Regulations for Delivery, Special Terms of Delivery of separate types of goods (Article 50 of the present Fundamentals) or contract.

The customer, after notifying the supplier, shall have the right to refuse to accept the goods whose delivery has been delayed, except as the contract provides otherwise. Goods despatched by the supplier before the receipt of notification from the customer must be accepted and paid for by the latter.

Article 46. Assortment of Goods Delivered

Goods must be delivered in accordance with the assortment specified in the contract.

Delivery of some types of goods listed in the assortment in excess of the quantity specified in the contract shall not be included to cover short delivery of other types of goods, except where such delivery is made with the customer's consent.

For short delivery of some types of goods listed in the assortment, the supplier shall pay the fixed penalty, even where delivery of the goods in total value has been completed within the period specified by the contract.

Article 47. Quality of Goods Delivered

The quality of goods delivered must correspond to state standards, technical specifications or samples. Contract may provide for delivery of goods of higher quality than that specified by state standards, approved technical specifications or samples.

In the event of delivery of goods of lower quality than that required by state standards, approved technical specifications or samples, the buyer must refuse to receive or pay for the goods, and where the goods have been paid for by the buyer, the amount paid shall be subject to refund.

However, where the defects of the delivered goods can be removed without returning them to the supplier, the buyer shall have the right to demand of the supplier correction of the defects at the place where the goods are located, or to correct the defects by his own means for the supplier's account.

Where the delivered goods correspond to state standards or technical specifications but prove to be of a lower grade than has been specified, the buyer shall have the right to accept the goods with payment at the price established for goods of the corresponding grade, or to refuse acceptance of, and payment for, the goods.

For actions arising from delivery of goods of improper quality, a six-month period of limitation shall be established to run from the day the buyer discovers, in the proper manner, the existence of defects in the goods delivered to him.

Article 48. Periods for Filing Claims Over Defects of Delivered Goods

The periods and procedure for disclosure by the buyer of defects of goods delivered to him which could not be discovered under the usual method of accepting goods, and for presentation to the supplier of claims arising from delivery of goods of improper quality shall be determined by the legislation of the U.S.S.R.

In respect of goods designed for long-term use or storage, state standards or technical specifications may provide longer periods for disclosure by the buyer, in the proper manner, of said defects (guarantee periods) with subsequent presentation to the supplier of claims for removal of thse defects or replacement of the goods. The supplier shall gratuitously repair the defects of goods covered by a guarantee period, or replace them, unless he proves that the defects have been caused by the buyer's breach of the rules governing their use or safe-keeping.

Contracts may fix guarantee periods, where such are not provided for by standards or technical specifications, and also longer guarantee periods than those provided for by standards or technical specifications. In respect of consumer goods sold through retail trading organisations, the running of the guarantee period shall commence from the day of the retail sale of the thing (Article 42 of the present Fundamentals).

Article 49. Delivery of Goods in Complete Sets

Goods must be delivered in complete sets, in accordance with the requirements of state standards, technical specifications or price lists. Where completeness is not determined by state standards, approved technical specifications or price lists it may, where necessary, be determined by contract.

In the event of delivery of incomplete sets of goods, the buyer must demand that the sets be completed or that the incomplete sets of goods be replaced, and until the sets are completed or replaced must refuse to pay for them, and where payment has been made, to demand a refund of the amounts paid for them.

Where the supplier fails to complete the sets of goods by the date fixed by agreement of the parties, the buyer shall have the right to reject the goods.

Article 50. Regulations for Delivery and Special Terms of Delivery. Liability for Breach of Delivery Contract

Contracts for delivery shall be made and performed in accordance with the Regulations for Delivery, approved by the Council of Ministers of the U.S.S.R., and the Special Terms of Delivery for Separate Types of Goods, approved in the manner established by the Council of Ministers of the U.S.S.R., and, in the cases provided for by it, by the Councils of Ministers of the Union Republics.

In conformity with these Regulations and Special Terms, breach of contract for delivery shall entail payment of penalty (fine, penal interest) and damages.

In the event of delivery of goods of improper quality or in incomplete sets, the buyer shall collect from the supplier the fixed penalty (fine) and, in addition damages caused by such delivery without any set-off for the penalty (fine).

Chapter 4

STATE PURCHASE OF AGRICULTURAL PRODUCE FROM COLLECTIVE AND STATE FARMS

Article 51. Contract for Delivery of Agricultural Produce

State purchase of agricultural produce from collective and state farms shall be made by contracts for delivery of agricultural produce, which are concluded on the basis of plans for state purchase of agricultural produce and plans for the development of agricultural production on collective and state farms.

Article 52. Content of Contract for Delivery of Agricultural Produce

Contracts for delivery of agricultural produce must specify: quantity (by type of produce), quality, delivery dates, order and terms of delivery, and place of delivery of agricultural produce;

the duty of purchasing organisations and enterprises to accept the produce and pay for it at the fixed prices and at the proper time, and also the amounts and the dates of advance cash payments to collective farms;

the duties in helping the collective and state farms to organise the raising of agricultural produce and its transportation to receiving centres and enterprises;

reciprocal material liability of the parties in the event of non-performance of their duties.

Standard contracts for delivery of agricultural produce shall be approved in the manner established by the Council of Ministers of the U.S.S.R.

THE CIVIL CODES OF THE SOVIET REPUBLICS

BUSINESS CONTRACTS (DELIVERY CONTRACTS, CONTRACTS FOR CAPITAL CONSTRUCTION, CONTRACTS OF CARRIAGE)

(By Ye.Fleishits, A. Makovsky)

96. Concept of business contracts. The main business contracts are co tracts of delivery, contracts for capital construction and contracts of carriage. In addition, the contracts between Soviet banks and the organisations they serve are very important, for they underlie the operations banks in settling accounts between organisations and the granting of cash loans by banks to organisations. The significance of contracts for banki loans been especially enhanced in connection with the decisions of the September (1965) Plenary Meeting of the Central Committee of the CPSU, wh stressed the need for strengthening the role of bank credit in the econom Business contracts also include the forward contracts drawn up for state purchases of farm produce from collective and state farms. These forward contracts are a kind of contract of sale in which purchase and sale are combined with terms relating to the purchaser organisation's (buyer's) meeting of various economic needs of collective and state farms (the vend

Each type of business contract is governed (1) by the general provisions of the Fundamentals of Civil Legislation, which are reproduced in all the civil codes, and by the general norms of the law of obligation co tained in the Fundamentals; (2) by the general provisions of the Republican civil codes and the general rules on obligations laid down by them; (3) by the norms of the Fundamentals or civil codes relating to the type of contract concerned; and (4) by special normative acts defining the numerous details of the relations arising from such contracts.

In the case of contract for delivery these normative acts are the Regulations on the Supply of Producer and Technical Goods and the Regulations on the Supply of Consumer Goods approved by the Ordinance of the USSR Council of Ministers dated 9 April 1969. The special circumstances of the supply of individual types of produce are determined by the Special Terms of Delivery drawn up by the organisations concerned on the basis of the Regulations and in most cases approved by the State Arbitration Board under the USSR Council of Ministers independently or jointly with the State Committee of the USSR Council of Ministers for Material and Technical Supply.

The Instructions on the Procedure for Accepting Producer and Consumer Goods Regarding Quantity and Quality approved by the State Arbitration Board under the USSR Council of Ministers are also very important for relations of supply and delivery.

The most important special instrument governing building contracts is the Rules on Contractor's Agreements for Capital Construction approved by the USSR Council of Ministers on 24 December 1969.

The contracts for carriage are regulated by the following transport statutes: the By-Laws of USSR Railways (1964), the By-Laws of Inland Water Transport (1955), the USSR Merchant Shipping Code (1968, the USSR Air Code (1961), and by Republican acts relating, in particular, to road transport.

Each of these acts is connected with several others relating to the procedure for planning of the relations concerned.

97. Significance and concept of contracts of delivery. Delivery (supply) contracts are most important agreements in the Soviet economy. Economically speaking they are a kind of contract of sale. But because of their paramount role in the economy, particularly in implementing economic plans, they have been given rather special and detailed legal regulation and have come to be recognised as an independent type of contract. The supply and delivery of goods without the conclusion of such a contract is now only permitted in cases expressly stated by the Council of Ministers of the USSR and the Councils of Ministers of Union Republics. Now the delivery of goods for export by Soviet enterprises to Soviet foreign trade associations does not require a contract.

The significance of delivery contracts in the economy is so great that they are often a synonym is Soviet legal literature for business contracts, and these concepts are sometimes also used indiscriminately in normative acts. Needless to say, relations of capital construction also cannot be properly regulated without proper legal organisation of the supply (delivery) of various raw materials and equipment. And contracts of such vast economic importance as those of carriage, primarily facilitate relisation of rights and duties arising from delivery contracts.

As already mentioned above, the regulation of the supply (delivery) relations comes within the competence of the USSR. Under Art. 3 of the Fundamentals of Civil Legislation, Republican legislation can only decide those matters bearing on delivery that are expressly referred to the jurisdiction of Union Republics by Union legislation.

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Thus, the Republican civil codes could not introduce any new norms re lating specifically to delivery contracts. The special chapter in the dealing with these contracts merely repeats the main provisions of the Fundamentals word for word.

These provisions open with the definition of a delivery contract given for the first time in Art. 44 of the Fundamentals (see Art. 258 RSFSR). The definition consists of the following elements: a) only organisations can be parties to a delivery contract; b) under the contract specified goo must be delivered by one organisation to the ownership or operative mana- gement of another organisation, and the latter is obliged to accept them and pay for them; c) the time of delivery of the goods does not coincide w the time the contract was concluded.

When state organisations are parties to the contract its performance does not, of course, entail any change of owner, becuase the state, which was the owner of the goods in the operative management of the supplier organisation at the time the contract was concluded, remains their owner after they have been conveyed by the supplier organisation to the operati management of the customer organisation.

When a co-operative or social organisation is the supplier it loses title to the goods when they are transferred under the contract to the customer - a state organisation- and the state becomes their owner, while the customer organisation exercises the right of operative mamagement ove them.

Though not coincident with the time of conclusion of the contract, t date of delivering the goods may be the same for all goods to be delivere (so-called single delivery). Yet the goods to be supplied are much more often to be delivered at definite dates and in part or lots.

Art. 44 of the Fundamentals, which is reproduced word for word in al the civil codes, distinguishes two types of delivery contract: a) those concluded on the basis of a planning instrument for the distribution of goods, which is binding on the parties; and (b) those concluded by the parties at their discretion.

The first type is the commonest in practice and is linked with the detailed planning of the supply of material and equipment. The second type of contract is concluded on the delivery of products not allocated in a planned way. The content of these contracts is for the most part agreed upon by the parties but to a certain extent these contracts, too,

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experience a certain impact of national economic planning (such as the planning and fixing of prices).

98. Obligations and liabilities under a delivery contract. Under the contract, the supplier must deliver, at each established supply date, a specified quantity of goods of a specified range and quality. For default the supplier pays the customer a fine laid down in the Regulations on supply, and reimburses any loss from short delivery not covered by the fine. In addition, however, according to the principle of specific performance, the supplier's short fall in deliveries must be made good in the manner and within the period laid down in the Regulations of Supply, and the Special Terms for Delivery of Certain Types of Goods, or in contract (Art. 45 of the Fundamentals; Art. 259 RSFSR). The supplier is released from this binding obligation only at the end of the accounting year during which the instrument of planned distribution of goods is in force.

The customer, however, is not obliged to accept goods delivery of which was defaulted by the supplier. The customer, having notified the supplier prior to the dispatch of the goods, is entitled to refuse to accept them.

The provisions of the Regulations are correspondingly applied when the supplier does not dispatch the goods but hands them over at his warehouse to the customer, who is to carry them by his own transport.

When a contract contains a clause on the range of goods to be supplied (i.e. the quantitative ratio of grades, types, articles, etc.) and the supplier violates this condition, then, under the Fundamentals (Art. 46) and the civil codes (Art. 260 RSFSR), delivery of some of the types of goods in the range in excess of the quantity specified in the contract shall not be counted as covering the short fall in the other types, without the customer's consent, and the supplier must pay the statutory penalty to the customer, and compensate him for losses not covered by the penalty, take back the goods delivered in excess and make good the short fall.

The quality of the goods delivered must correspond to the state standards and in the absence of a standard, to the technical specifications or samples, approved in the established manner.

The terms of a supply contract on the quality of the goods is recognised as one of the legal means of encouraging steady improvement in the quality of output of Soviet enterprises. A contract may accordingly provide for delivery of goods of a quality higher than the state standards, technical specifications, or samples (Art. 47 of the Fundamentals; Art. 261 RSFSR).

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Strict liability is laid down for breach of the terms on the quality of the goods to be delivered (Art. 50 of the Fundamentals; Art. 266 RSFSR). The customer is bound to refuse to accept and pay for goods of improper quality; and when payment has already been made he is obliged to claim restitution of the moneys paid for them, and to claim and recover the fine laid down by the Regulations, and, in addition, full damages for the losses incurred.

Only when the defects in the goods can be removed on the spot without returning them to the supplier is the customer entitled to demand their removal by the supplier, or to remove them by his own means at the supplier's expense, claiming and recovering from the latter both the statutory fine and damages.

The procedure for checking the quality of the goods delivered is defined by special instructions approved by the State Arbitration Board under the USSR Council of Ministers. Defects discovered during the check are recorded in an act completed in the statutory manner. A six-month period of limitation for bringing an action about the defects in the goods delivered runs from the date of signing of the act or from the date when the period for drawing it up has expired. Action is brought if the complaints made to the supplier have not been satisfied.

The period of limitation of such action, however, can be prolonged, or rather the initial date when this period begins to run can be put off. This happens when hidden defects have been discovered in the goods that could not be detected during their ordinary receipt. Special, longer periods are laid down for drawing up the act about such defects and filing complaints about them; and they may be lengthened if a guarantee period has been set for this type of goods. A guarantee period is a special period for defecting improper quality of goods delivered, and it exceeds the general period for drawing up the aforementioned act. Guarantee periods are established by the state standards or technical specifications for various goods intended for lengthy use or storage. With the aim of enhancing the role of delivery contracts as a means of improving the quality of goods, the Fundamentals of Civil Legislation (Art. 48) allowed the establishment in contracts of longer guarantee periods than those provided by the standards or technical specifications, and also the establishment of guarantee periods for goods for which such periods have not been laid down by either standards or technical specifications.

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On a customer's complaint filed after the establishing of defects in goods during the guarantee period, the supplier must at the customer's choice either remove the defects at his own expense or replace the defective goods by other goods of the necessary quality and sort. He is released from this duty when the defects have come about through the customer's breach of the rules governing the use or storage of the goods.

The period of limitation for filing a claim about defects in goods for which a guarantee period has been established runs from the date of drawing up of the act about them within the guarantee period or, if an act has not been drawn up, on the expiry of five days from the date when the defects were found.

These rules are supplemented by the following important provision: according to the Regulations on Supplu, in the case when the supplier is not the enterprise manufacturing the goods, liability for their defective auality falls on the manufacturer rather than the supplier, even when the defects were caused by imperfections in the raw materials, supplies, parts, etc., delivered to him by his suppliers. In order to release himself from the liability, the manufacturer must prove that the defective quality did not arise either through his fault or through that of his suppliers.

Strict liability is also established for the delivery of goods in incomplete sets (Arts. 49 and 50 of the Fundamentals; Arts. 264 and 266 RSFSR). In this case the customer (buyer) can demand completion of the sets or their replacement by completed sets within a period agreed by the parties. Pending the fulfilment of either of these cliams he may refuse to pay for the goods, or, where payment has already been made, may demand refund of the moneys paid for them; and in addition, he may claim and recover the statutory fine and damages in full for the loss sustained by him.

99. Legislation on capital construction. Concept of contracts for capital construction. According to Art. 3 of the Fundamentals of Civil Legislation, relations connected with capital construction are governed by USSR legislation in the same way as supply relations. So the civil codes only reproudce the few norms of the Fundamentals reinforcing the basic principles governing relations connected with capital construction. These norms are supplemented by a whole number of others contained in the Rules on contracts for capital construction, approved by the USSR Council of Ministers on 24 December 1969, in separate Resolutions of the Central

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Committee of the CPSU and the USSR Council of Ministers, and in instruments issued by government departments managing capital construction, the USSR Ministry of Finance, the USSR State Bank, and the Construction Bank of the USSR (Stroibank).

According to the definition given in Art. 67 of the Fundamentals, a contract for capital construction is an agreement by which a contract organisation undertakes to build by its efforts and at its expense and deliver a planned project to the client organisation, in accordance with th approved estimates dor the designad project and within a fixed period, and the client undertakes to put the building site at the contractor's disposal, to transfer the approved estimates to him, to ensure financing of the building operations on time, to accept the completed projects, and to pay for them. This definition brings out the basic features of this contract: it is a plan contract to which only socialist organisations can be parties, and it is a contract that requires that the future client perform serveral actions in advance that are necessary for fulfilment of the obligations arising from it for the contractor, such as preparation of the building site and provisions of the approved documentation and financing of the job. When documentation relating to the estimates for the project has been approved in the established manner and is available by a time-lim laid down in the statutory procedure, capital construction jobs are included in what are known as itemised lists for schedules.

Itemised lists of construction jobs are compiled and confirmed in a manner determined by the USSR Council of Ministers for the whole period of construction broken down into years, and stipulate the name and locatic of construction job projects, their priority items, capacity, volume of capital investment, volume of building and assembly work, and the year of the start and completion of building. On the basis of itemised lists of building jobs intra-construction itemised lists are compiled and confirmed by the client in agreement with the main or general contractor, indicating the names of the items, enumerating the jobs and their volumes, and the expenditure to be allowed in the plan year. Apart from confirmation of the documentation and itemised lists, the conclusion of a building contract for capital construction also requires a plan of the financing of the job and incorporation of the job in the plan of the contracting organisation.

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According to the decisions of the September (1965) Plenary Meeting of the Central Committee of the CPSU and the resolution of the CC CPSU and the USSR Council of Ministers of 4 October 1965, "On Improving the Planning and Economic Stimulation of Industrial Production" based on these decisions, capital investment in the building of new enterprises comes in accordance with the centralised plan for capital investments from the state budget, the profits and the part of the depreciation funds of the organisations concerned earmarked for full restoration of fixed assets, in the scale stipulated by the job's financial plan. When the expenditure on building, however, can be refunded within five years of commissioning of the project, the outlay comes from credit granted by the USSR Construction Bank and from the resources of the industrial enterprises (organisations) themselves as provided in the financial plan for this purpose.

According to the decisions mentioned above, the recongtruction and extension of existing enterprises is financed under the centralised capital investment plan from the part of profits and depreciation funds earmarked in the financial plan for full restoration of fixed assets and from credits granted by the Construction Bank. Reconstruction of enterprises from the state budget is only allowed with permission of the USSR Council of Ministers.

100. Types of Contract for capital construction. The Fundamentals of Civil Legislation consolidated three types of a contract for capital construction: 1) a contract beteween the client and the general or main contractor who is obliged to hand over to the client the whole completed complex of building work; 2) a contract between the general contractor and a sub-contractor, a specialised organisation that undertakes to carry out separate types of work commissioned by the general contractor; 3) what have come to be called direct contracts concluded by the client, with the consent of the general contractor, with the assembly or other specialised organisations for erection, installation or other specialised work.

This system of contract for capital construction comes about primarily because of the desirability of concentrating the general direction of building work and responsibility for the completion of the job in one building organisation, which becomes the genral contractor. At the same time it makes it possible to use the personnel and equipment of specialised assembly and other organisations in building complicated

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projects. In the contracts concluded by the general contractor with subcontractors, he figures as the client. In the client's direct contracts with specialised organisations, the latter are contractors.

101. The rights, duties and liability of the parties. Under building contracts for capital construction the contractor must: a) build and deliver to the client by his own efforts and means the project specified in the plan; b) carry out the job in conformity with the approved documentation on the estimates for the project; c) complete the work within the established period.

The contractor's obligation to build the project specified in the plan by his own efforts and means also includes an obligation to provide the necessary material resources for the job.

The exemptions are equipment and apparatus which must, according to the Fundamentals, be supplied by the client unless otherwise provided for in special regulations. In some cases special regulations may make the client responsible for providing materials for the job as well as equipment.

The date by which a job is to be handed over by the contractor, i.e. the whole period of building operations, is determined not by the parties to the contract but by the norms on the length of building approved in the statutory manner. For separate building jobs the dates for the beginning and completion of construction may be laid down in the itemised lists.

Dates for fulfiling separate works, known as intermediate dates, also have to be laid down when concluding a contract. They are determined by agreement of the parties and are included in the time-table for the performance of work annexed to the contract. Fixing of these dates makes it easier for the client to exercise his right of control and technical supervision of the work.

The right of control and technical supervision is secured to the client in the Fundamentals of Civil Legislation. He is entitled to control and exercise technical supervision over whether the volume, cost and quality of the work done conform to the estimates and plans and to check the course and quality of the building and erection work, and the quality of the materials used. Yet he must not interfere with the contractor's operational and managerial activities. Disputes with the client arising from the client's technical supervision of the work must be settled by arbitration.

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Of course, the client's technical supervision does not exclude either the author's supervision by the organisation designing the project, or architectural and building control by the appropriate bodies and organisations.

The Fundamentals listed the following obligations binding on the client under a building contract: a) to put a building site at the contractor's disposal; b) to hand over approved plans and estimates to the contractor; c) to ensure financing of the job; and d) to accept the objects when built, and to pay for them. In addition, there are other obligations laid down in the Rules on Building Contracts, in particular the duty to help with the allocation of housing, supply of water, steam and power, and so on.

A state commission is set up to accept the completed construction job. The body appointing the commission is determined according to the departmental subordination of the job, its purpose and estimated cost.

From what the Fundamentals say about the customer's obligation to accept the completed building job it follows that, in the event of his finding defects in a job ready for handing over, he can refuse to pay for it pending the remedying of the defects by the contractor. Final accounts for the completed work must be settled with the contractor not later than 30 days after acceptance. In the settlement of accounts the client's preliminary payments on intermediate accounts are subtracted; such payments are permitted when the estimated cost of the job is not less than 20,000 rubles (not less than 10,000 rubles on rural construction jobs) at times established in the statutory manner.

Liability for breach of obligations under a building contract for capital construction arises, as a general rule, where there is fault for the breach. The main contractor, however, is liable to the client not only for the breach of obligations through his fault, but also through the fault of a sub-contractor. This follows from the fact that the rule in the Fundamentals relating to sub-contractor refers to the general provision on liability for breach of contractual obligation the performance of which has been assigned by one party to an outside organisation. Liability for breach of such an obligation falls on the party assigning fulfilment of the obligation to another organisation except when liability is imposed by law on the actual performer.

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The law does not make a sub-contractor liable for non-fulfilment of obligations arising from the general contractor's contract. Consequently the general contractor is liable to the client although the break of contract was due to faulty actions of a sub-contractor to whom fulfilment of the obligations concerned was assigned.

Having incurred liability to the client the main contractor can, of course, lay a counter (regressive) claim against the sub-contractor.

The liability for breach of obligations arising from a building contract for capital construction envisaged in the Fundamentals consists in payment of a statutory penalty (default interest) by the guilty party to the other party and in the payment of damages for losses in excess of the penalty incurred by the other party in the form of expenses, or damage to, or loss of, its property. The liability can arise not only on expiry of the date for performance of all the work, but also when breach has been discovered on completion of separate items of the work. The amount of the penalty (default interest) paid by the contractor for failure to meet the dates for the performance of separate jobs is refunded to him in the evenet of the work as a whole being completed by the date fixed in the contract.

As already mentioned above, the client can also demand remedying of defects in the work completed by the contractor at his expense.

102. Legislation on carriage. Concept of a contract of carriage. Art. 3 of the Fundamentals of Civil Legislation referred the regulation of relations arising from the carriage of goods or passengers by rail, water or air to the jurisdiction of the USSR (as already noted). The civil codes, therefore, only repeated the relevant norms of the Fundamentals. Relations involving road transport are regulated by Republican legislation, and the main provisions on carriage by motor vehicles are to be found in the Republican civil codes.

The rules of the Fundamentals dealing with carriage and reproduced in the civil codes open with a definition of a contract for the carriage of goods and passengers, common for all types of transport (Arts. 373 and 374 RSFSR).

By virtue of a contract for the carriage of goods, a transport organisation (carrier) undertakes to deliver goods entrusted to it by the consignee, and the consignor undertakes to pay the established charge for their carriage.

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It follows from this definition that a contract for carriage must be deemed to have been concluded the moment the goods have been delivered by the consignor to the carrier. In other words, a contract for carriage is a real contract. But it may also be consensual, binding the carrier to provide the means of carriage for the goods and the consignor to present the goods for carriage. The contracts of affreightment in the form of a charter, provided for in the 1968 USSR Merchant Marine Code (Arts. 118,120 and 122) and a contract for road carriage when it is concluded through the sending of a single order to a road transport enterprise and its acceptance by that organisation, are also consensual.

The shipping carriers of goods in the USSR are the state enterprises in the various forms of transport.

When goods are carried on a single transport document by several organisations of one type of transport (direct trafice) or different types of transport (mixed direct raffic), only the organisation accepting the goods from the consignor is a party to the contract, and is regarded as acting on behalf of the other carriers who are thus parties to the obligation arising from the contracy.

The other party to the contract is the consignor, i.e. the party delivering goods for carriage and who is named as the consignor in the main carriage document (way bill, bill of lading, consignment note, etc.).

The consignee is not a party to the contract for carriage, but he is authorised to receive the goods, and his right arises from the contract concluded between carrier and consignor. The consignee is generally named in the main transport document. In foreign trade carriage by sea, order or bearer documents (bills of lading) are also allowed.

The consignee has the right to demand delivery of the goods from the carrier and perform certain actions linked with obtaining them (inspection of the goods, the drawing up of a carrier's statement, etc.), and to claim compensation in the event of breach of contract by the carrier.

A contract for the carriage of goods is a contract for compensation: carriage fee is paid for the carrying on a scale laid down for most types of transportation in the standard manner by the competent bodies. The carriage fee may be determined by agreement of the parties only in a limited number of cases, mainly for carrying the cargoes of foreign charterers in Soviet vessels.

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The general definition of a contract of carriage in the Fundamentals (Art. 73) has and addendum that such contracts for the carriage of goods belonging to state, co-operative and social organisations are concluded on the basis of the freight plan which is binding on both parties. But transport by-laws also provide for the procedure of concluding unplanned contracts for the carriage of goods, in particular, of small batches and of citizens' household effects, which are accepted on presentation by the consignor. The carriage of cargoes for foreign charterers in Soviet vessels is also outside the plan in the sense that they are planned only for the carrier and not for the other party to the contract and only as regards gross figures.

The provision in the Fundamentals on the planned character of freight carriages is accompained in all the civil codes with reproduction of the rule on liability for the failure to fulfil the freight plan (Art. 73 of the Fundamentals, Art. 376 RSFSR).

Responsibility for non-fulfilment of the freight plan is primarily the liability of the parties for non-fulfilment of obligations binding in civil law arising directly from the freight plan: namely, the carrier's obligation to supply means of conveyance and the consignor's obligation to deliver the goods for carriage. Proper fulfilment of these obligations is a sine qua non for concluding a real contract of carriage, and failure entails a civil-law liability for both the carrier and the consignor.

The provision of transport not suitable for carrying the freight planned is tantamount to failure to provide means of transport, while delivery of freight in a condition not complying with the rules of carriage is tantamount to failure to deliver the freight, unless it is delivered by the consignor in proper condition and in time to ensure duly dispatch of the freight.

The carrier and the consignor are also both liable for delay in performing these actions and for other breaches of the freight plan. In all these cases the liability consists in paying the exemplary penalty established by law, i.e., a penalty payment of which excludes damages. This liability is more stringent, however, than the normal one because of the grounds for it, namely that both carrier and consignor are released from liability for breach of the freight plan only in cases expressly stipulated in law.

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With unplanned carriage the parties' obligations to supply menas of conveyance and deliver the freight areise when the consignor presents the carrier with an application to carry freight outside, or over and above, the plan and the carrier has accepted it. These obligations may also be provided when a consensual contract of carriage is concluded, e.g. a charter party. With carriage by rail, air, and inland water ways the parties bear the same liability as that for breach of contract for non-fufilment of the binding obligations arising from the freight plan.

These general provisions on the carriage of goods are supplemented in the codes by norms on liability for breaches of the road transport freight plan.

These general provisions on the carriage of goods are supplemented in the codes by norms on liability for breaches of the road transport freight plan (Art. 377 RSFSR).

The definition of a contract for the carriage of passengers given in the Fundamentals (Art. 72) and repeated in all the civil codes (Art. 374 RSFSR) says that under such a contract the carrier undertakes to carry the passenger to his destination and, in the event of the passenger's registering luggage, also to deliver such luggage to its destination, and to deliver it to the person authorised to receive it. The passenger undertakes to pay the established tariff for its carriage.

It is clear from this dfinition that a contract for carriage of a passenger also applies to carriage of luggage. But the definition is incomplete since it does not mention the fact that under the contract the passenger can carry children free to charge with him (her) or on preivileged terms (depending on their age), carry hand lauggage or some of his (her) luggage (within the fixed limits) free of charge, and can change the terms of the contract at his (her) discretion, e.g. make a stop on the way, and has other rights aimed at creating optimum conditions for the passenger's travel.

Contracts for carrying passengers, like those for carrying goods, are contracts for compensation, i.e. the passenger must pay the carrier a fare established by a tarrif.

The terms for carrying goods, passengers, and luggage are determined, as stipulated by the Fundamentals (Art. 72) and, following them, the civil codes (Art. 375 RSFSR), by transport codes and by-laws. These are

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the 1964 USSR Railway By-Laws, the 1965 USSR Inland Water Way By-Laws the 1968 USSR Merchant Marine Code, and the 1961 USSR Air Code. On the basis of these instruments the appropriate transport ministries issue rules which develop and supplement the relevant by-laws and codes.

The terms for carrying goods, passengers, and luggage by road transport are determined by the norms of the civil codes, which are elaborated in detail by Republican by-laws on road transport (see Para. 103 below) and in rules supplementing them. In addition there are separate special acts on road transport operative in the Republics.

103. The rights and duties of parties to a contract of carriage and liability for breach of contract. All the civil codes reproduced the norms of the Fundamentals defining the main binding obligations arising from a contract of carriage, the liability for breach of contract and the procedure for filing claims arising from breaches.

First of all, Art. 75 of the Fundamentals, reproduced in all the civil codes, establishes that the carrier must deliver the goods or luggage to their destination within the period established by the transport by-laws (or codes) or by regulations issued in the established manner. When the period of delivery has not been fixed in this way, the parties are entitled to fix it (Art. 380 RSFSR).

The transport by-laws (codes) do not usually establish periods for the delivery offreight and luggage. The exception is the USSR Railway By-Laws. Periods for the delivery of freight are defined by the regulations, issued in the established manner, for carriage by rail and by inland water ways and by sea in small cabotage and by interurban road transport. Agreements of the parties on periods for the delivery of freight for which such periods have not been laid down in the statutory manner are seldom encountered in practice.

In establishing the rule on obligatory obsevance by the carrier of the periods for the delivery of freight and luggage, the Fundamentals also made provision for liability for violation of these periods; the carrier is liable for delay in delivering freight and luggage if it si due to his fault. This fault is presumed, and the onus is on the carrier to prove that the delay was not his fault.

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The civil codes added to these provisions that payment of a fine for delay in the delivery of goods does not release a road carrier from the binding obligation to pay damages for the loss, shortage or damage to freight caused by the delay (Art. 380 RSFSR). This is becuase the carrier in such cases fails to fulfil two obligations, that to deliver the goods within the established period and that to deliver them safely.

The Fundamentals also defined the principles of the carrier's liability for the loss, shortage of or damage to freight or luggage accepted for carriage (Art. 74). It is the general principle of fault. The fault of the carrier for loss, shortage of or damage to feight or luggage is presumed and the onus is on him to prove absence of fault in his actions. The transport by-laws, however, provide for cases where the onus of proving the carrier at fault is on the consignor or the consignee. These are the cases when the carrier's fault is unlikely, i.e. when the carrier had no access during its carriage to freight delivered short to destination or when the matter in question is shortage or damage to goods the properties, packing, or manner of conveyance of which involved risk of accidental partial loss or damage, etc.

The Fundamentals exclude placing on the passenger of the onus for proving the carrier at fault for loss, shortage of or damage to luggage.

The only exception to the rules on fault as grounds for the carrier's liability is the provisionsof the USSR Merchant Marine Code (Art. 161) under which a marine carrier is relieved of liability for daamge to cargo or baggage in carriage by sea caused by any action, even faulty, or oversight of the captain, crew, or pilot in navigating the ship (so-called navigation errors).

The Fundamentals established rules, reproduced by the civil codes, on the procedure for filing claims arising from the breach of a contract of carriage (Art. 76; Art. 384 RSFSR). According to these rules, a claim must be presented to the carrier before an action is brought against him arising from carriage. An action may only be brought after the claim has been rejected by the carrier or when a reply has not been received within the established period.

Uniform periods are established for filing claims arising from all types of carriage. A claim must be filed within six months, except claims for the payment of fines and premiums which must be made within 45 days.

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A three-month period is established for consideration of the claims by the carrier and notification of the results. This period is increased to six months when the claim made has arisen from a contract of carriage in mixed direct traffic and is cut to 45 days in the case of a claim for payment of a fine or premium.

All periods for filing claims are preclusive, i.e. do not permit prolongation on any grounds.

A two-month period of limitation on suits, common for carriers of all types of transport, runs from the date when the period established for answering claims has expired.

The Fundamentals, and following them the civil codes, stipulated that special rules on the period of limitation and procedure for bringing action in disputes over carriage on foreign-going traffic are established by the transport by-laws (codes) or by international agreements.

A special procedure is laid down only for filing claims against the carrier; the carrier's claims against client organisations must be laid in compliance with the general procedure for making claims, and not with special procedures.

Most of the Republican codes supplement these rules with others on the rights and obligations arising from a contract for carriage by road transport. These rules define the parties' obligations as regards the loading and unloading of freight and establish the scale of liability incurred by a road transport organisation for loss, shortage, or damage. There are also a number of rules concerning the carriage of passengers by road transport on interurban routes.

The Republican codes provide, in addition, that the terms for carriage of freight, passengers, and luggage by road transport and the terms of the parties liability on them will be itemised and made specific by road transport by-laws of the respective Republics confirmed by their Council of Ministers. Such by-laws have been issued in Republics; in particular the RSFSR by-laws on Road Transport were confirmed by an Ordiance of the RSFSR Council of Ministers on 8 January 1969.

There are no special provisions on carriages by road transport in the civil codes of three Republics (Estonia, Tajikistan and Uzbekistan), but these codes contain references to the respecitve Republican by-laws on road transport.

.../

104. The carrier's liability for causing death or injury to passengers. The liability for damages connected with death or injury to a person in non-contractual liability in all cases under the Soviet law, even when the actions causing death or injury represent a breach of contract (see Parars. 146 and 151).

Accordingly, the carrier's liability for causing death or injury to passengers is determined by the general rules on extra-contractual (tortious) liability. The exceptions to this principle are cases when carriage of the passenger comes under an international agreement to which the USSR is party. In such cases the terms, procedure, and limits of the carrier's liability for death or injury is defined by the international agreement concerned.

The Fundamentals, however, provided (and all the civil codes reproduced this provision) for cases when the law established heightened liability for the death or injury of passengers. The general rules on tortious liability are excluded in these instances since these rules contradict the special norm.

Under the general rules transport undertakings, as the owners of what are called sources of increased hazard, are liable for the damages caused by such a source regardless of their fault and are only relieved of this liability when they prove that the injury resulted from force majeure or intent on the part of the injured person. An air carrier is liable for damages connected with death or injury to passengers even when the harm has been caused through force majeure.

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Footnotes Ommitted

Excerpts From: Rudolf Huebner, A History of Germanic Private Law (Translated by Francis S.Philbrick) (1968) pp. 544-552)

82. Obligations ex contractu, generally. The development of distinct tyoes of contract, distinguished by legal characteristics, is always the result solely of increased trade and advanced juristic technic. In the development of the medieval law one can trace the gradually appearing differentiation of the various forms of contract. Like the law of things, the law of obligations started with a single legal form, which it at first adjusted to all the needs of life. This oldest contract was that of sale, "the typical contract of Germanic law." Hence we find the word "chouf" in the old High German glosses, for example, employed in the general sense of "negotium", "merces", "business transaction" ("Geschaft"); and the Scandinavian languages designated with the words "kaupa" and"kaup" every contract "that can be called in any sense a trading transaction ('Handelschaft')". A sale ("Kauf") in this oldest sense, however, was nothing else than a gift ("Gabe") that obligated the person receiving it to some counter performance. Consequently, all transactions that could in any way arise could be regarded as varieties of this all-inclusive concept, for the transactions of primitive legal traffic, which could be concluded only as non-credit transactions (supra, p.459) invariavly consisted in a mutual delivery of goods for goods (barter or of goods for a money price (sale in the narrow sense.) And this was not affected by the fact that the spot transaction could be replaced by a real contract, for here also the delivery of the thing created the obligation of the other party. This delivery was a "gift with a charge" ("Gabe mit Auflage"); a type of contract whose characteristics resembled not only those of a sale on credit but also those of a loan and a bailment for custody.

The gratuitous gift or donation ("Schenkung"), also fell within this category. For although the essential characteristic of the donation as the law was finally developed lay in the gratuitous nature of the payment ("Zuwendung"), this charactristic was originally alien to Germanic law. Like all other primitive legal systems it recognized solely transactions for value. Every performance ("Leistung"), if it was to produce legal effects and enjoy legal protection, required a counter perfomance. Therefore the "Schenkung" also required a counter gift. This principle, however, which necessarily followed from the exclusive recognition of non-credit contracts, was flet to be at the same time a moral obligation; since the persent required the thanks of the

recipient, the latter, it was said, should repay gift with gift. The legal aspect of this idea was developed most logically by the Lombards. Their law required for the legal validity of the donation that something pass in turn from the donee to the donor, which, however, in order that it might not disappoint the good will expressed in the donation, was a mere nominal gift. a so-called "launegild" ("Lohngeld"). It was only the "launegild" which made the donation irrevocable; through it this acquired the character of a spot contract.

To be sure, already in the Middle Ages the various transactions that were needed in commerce were developed with increasing distinctness from the single, originally all-inclusive, normal type of contract; a distinction between the purposes of trading transactions being followed by a distinction between the corresponding institutes of the law. Sale, hire ("Miete"), lease ("Pacht"), pledge, and other contracts were thus legally differentiated from one another. The German law, however, did not attain to any perfection of theory in its law of contracts. As already mentioned (supra, p. 463), that was first realized under the influence of the Roman law. It is significant that the legal sources of German Switzerland, where the influence won by Roman law was very much weaker, maintained down into the 1700s an almost absolute silence concerning different forms of contract.

In view of these facts we need only emphasize in the following pages a few matters in which the Germanic law either attained a noteworthy independent development, or preserved old rules as part of the modern law of trade that has been developed upon the basis of the Roman law.

82. Contracts of Sal. (1) Prohibitions ("Verbote"). The fact, above mentioned, that every sale was originally concluded as a non-credit transaction explains the other fact that there still existed in the Middle Ages such a preference for spot sales that sales for future delivery, also known as "Vorkauf" ("forestalling" a sale before the goods are available), although common in practice, were repeatedly forbidden by statute. This was still the case in the 1400s at Hansa fairs, and likewise in many of the Hanseatic systems of town law (Breslau, Lubeck, Riga) and in Swiss legal systems.

Other prohibitions and restrictions originated in considerations of a lego-polrtical nature. In order to discourage usurious overreaching (infra, 86), the sale of uncut grain was frequently prohibited, and in general all sales whatever in which measures were resorted to by which h the just relation between price and goods was falsified or the recognition

of the relation made impossible. In order to suppress middlemen, and to insure the conclusion of all sales under the eyes of public authorities, it was forbidden to sell goods that had not yer reached their final ("eigentlichen") market; particularly, sales outside the gates of the city (likewise known as "Vorkauf", forestalling), and the like.

(II) Obligation of General Warranty and of Warranty to Title.

Germanic law imposed upon the seller a duty of warranty corresponding to the old Roman "auctoritas". That is, when a third person, by legal action, demanded of a purchaser the delivery of the thing purchased, the seller was bound, upon formal citation by the impleaded buyer, to appear in court, give warranty, take the place of the buyer as defendant in the action, and by a favorable prosecution of the suit preserve the seisin of the thing to his buyer (supra, p. 411); for, as it is expressed in the French coutumes, "tous venderes doit varandir". To be sure, there was no procedural compulsion thus to assume the defense ("defensio", "Schirmung"). But a warrantor who did not appear was regarded as a thief, and was onliged to pay to the complaining third party the bot for larceny and to repay the purchase price to the purchaser, since the buyer whose warrantor made default was obliged to deliver the thing to the third person. In the same way the seller was liable in damages if defeated in the action he undertook to defend. Although this duty of warranty existed by force of law it was nevertheless customary, when a contract of sale was concluded, to promise it in penalty clauses in the instrument; in these the seller not only promised for himself and his successors in title not to disturb in future the possession of the vendee, but also expressly assumed the duty of warranty against legal attacks by third parties.

This law of warranty, which was closely associated with the medieval system of procedure as well as with the principles of seisin, was maintained in essentially undiminished authority so long as the body of the Germanic law remained intact. As late as the beginning of the 1600s it was possible to say in Austria: "every sale carries warranty and protection 'on its back' (auf dem ruckhen')." Indeed, the old system of warranty remained in force in many places after the Reception, although only in a weakened form. In France voucher to warranty was transformed into a" fuaranty-action", by which the naming of a warrantor became merely a defense available to the defendant at his option; it was at his disposal in case he did not wish to make use of the right of independent defense that was now permitted to him in all cases. In Germany, the reception of the alien law gradually sapped of vitality the traditional native principles. In consequence, acceptance was

generally accorded to a theory which, under the controlling influence of the Germanic idea of voucher to warranty, had developed in medieval Italy out of the purely substantive liability of the vendor in Roman law for the "habere licere" a procedural duty of "defence" or warranty ("Defensionspflicht") that was exercisable through a "Litis denuntiatio," and also an action to compel such defense. Native and alien ideas, principles of substantive and procedural law, rules of positive law and theories of natural law, were combined in the theory, which created in the law an exceeding confusion that is here and there reflected in the great modern codes. Clarification was introduced for the first time when the Historical School of the 1800s rediscovered the pure Roman law and its liability for "habere licere", the so-called warranty of title (warranty against eviction, "Eviktionsklage"), and taught students that under the Roman law the vendor, as such, was obligated merely to perform the act of conveyance and was not responsible for the result of such conveyance; and that consequently he must assume a supplementary warranty of possession, that is, of the "habere licere." The Civil Code, finally, has done away with all earlier differences and doubts by establishing the principle, which is substantively in agreement with the early Germanic law, that the vendor is obligated to secure to the vendee an unimpeachable ("lastenfreie") title to the thing purchased (433-434): a rule that was unknown to the Roman law, and which could not have been laid down in that form even by the medieval law, because this did not proceed from ownership but from seisin. The vendee is entitled to-day (as he was earlier under the Prussian "Landrecht") not only, as formerly, to an action against his vendor in case of eviction (disseisin), but whenever the better right of a third person can be established. A notification of a claim by a third party is accordingly no longer requirsite. On the other hand, in all those cases in which the vendee, despite the defective title of his vendor, acquires ownership without further steps through the rule" hand warrant hand" or as a result of the public faith of the land register (supra, pp. 223, 438), it is no longer necessary to sue the vendor.

(III) Defects in the Thing Sold Although the old Germanic duty of warranty already imposed upon a seller, in modern phraseology, liability for defects of title ("Mangel im Recht", defets" in law"), there did not exist, generally speaking, a liability for physical defects in the thing sold. To be sure, good faith required that the thing sold should possess the qualities positively agreed upon, and should be without any considerable faults ("Fehler"). But if the buyer had once seen and accepted the thing he could not thereafter bring an action for defects that became apparent later. His acceptance was regarded as an approval which deprived him of the right of later objection ("Ruge").

Hence the maxims, "he who does not open his eyes opens his purse", "he who buys like a fool must pay like a wise man. It was only when the seller concealed defects with intent to deceive ("arglistig"), or when there were involved certain especially serious defects (which were typically defined for different sorts of goods), or defects of qualities expressly averred to be present, that the seller was liable for these. In such cases the seller might within a certain short period "wandeln" the transaction, that is rec rescind it, and then demand the repayment of the purchase price upon redelivery of the goods. In case of concealment with intent to deceive, the purchaser also had a claim for damages. This treatment of the seller, in general mild, was made decidedly harsher by the adoption of the Roman rules. For from that time onward a liability was imposed upon the seller, in accordance with the Roman law, for all so-called "latent" ("heimlich", secret) defects, that is, defects not perceptible at the time the sale was concluded; and this was not excluded even by an acceptance of the goods without reservation of rights. More than this, the buyer was accprded at his will the so-called aedilian actions of Roman law, namely the "actio redhibitoria". which corresponded to the action for rescission ("Wandelungsklage") of Germanic law, and the " actio quanti minoris" ("Minderungsklage", action for abatement of price), and in addition to these, in case of special warranty ("Zusagen") or culpable conduct on the part of the seller, an action upon the contract for damages ("actio emti"). The system of actions which was thus established by the common law passed over into the modern codes. At the same time after-effects of the old native law continued, so, especially, in many legal system the rule that the buyer forfeited his right by an acceptance without reservation thereof. This continued to be recognized in the Hamburg law in its original strictness, and in case of all (even latent) defects. The Prussian "Landrecht" adopted it, at least in the weakened form that the buyer must immediately object to such defects as he noticed at the time of acceptance, or ought to have noticed. The General Commercial Code also adopted the view of the Germanic law, requiring in sales between absent parties that the buyer, immediately after the delivery of the goods sent to him, should examine them with due care, and must then without delay give notice to the seller of defects known to or knowable by him; defects which became perceptible only later must be reported immediately upon their discovery (347). The present Civil Code has rejected, in favor of the opposite Roman rule, the view of Germanic law that the buyer lost his rights, in case of possible defects in the thing, by an acceptance

without reservation; it is only as to those defects which the buyer has demonstrably known at the time of acceptance that it requires a special reservation of his rights (464). But the new Commercial Code has in turn preserved the duty of examination and objection in all sales between merchants; in other words, it has preserved the stricter treatment of the buyer under Germanic law (377).

Finally, in the case of cattle transactions, the rule of the old law was preserved throughout a great part of Germany, and most especially in the entire South and in Saxony; the seller being made liable only for certain particularly important defects known as "chief" ("Haupt-") defects, which are exactly defined by statute. There was not at all involved in this, originally, a preference of those selling cattle as compared with other vendors; for under the old law, as already stated, every seller had enjoyed the same favorable treatment. After the reception of the stricter Roman rules, however, which made the seller liablefor all latent defects, the preservation of the old rule in such cases actually became a privilege of those who sold cattle. The "ludicrous Mosaic of legal diversities" presented by the theretofore existing law of the cattle trade was done away with by the detailed provisions of the present Civil Code (482-492). It has adopted in this matter the traditional native rules. Liability exists only for certain "chief" defects which are listed in a catalogue prepared by omperial order; and this only when they appear and are duly objected to within a definite and unusually short period (3, 10,14, or 28 days). Moreover, the buyer has no action under the Code for abatement, but ordinarily only a right of rescission, and in the case of animals purchased for breeding the right to a later delivery of an undefective in place of the defective animal. In the new Swiss Code of Obligation Law the rule has been adopted, in the case of a sale of cattle (202), that if the written warranty contains no provision as to time, and there is no question of a warranty of gravidity, the seller is liable to the buyer only when the defect is discovered and notice given thereof within nine days, or when an examination of the animal by experts is demanded of the authorities within a like period.

(IV) Transfer of Risk. The treatment of the question from what moment an accidental destruction of or damage to the thing sold shall be borne by the buyer, and no longer by the seller, was determined in the old Germanic law by the rule that the risk, like the usufruct, should pass to the buyer with the transfer of the seisin. Consequently, the transfer of risk took

place in the case of chattels at the moment of acquiring the corporeal seisin, and in the case of lands at the moment of investiture, originally corporeal investiture, but later, when symbplical investiture was introduced, equally at the moment this was realized, and so, notably, under the medieval law at the moment of release ("Auflassung"). In this case, therefore, the unsufruct and the risk might be separated (supra, p. 189). These rules of Gremanic law, as contrasted with the opposing Roman rules according to which the "periculum" passed at the conclusion of the agreement to sell, were preserved in some of the regional legal systems. They were adopted by the Prussian "Landrecht" and by the Austrian Code, and in the case of chattels have finally been recognized by the Civil Code (446-447). When goods were sent to a buyer from another place the risk passed, according to the older Germanic law, at the moment of dispatch. This rule, also, has been adopted by the Civil Code, following the example of the Prussian "Allgemeines Landrecht", but with the difference that such dispatch is no longer treated by the former as a delivery, as it was in the Prussian law.

EFFECTS OF MISTAKE IN CONTRACTS

A Study in Comparative Law

By

E. Sabbath *

1. The effects of operative mistake in contracts are various. In almost all countries mistake renders, under some circumstances, the transaction void ab initio or voidable. Many legal systems provide for an action for damages available to the victim of mistake or to the other party if he suffered a prejudice by the invalidation of the contract. Sometimes there is only a possible case for rectification of the error. The effects of a rule of law are always important. They are especially so in matters of mistake, since the view which a legal system takes toward this question reveals its conception of the nature of contractual transactions. According to each specific remedy, justice is done more or less completely to the mistaken covenantor or to the other party and even to third parties who are involved. Furthermore, each remedy may assure the security of commerce or hinder it, and by so doing, further the development of the scope of operative mistake, or restrict it. In Roman law, for instance, error had an effect only if it destroyed consent, which rendered the transaction absolutely void. It is to be assumed that the scope of error remained restricted largely because the effects of error were too rigid and rigorous. Similarly, one of the reasons why English courts are said to be reluctant to intervene in favour of the mistaken party is that at common law mistake renders the contract void ab initio. Such an effect results in prejudice to the parties and even to a taird party who has acquired an interest in the subject-matter of the contract.

What are the effects of mistake and what is the impact of such effects on the development of the theory of mistake? The problem will be examined here in the light of a comparative study. The matter of invalidity, that of damages, and finally the problem of rectification, will be successively considered.

2. The most important effect of mistake is to render the contract invalid. Nullity is indeed the usual sanction in civil matters and especially in contractual obligations. As a counterpart to contractual freedom, the law establishes what is necessary to constitute a valid agreement. A contract which does not fulfil the legal rules is generally invalid and the party who is obligated under it has the right not to perform his contractual obligations. The effect of this is in itself clear and simple, but it has been complicated by historical development, since many kinds of nullities have been created over the ages, similar to each other, but also different in their effects. Before considering the problem of invalidity for mistake it will be useful to take a brief look at nullity in general, in order to get a better understanding of the problem involved.

Nullities in most modern laws originated, it appears, in Roman law. In the early civil law the rule seems to have been that no obligation could arise from a contract lacking an essential element needed for its formation. With the praetor's interference, in order to correct the civil law in cases where it

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did not secure justice, the matter began to be complicated. As the praetor was unable directly to nullify a contract valid in law, he did it indirectly by using various proceedings and especially by a specific remedy, the in integrum restitutio. Beside these two forms of invalidity, there appeared, as it seems, the case of a contract which was invalid but which could be confirmed by the person for whose protection the nullity was established. Thus, various ways of setting aside contracts appeared, either ipso jure or by praetorian remedy.

The Roman System was restated during the Middle Ages by the glossators and even by the Canonists, who adopted the distinction between nullity ipso jure and nullity per in integrum restitutionem. Little by little the difference between the two became more substantial; and historical development resulted finally in the modern distinction between two categories of nullity which denote different degrees of ineffectiveness. It is true that further inquiry proves that in many countries invalidity of contracts is by no means restricted to two and that the terms denoting each kind of ineffectiveness are often used with insufficient precision. But generally speaking, and for the sake of a comparative classification, it is not wrong to say that there are two distinct legal techniques available, one more rigorous and effective than the other, each of them being appropriate to secure different legal ends. On the one hand, a contract may be an absolute nullity, generally as a result of illegality or immorality, or if an essential element needed for its formation is lacking. In such a case, the nullity is absolute from the beginning and the parties are in the same position as they would have been, had the contract never been made. Consequently, neither party is obligated under it, the contract cannot be in general ratified or confirmed and in many countries the supposed rights acquired under it may not be validated by the passing of a specified time. A contract ab initio having no effect at all, quod nullum est nullum producit effectum; there is no need on principle to declare it void by an order of the court. It is also admitted that no property can pass under it, and that a third party who purchased goods, which have been the subject-matter of such a contract, would acquire no title to the goods.

On the other hand, a contract may be only voidable, especially when the protection of only one of the parties to the contract must be assured, as in cases of fraud or misrepresentation. When a contract is voidable, only one of the parties, generally the party whom the law aims to protect, may rescind it or affirm it at his option. If he chooses to affirm the contract or if he fails to exercise his right to rescind it within a specified time, he is obligated under it. In most countries a voidable contract continues to subsist as an effective contract, until repudiated. There are, however, divergencies between the various legal systems. In the civil law countries, rescission of a voidable contract has the effect of rendering the contract void ab initio, whereas in the English system the repudiated agreement is treated by the law as having terminated from the date of such repudiation.

The difference is important from the practical point of view. The retroactive effect of rescission as understood in the civil law systems, does not allow a third party to acquire an interest in the subject-matter of the contract, even if the contract is repudiated after the said acquisition. Under English law, on the other hand, once the title is transferred before rescission to a bona fide

purchaser for value, it cannot be defeated. For this reason many English authors are much in favour of mere voidability in case of mistake. Although the "third party cases" are conclusive, there are many other reasons for adopting the same point of view, since, as will be shown, voidability is better suited than absolute nullity for the protection of the mistaken party.

After having surveyed the theory of invalidity of contracts in general, the question arises as to what kind of nullity covers mistake. All systems of law have not adopted a uniform point of view. Historical development shows, however, that there is an evolution from absolute nullity toward mere voidability, that evolution being accompanied by an extension of the scope of operative mistake.

In Roman law, error had the effect of nullifying the contract. As it is sometimes said by the texts, in such a case there is no contract. On the other hand, where mistake affected a contract at all, it avoided it for lack of consent. In the final analysis, error rendered the contract an absolute nullity because one of the essential elements for its formation was lacking.

The matter progressed during the ages. While the glossators and the pandectal writers remained within the boundaries of the Digest, in some countries there appeared a new conception of mistake and a moral evaluation of its effects in contractual relations. Such a progress was probably favoured by the canonists who introduced the idea that a party must be protected if he is in an inferior contractual position. Mistake ceased in that way to be exclusively connected with the rules concerning the formation of the contract, and became operative even in case the consent of a party was only vitiated by error. At the same time, mistake led to mere voidability, as a consequence of the idea of protection. In other words, the law aimed to protect the party in error by allowing him, under certain circumstances, to rescind the contract. There is no doubt that the new effect of mistake, more flexible than the Roman rule, allowed a considerable extension of its scope.

The introduction of equitable remedies in England is perhaps an illustration of such an evolution, although the intervention of equity in this field seems to have been of limited effect and of late appearance.

More conclusive is the evolution in French law. Already the ancient French lawyers adopted a new conception of operative mistake and gave to it effects more suited to commerce and to morals than it had at Rome. Through them, these effects became various and besides absolute nullity they mention mere rescission. According to Pothier, for instance, there are two kinds of operative mistake: the first "annihilates" consent. It is found, for example, in the case of a party who is mistaken as to the identity of the subject-matter of the contract. Then there is no contract at all and no need to get an order for rescission. On the other hand, error concerning qualities of the subject-matter gives to the party in error the right of rescission. It is, indeed, striking that the French Civil Code only refers to error as to the substance and as to the person,, the effect of these being mere voidability. As it is not, however, possible that the legislator did not provide for any rule concerning mistake as to the identity of the subject-matter or the nature of the agreement, most of the

writers are of the opinion that the Code refers only to errors which vitiate consent without nullifying it, and that besides such errors, a contract is void ab initio when by mistake there is no consent at all. Such a mistake is denominated by some writers erreur obstacle because it prevents the formation of the contract. The agreement is then invalid on the ground of rules related to the formation of contracts, the mistake being only the cause of lack of consent. In the final analysis, under the predominant opinion, there are in French law two categories of mistake, having different effects. The one expressly mentioned by the Code renders the contract voidable at the option of the mistaken party. The other, connected only indirectly with the theory of mistake, renders the contract an absolute nullity.

This opinion is subject to criticism on its theoretical grounds as well as on its practical merits, because the line between lack of consent and a consent only vitiated is not always easy to draw and often proves to be illusory. As was maintained by some writers, identity of the subject-matter is in the final analysis only an aggregate of attributes, and one attribute may prevail in some instances. Therefore, it is difficult to see why both cases should be subjected to different rules. Furthermore, it is doubtful whether there is a moral ground to give to a party the right to repudiate his obligations, because the other party was mistaken. At any rate, there is no public interest for granting such a right.

On the ground of such arguments, some French authors propose that mistake, when it operates, should as a general rule be covered by voidability and the courts followed suit in a few cases, although indirectly, qualifying, for instance, a mistake as to the nature of the contract as mistake as to the substance of the subject-matter. In Le Tresor de l'Agriculture v. Polino, the defendant signed a document believing it to be an insurance policy. In fact, it was a mutual insurance. Clearly the mistake turned on the nature of the contract, since instead of being merely insured, the defendant became also insurer. The Cour de Cassation decided that the contract was voidable for mistake as to the substance of the subject-matter. It is to be assumed that by so doing the Supreme Court showed its preference for the voidability system.

What the French Cour de Cassation was presumably trying to achieve in Le Tresor de l'Agriculture v. Polino, has been expressly formulated by some modern statutes. Under German law, for instance, a declaration "of intention" is voidable if it is affected by a mistake, provided the mistake is of the kind which is declared to be relevant. On principle, therefore, mistake does not render a legal transaction void, as it does under English law. To be sure, there are also instances where mistake indirectly prevents the formation of the contract, as for example, in case the parties, owing to the rules pertaining to the formation of contracts, are not ad idem. This is, however, exceptional, since under German law discrepancies between offer and acceptation (dissens) in general prevent the formation of the contract only if they appear expressly in the declaration of intention made by the parties.

Other codes likewise reject more or less absolutely the rule that mistake as such renders the contract void, the tendency being to assimilate, as to their effects, mistake, fraud and duress. The most conclusive system seems

to be that of the Swiss Obligations Code which provides in very general terms that mistake, when it is operative, renders the contract voidable or more precisely "not binding." The rule relates to unilateral mistake as well as to mutual mistake, under the condition that the mistake is "material." It is noteworthy that "material mistake" comprehends also error as to the identity of the subject-matter and error as to the nature of the transaction, which in many other systems of law renders the contract an absolute nullity.

In comparison with the evolution which took place in the continental systems, the English common law remains very traditional. At common law as in Roman law, the effect of mistake, if it operates at all, is to render the contract a complete nullity.

On the other hand, the courts have developed the use of equitable remedies which may render the contract merely voidable. But as equity in general follows the law in its attitude toward the doctrine of mistake, the whole English system appears to be too rigid. It is also imprecise, since the relationship between common law and equity in contractual mistake is not well settled. In that connection some efforts were made to change the defective state of the law. In Solle v. Butcher, Denning L.J. specifying the area of contractual mistake covered respectively by common law and equity, said that: "Since the fusion of law and equity ... it will be found that only those contracts are now held void in which the mistake was such as to prevent the formation of any contract at all." On the other hand, if the parties have "to all outward appearances" made a contract, it may be voidable in equity. To remove any doubt, Lord Denning considered that Smith v. Hughes, and Cundy v. Lindsay would nowadays be cases where the contract should be voidable and not void. The same line of thought was elaborated in his book The Changing Law, the following passage of which is relevant:

> "The courts of common law had no power to set aside a contract on the ground of mistake. All they could do was to say the contract was a nullity, null and void from the beginning. They had no other way of granting relief. This meant that they were placed in an awkward dilemma. ... The infusion of equity has removed that awkward dilemma. The court is now able to set aside a contract on such terms as may be just. ..."

The system just described, reminds one broadly of the dualist system of the French dominant doctrine. On the one hand mistake may be such as to prevent the formation of the contract-in French terminology one should say erreur obstacle. In all other cases of invalidity for mistake, the contract is merely voidable. It seems that in both systems mistake will rarely be held to render the contract an absolute nullity. This is the situation in French law, and it may be inferred as to the Solle v. Butcher system from the passage quoted above.

However, we should not come to the conclusion that the approach of both systems to the problem of operative mistake is the same. We are now concerned with the problem of effects of mistake, and on that point Solle v.

Butcher seems to be in favour of mere voidability, the common law rule being reserved for those cases in which the parties were not agreed "to all outward appearances."

Solle v. Butcher has been criticised on many grounds. The area which it reserves for the common law has been said to be undefined, imprecise, and too narrow. It was also said that there is no authority for holding that the courts have jurisdiction to relieve parties from the consequence of their own mistake, where the contract is void at law and there has been no misrepresentation. Consequently, it was said that the better view would be that the question of common law mistake should be first considered by the courts, and only if the contract is valid in law may the court proceed to consider the possibility of granting equitable relief. The consequence of this view is that the scope of mistake at common law, narrow as it is, remains too wide, its main defect being its rendering the contract void ab initio. Most of the English writers insist on the point that such an effect results in prejudice to innocent third parties, and for that reason the courts are reluctant to intervene. It may be suggested that the victim is the mistaken party, since at common law the problem of mistake appears, rather as a technical issue specifically concerned with the formation of the contract, than as a relief granted to a party in error. It is true that the courts have attempted to extend the operation of equitable remedies, at least so far as mistake does not render the contract void at common law. This attempt has nevertheless limited effects, and the scope of the cases in which equity intervenes so as to grant relief to the victim of mistake, is too narrow.

As was suggested above, the theory of mistake has not evolved in English as in other countries, because the effects of mistake at common law are too rigid. But, conversely, these effects are rigid, probably as a result of the traditional view that in law mistake must not be an issue of protection. Solle v. Butcher was an attempt to combine in one system the strict effects of the law with the need of granting equitable relief to the victim of error. No doubt the principles stated in this decision, if accepted and generalised, would indicate a more extensive operation of equitable remedies and so would extend the protection of the court to a party who in good faith entered into a contract by mistake.

What English law has failed to perform, has been achieved, after the amalgamation of law and equity, by many of the American states of the common law system. Courts and juridical writers have unified, in one theory, the scope of both absolute nullity and voidability, in a way which reminds some of the civil law systems.

Under this doctrine the transaction is void when the mistake prevents any real expression of agreement, as for instance where there is no mutual assent. On the other hand, when there is a contract in existence the court may grant the mistaken party equitable relief, in particular the right of rescinding the contract.

As in French law and also in the theory of Solle v. Butcher, so under the American system, at least as it appears in the Restatement, operative

will it render it void ab initio or non-existent. This approach to the problem of mistake seems to be sounder than the strict view of the English prevailing opinions.

The historical and comparative survey related above, shows that the law of invalidity of contracts for mistake is still developing. In Roman law error rendered the contract an absolute nullity if it had any effect at all. The praetor who granted equitable relief in case of dolus or metus, refused his protection to the mistaken party. The rules developed under the idea of justice and equity. Besides the notion of mistake rendering the contract an absolute nullity for lack of consent there appeared the concept of mistake vitiating consent, which became the legal basis for protecting a party in error. This progress was itself due, to a great extent, to the evolution of the theory of voidability, which instead of being founded merely on procedure, was adapted during the ages to the use of protecting parties.

This twofold system, which prevails in most countries, is however, itself the object of criticism, since there is no public interest or moral ground for allowing a party to take advantage of the error of the other party, even in cases where theoretically no contract comes into existence, owing to mistake. The tendency is, therefore, to extend the sphere of voidability at the expense of absolute nullity, and in some countries absolute nullity ceased altogether to be a legal effect of mistake.

3. Damages. Mistake may be a ground for awarding damages to the mistaken party, and also, in many countries, to the other party, for the harm caused to him by the rescission of the contract.

Invalidation of the contract does not always have the effect of providing full reparation to the mistaken party or put him back in his old position in every respect. The question then arises if he is entitled to recover damages or an indemnity besides the invalidation of the contract. In most legal systems rescission is no bar to an action for damages when special harm has been proven, but this right is generally conditional on the fraud or at least the fault of the other party. In English law, for instance, the right to damages or to an indemnity may result from misrepresentation. A more liberal point of view is admitted in France, where the victim of the mistake may, after having invalidated the contract, get damages on proving that his mistake was due to the fault or negligence of the other party. In the final analysis the matter is not one of mistake but of contractual or tortious liability.

Independent of the rights of the mistaken party, the question arises whether the other party to the contract also has an action for damages for his losses as a result of the rescission of the contract. At first sight this form of relief would appear to be astonishing. Why, indeed, should the victim of the error, who by invalidating the contract used a legal mean for his protection, be liable to pay damages? The problem involved must be evaluated in connection with the development of the theory of mistake which operates in many countries, and with the extension of its scope. There is no doubt that the new conception of operative mistake in some of the modern continental laws raised the question of the necessity of protecting a party against the mistake of his co-covenantor,

as well as the need of assuring the security of contractual relations, by the so-called doctrine of "negative interest.". In England there is no such a doctrine and it seems there is no need for such a safeguard, since under the English system the other party is sufficiently protected by the theory of operative mistake itself, especially when the error is of one party only. Common law, indeed, by giving effect to a unilateral mistake only if the other party knew or must be taken to have known of it, provides a sufficient protection of the security of trade. Clearly, in such a system the co-covenantor is not worthy of getting any damages or to be entitled to a particular protection of the law. The situation is entirely different in countries where mistake is operative independently of the knowledge of the other party. In such systems there is a need for a safeguard, which is generally provided for by granting damages to the other party who entered into the contract in good faith. The basis of this relief is not, however, uniform and it may be founded on contractual liability or on torts.

The modern theory of "negative interest" was first introduced in the German common law by the writers who based it on Roman sources. The problem had a general aspect: When a contract is void, which party will sustain the harm resulting from the invalidity? Ihering, in his well-known theory of culpa in contrahendo, based the right to be indemnified on contract. He founded it on the assumption that a party who, by making an offer, or, more generally, a declaration of intent, induces the other party to believe in the validity of the transaction is therefore liable if the contract is invalidated. This is clearly aimed at assuring the security of commerce. The damages, however, which may be recovered are not the same as those due for a breach of contract. The writers distinguish clearly between Erfullungsinteresse, which represent the interest the other party has in the proper execution of the contract, and damages for Negatives Vertragsinteresse, which are those sustained. Negative interests do not in general include loss of profit. They may, for instance, be expenditures for drawing up the contract, travel expenses in connection with its conclusion and other similar losses which would not be suffered by the plaintiff, had he not relied on the offer of the mistaken party.

During the nineteenth century this issue was the subject of great controversy. However, one point was clear. The fact that the plaintiff was aware of the invalidity precluded him from recovering damages. On the other hand the impact of the culpa of the mistaken party for having been in error was not solved with the same unanimity and the various opinions are represented in those modern laws which adopted the "negative interests" theory.

Under German law, for instance, the mistaken party is liable for loss suffered by the other party, independently of his own fault. That rule renders the sphere of damages for "negative interests" very wide, since the mistaken party is bound to pay damages in every case where the contract is invalidated by him, unless the other party knew of the mistake or must be taken to have known of it. Since under German law mistake renders the contract merely voidable, the mistaken party has the choice between confirming the contract, or avoiding it and paying damages.

A different system is adopted by the Swiss Code of Obligations, which provides that the mistaken party by repudiating the contract is under a duty to pay damages "if the error is due to his fault." The fault of being mistaken is, however, interpreted widely by the courts and includes the case of negligence. This makes the writers conclude that in most cases the mistaken party will be liable for damages since, in general, when a party is mistaken, there is some element of lack of care on his part, unless it is a case of an excusable mistake.

The French Civil Code does not mention the theory of culpa in contrahendo. The prevailing opinion, however, admits that the mistaken party must indemnify the other party for his losses, and the courts have in some instances granted such relief. The writers are, however, divided on the question whether the relief is in contract or is a liability based on tort. The issue is important for determining the impact of the fault of the mistaken party on his duty to pay damages. Most of the writers conclude that the issue concerns the law of tort, since the code does not expressly mention it in connection with contracts, while the provision concerning the duty to redress torts is wide enough to include losses sustained by invalidation. At any rate, the prevailing French doctrine is in favour of making the liability of the mistaken party depend on his own fault. Clearly, in such a system, the indemnity due is not so much the counterpart of the right of invalidating the contract, or merely the duty of redressing losses caused by having committed a fault. That renders the relief too narrow, and consequently the doctrine of mistake in French law lacks an adequate safeguard for the protection of the other party who entered into the contract in good faith. The effects of this are unsatisfactory. On the one hand the French Civil Code gives a wide scope to operative mistake. On the other hand it does not afford an adequate protection for trade and commerce. This inconsistency explains why the French courts very often hesitate to grant rescission for mistake even if it is operative under the Code, and also why some writers are unsatisfied with the legal provisions, proposing, for instance, to limit operative mistake to those cases which denote some unfairness on the part of the other party.

As shown above, the theory of culpa in contrahendo aims at protecting a party against the mistake of the plaintiff. The question is now, what is the rule if both parties are in error? It seems that when the mistake is common it would be unfair to render the party who avoids the contract liable to pay damages to the other, because in such a case he will bear not only his own losses but also those of the other party, who may be just as interested as himself in setting aside the contract. In Germany, courts and writers are in general of the opinion that the theory of culpa in contrahendo does not apply if both parties have been mistaken. A similar point of view is admitted in other countries.

Summarising, it may be said that while the invalidation of contracts is in modern law chiefly allowed to protect the mistaken party, there is a need for a safeguard in order to protect the co-covenantor and to assure the security of trade. The English and some continental laws resolve the problem by the doctrine of operative mistake itself. Although there are differences between these various systems, they have at least on point in common: When the mistake is of one party only, rescission is granted under the condition that the

other party has shown himself to be unworthy of legal protection, as for instance, if he knew that the plaintiff was mistaken, or if he was ignorant of the error by his own negligence. No doubt that this way of settling the problem to a great extent limits the scope of operative mistake. In other countries, where rescission is granted more liberally, the co-covenantor who entered the contract in good faith has the right to be indemnified for losses sustained by him in believing that the transaction was valid. Such a relief is effective only if it is independent of the fact that the plaintiff was mistaken by his own fault. That is at least the rule concerning the mistake of one party only. When the two parties are mistaken, the opposition between the view of English law and the civil law systems is patent. While in cases of common mistake English law, concerned for the security of trade, renders the contract void in very exceptional cases, most of the civil law systems have not adopted the same legal policy. Consequently they admit on various grounds that common mistake has the effect of rendering the contract invalid, as well as the mistake of one party only. On the other hand, the party who opposes the avoidance of the contract does not always have such a valuable protection as in the case of unilateral mistake. The effect of this is that in many civil law countries, the security of commerce is not sufficiently protected when the mistake is common to both parties.

4. Rectification and reformation of the contract. - While nullity and award of damages are the most common effects of contractual mistake, other remedies have devloped in most countries. The absolute nullity of the contract and even its mere voidability, as well as the theory of "negative interest," are not always well suited to settle the problem raised by the error of one party or of both. Instead of setting aside the contract, the erroneous element may, in many legal systems, be rectified either by the parties or by the court.

Rectification by a party occurs when the defendant to an action of invalidation for mistake, accepts that the contract should be construed in the terms the mistaken party understood them and by so far as the mistake is such as to prevent the formation of the contract, there can be in law no place for such validation. Such a point of view is perhaps technically well founded, but may be absolutely unjust in its effects. Take the example given by a German author, where A offers B 1,000 talers for painting his portrait. After B's acceptance, A gives a notice of invalidation, because by mistake he offered 1,000 talers instead of 1,000 marks. Why cannot B validate the contract by declaring his readiness to accept the offer as understood by B? The prevailing opinion in Germany seems to be in favour of such validation; but it places the whole matter in the realm of good faith. A similar result is achieved by English equity. In certain cases, where the mistaken party satisfied the court that a contract put into writing did not represent what was his own intention at the time of formation, the court gave the defendant his choice of " having the whole contract annulled or else, taking it in the form which the plaintiff intended."

What seems to be "anomalous and exceptional" in English law, appears expressly in certain modern codifications as a specific rule of law. That is for instance the case of the Greek Civil Code, which provides that a jural act is not invalid for mistake if the other party accepts the expression of intention as it was understood by the mistaken party.

In the final analysis, in most systems of law, the defendant has a special remedy against invalidation of the contract. He may take it in the form which the mistaken party intended. That remedy is however, granted more or less liberally, and in general, it is based on equity and good faith.

Besides the right of the defendant to submit to rectification as explained above, the court has in most countries a certain power of rectifying the contract. It is then a remedy in favour of the mistaken party, generally granted on his plea. In England this relief was developed by Equity, since in law mistake when it operates renders the contract an absolute nullity. The problem of rectification arises when the mistake appears in a contract which is reduced to the form of a written instrument. The instrument may be valid under the common law rule, but equity allows the rectification of the error when certain conditions are satisfied. The general rule is that rectification will not be granted unless there has been mistake in expression which is common to all parties. Consequently, rectification is available only if the parties have been in final and full agreement on the terms of their contract, but by mistake, wrote them down wrongly. It is doubtful, especially in the light of a comparative survey, whether we may classify that rule as a remedy for mistake. As was said "what is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing." In the final analysis, the issue is connected with the authority of a written instrument and it constitutes an exception to the principle under which a written contract cannot be varied or contradicted by parol evidence. At any rate, the scope of rectification remains very narrow, as long as it is based on the mistake of all parties. To the general rule there are however exceptions and in some decisions when fraud was proven the court ordered rectification where only the plaintiff had been mistaken. In other cases already mentioned above, the court suspecting dishonesty and yet hesitating to find fraud, has given the defendant his choice of either accepting rectification or else submitting to rescission. The matter is progressing and recently the court rectified an instrument where the defendant was aware of the mistake, but did nothing to correct it. The legal basis of the last decision is not very clear, but there is no doubt that the new approach to the problem of rectification represents a very interesting way of resolving some aspects of mistake.

Rectification of unilateral mistake has been more fully considered in American law. The Restatement of the Law of Contracts, after having restated the rules concerning mutual mistake, provides as follows: "...if one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, but knows what that intention is, the later can have the writing reformed so that it will express that intention." The same rule is expressed by American writers and applied by the courts of many states.

In the civil law countries, the doctrine of rectification has not at first sight the same importance as in Anglo-American law. As a matter of course they admit that an error clearly appearing on the face of the contract will be corrected when this can be done from the other parts of the agreement. The rule is either inferred by the courts, generally as a matter of interpretation of the contract, or expressly provided by the legislator. Rectification of the contract however, as it developed in England and the United States, has no

parallel on the continent, probably because in the civil law systems the distinction between writings and the other modes of manifestation of intention is not as patent as in the Anglo-American system. With them, the will may be manifested in several ways, and especially by writing or orally. A party who by error expressed something different from what he intended to declare, is mistaken and therefore may avoid the transaction if his mistake is one which is operative under the law. The civil codes of some countries explicitly mention such mistakes in expression, but in general a mistake in the way in which the transaction has been expressed (either written or oral) may be operative as well as mistake of intention and consequently render the transaction invalid. To be sure, under the civil law systems, there are also instances where the agreement must be reduced into writing either as a specific requisite required by the law for its validity, or as evidence of the transaction. In these instances the proof of the error may be very restricted by the law and even excluded. However, so far as mistakes are operative when they appear in such writings, they do not in general allow the rectification of the error but render the transaction invalid, because rectification is not with them a current and common relief for mistake.

In this connection it is noteworthy to mention a few but important attempts made in France for resolving certain aspects of mistake by rectification or more precisely reformation of the contract. Under French law, mistake as to the value of the subject-matter of the transaction in general gives no right to a remedy. The courts nevertheless, in some cases of sale of business, the so-called fonds de commerce have decreed rectification of the price, on the ground that the buyer was mistaken as to the amount of the business profits. In Petit v. Leclabart for instance, the vendor misled the buyer, although not fraudalently, as to the accounts of the business sold. The court rejected the plea for invalidation of the sale, but reduced the price agreed upon. The same point of view was adopted in another case by the Cour de Cassation. These anomalous decisions no doubt lack a legal basis, since the Code Civil does not include in the scope of operative mistake an error as to value, or mention rectification as a general remedy for mistake. The rectification of the price by the court may perhaps be explained by the concern for arriving at a just solution, as was also the aim of the English courts in similar cases. The way, however, in which the French courts conceived the problem of rectification is completely different from the Anglo-American doctrine. First, they did not consider the rectification as connected exclusively with a written contract expressing a previous agreement. Secondly, the French courts did not limit themselves to correcting an erroneous expression. They considered themselves empowered to "reform" the contract, since by taking into consideration the mistake of the plaintiff and the circumstances involved, they ordered the reduction of the price, without taking into account what the parties in fact agreed upon. It seems that nothing is more opposed to the spirit of Anglo-American law, than the power of the court to "make agreements for the parties," instead of compelling them to perform the terms agreed upon by themselves.

The same divergency of thought between the civil law and the English law, at least as it stood at an earlier period, appears in connection with the theory of implied warranty for hidden defects of goods sold.

The principle of "caveat emptor" as understood by the common law, is not part of the civil law systems. Consequently they admit that the seller warrants not only a quiet possession and enjoyment of the goods sold but also their fitness and the absence of any latent defect. Under this rule, which originates in Roman law, the seller is liable for qualitative defects, whether or not he had or could have had knowledge of them, provided the defects are substantial and that the buyer was not aware of them.

No doubt the doctrine of implied warranty for latent defects resembles the problem of error in substantia, since the buyer is granted a relief on condition that the defect is latent and unknown to him. Furthermore, the dividing line between a latent defect and mistake as to the subject-matter of the contract is not always easy to draw. In the last analysis, both remedies aim to protect the victim of an ignorance of fact and very often the same fact may be looked upon as an error in substantia or as a latent defect. This is often stressed by juristic writers and the courts of some countries do not always distinguish very clearly between the two remedies, applying concurrently the legal provisions which concern latent defects and mistake. It is true that the prevailing opinion is against such a confusion, and the better view seems to be that as long as the buyer has a right based on warranty against latent defects he should be precluded from an action for mistake. But that is a matter of positive law. For the issue which is the subject of the present study, the doctrine of latent defects suggests a new evaluation of the effects of mistake in contracts. Indeed, what is noteworthy are the remedies granted to the buyer, who may either claim rescission of the sale or ask for a reduction of the price, if he decides to keep the thing bought. When the court is asked to reduce the price, its task is then to rectify the contract or more precisely to reform it, since the inferior value of the goods must be evaluated in order to fix the rights of the plaintiff.

As was already mentioned above, annulment of the transaction for mistake is not always the best way to settle the rights of the parties, especially after the contract is executed. There are also instances where even before execution it would be unfair for one party or the other to set aside the whole transaction. Reformation of the contract may then afford a satisfactory solution. However, the attempts made by the legislator and the courts in that direction are not very satisfactory. The Anglo-American doctrine of rectification is too narrow. The French decisions, ordering reformation of the price are not consistent enough to provide a base for a rule of law. The principle of good faith in German law lacks certainty, at least so far as rectification is concerned. All these attempts show, however, that the traditional effects of mistake, in spite of their development for centuries, are still too rigid. In this sphere of the law there is a need for great flexibility, which may be achieved by a variety of remedies.

The old Roman rule, granting to the buyer an action for reduction of the price, is to a certain extent a complement of the theory of mistake. At any rate, it resolves as a matter of fact many cases of mistake, since in commercial intercourse errors are very often committed in relation to defects and quality of things sold. The idea is not a new one. In Roman law this relief corrected the harshness of the doctrine of mistake and it is now part of the law of most

countries. It is noteworthy that the International Institute for the Unification of Private Law has adopted the same rule, rendering its scope very wide. The draft of "A Uniform Law on International Sales of Goods" provides that the buyer is granted a remedy where the seller has delivered goods which do not possess the qualities necessary for their ordinary or commercial use, or goods which do not possess the qualities required for some particular purpose expressly or impliedly contemplated by the contract, and where generally he has delivered goods which do not possess the qualities and characteristics expressedly or impliedly contemplated by the contract. On the other hand, it is also expressly provided by the draft that the rights conferred on the buyer exclude all other remedies upon which he might otherwise have relied, and in particular those based on mistake. This provision, if adopted, will have the effect of empowering the courts to reduce the price at the request of the plaintiff in many cases of mistake.

It is to be assumed that the extension of the doctrine of latent defects, as well as the insertion of its remedies into the theory of mistake, will resolve many difficulties and afford an equitable protection to the party in error.

5. Conclusion. The problem of mistake constitutes one of the most difficult topics in the law of contract, since the task of the court is to settle opposite interests, independently of fraud or misrepresentation. The principles upon which the courts intervene and the circumstances in which they do so are to a certain extent dependent on the effects of mistake. As shown above, the scope of operative error remained restricted as far as its effects were too rigid and it evolved when its effects progressed. This historical explanation is however only one side of the problem. The theory of "operative mistake" and of the "effects of mistake" are in the last analysis two aspects of the same topic and the true "rationale" of the legislator and the courts in granting relief is an issue of legal policy. No doubt the view which a legal system takes of the theory of mistake is greatly influenced by its conception of the nature of contractual relations. The "will theory" for instance, had the effect in many countries of extending the sphere of operative mistake. English law is based on a different principle. As was said by Lord Atkin, "... it is of paramount importance that contracts should be observed and that if parties honestly comply with the essentials of the formation of contracts, i.e., agree in the same terms on the same subject-matter, they are bound and must rely on the stipulations of the contract for protection from the effects of facts unknown to them."

However, the trend is in general to apply equitable principles in order to correct and mitigate the harshness of the legal rules and principles, either in favour of the mistaken party or of his co-covenantor. In this connection, the flexibility of the reliefs which the court is empowered to grant, is of paramount importance, because justice and equity cannot be limited by rigidity and rigour. The main evolution was rendering the contract merely voidable instead of void ab initio. The "negative interest" theory provides another important advance. "Rectification" as provided by Anglo-American law, is a highly equitable means of resolving some aspects of mistake in expression.

Writers and courts are not, however, always satisfied with these traditional remedies. The old action quanti minoris suggests a new remedy for mistake: the reformation of the contract by the courts. To be sure, the effect of this is likely to endanger the security of trade. However, the incorporation of morality by the legislator into contractual relations is a general trend everywhere, and the power of the court to revise contracts is growing in modern law. Mistake is one of the legal topics where the equitable intervention of the courts is the more justifiable, because the conditions under which a party becomes victim of an error are so various. It is a matter which cannot be rigidly regulated, and the court must be able, under some circumstances, to "review the whole transaction and determine the rights of the parties as practical justice seems to demand." This is perhaps the best inference from the English evolution on this topic. It is also the conclusion to which our comparative study seems to lead.

SALES AND SECURITY DEVICES

1988

Conclusion of Sales Contract taken from Immenkotter, Commercial Law with slight variations)

1. S in Harrar sells to B in Addis Ababa his used truck for birr 20,000. S and B are still negotiating on the question who is going to pay for the transport of the truck from Harrar to Addis. Can S demand payment of birr 20,000 from B?

2. S and B agree that S will sell to B his radio the price of which will be decided at radio repair shop which also estimates the price of used radios. Is there a sales contract?

3. The Harargie Agricultural Development Corporation sells to B a merchant in Addis Ababa about one thousand tons of its organ produce of the 1977-78 harvest year. Is there a sales contract?

   What is the situation if dues to heavy rain and flood the orange s is destroyed?

4. B wants to buy a certain painting from S. Because they cannot agree on the value of the painting they finally agree that Ato X, who is an expert on paintings, shall decide the price and that the painting shall be sold to B at the so estimated price. Before Ato X makes an estimate S sells and delivers the painting to another customer E for birr 2,000, believing that Ato X will fix a price below birr 2,000. Later S asks Ato X to refuse to fix the price. Ato X who wants to remain on friendly terms with S accordingly refuses to make an estimate.

   B wants to have the painting or damages. The value of the painting is birr 1.000.

   To what remedies is B entitled under the law?

5. S sells his truck to B on January 5, 1978 for birr 30,000. It was agreed that S will deliver the truck to B, on January 10, 1978. On January 3, 1978, the truck overturned on its way to AddisAbaba at Debre Sina and became completely out of use. S did not know of this fact at the time of the contract.

   Is there a sales contract between S and B? Any difference if a) the accident took place on January 9, 1978? b) on January 15, 1978?

SALES AND SECURITY DEVICES

1988

Obligations of the Buyer

I Note

The main obligation of a buyer is to pay the price of the thing (see Art. 2314, 2315, 2317, 2318, 2319, 2320,-22 for other obligations of the buyer). The buyer's obligation to take delivery is complementary to the seller's main obligation to delivery the thing.

It must be noted that taking delivery of the thing by the buyer does not preclude the buyer from exercising his remedies for defects in and non-conformity of the thing. Hence taking delivery of the thing by the buyer does not necessarily mean that the seller has performed his obligations in accordance with the contract and the law.

II Assigned Reading Art. 2303-2313, 2314-2322, 2333-2335, 2347-2353.

III Problems

1. The South-Western Agricultural Development Corporation whose farms are located in Shoa, Kaffa and Elubabor provinces, produces fruits and vegetables. B, a fruits and vegatables merchant, buys 3,000 quintals of fruits to be delivered at his store in Addis Ababa on April 2, 1978. However, when the fruits arrive in Addis Ababa loaded in trucks, B refuses to take delivery on the ground that since the market price of the fruits had gone down, he would loose unless the corporation reduces the agreed price.

   What alternatives are open to the corporation under the law assuming it does not want to reduce the agreed price?

2. S sells a dining table to B. It is agreed by the parties that delivery shall be on March 10, 1978. However B does not take delivery of the dining table on March 10, 1978, On March 15, 1978 S sells it to C. On March 20, 1978 B demands the dining table or damages of 50 birr on the ground that if he has to buy it somewhere else, he will have to pay 50 birr more. S,on the other hand, argues that since B failed to take delivery of the dining table at the agreed time, he had a legal fround to cancel the contract. Whose argument is tenable under the law?

   Would it make any difference if the thing sold were a painting by a renouned Ethiopian artist?

3. B buys ten dozen shirts from S. It was agreed that B will pay the price on April 1, 1978. B failed to pay the price on the agreed date.

   What alternatives are open for S under the law?

4. B buys 10,000 quintals of ginned cotton from S at a price of 100 birr per quintal. After B took delivery of half of the ginned cotton, S demands that since the turn over tax that should be paid to the government has not been computed into the sales price, he will not deliver the rest of the ginned cotton unless B pays the turn over tax. Is S's demand tenable under the law?

Exclusion of Seller's Liability for Defects in the Thing

1. Note The law gives the seller the right to exclude or restrict his warranty against defects.
   (c.c. art. 2293, 2295, 2297 and 2294). However, in order for the restriction or exclusion to be effective, there must not be fraud committed by the seller.

   It must be noted that exclusion or restriction of the seller's warranty for non-conformity is not allowed by the law. This seems to be based on the rationale that conformity of the thing delivered with the contract is a prerequisite for performance.

II. Assigned Reading. Same as for warranty against defects in and non-conformity of the thing.

III. Problems

1. B wants to buy a second hand car from car dealer S. S states to B that he will not give any warranty on the brakes. When B tries one of the cars he wants to buy, the engine noise sounds irregular. He talks about it to S. S tells him that he will look after it. Then B buys the car for 7,000 birr. It was agreed that S will deliver the car to B in a week's time. A week later S takes the car to B's house, Four weeks after delivery, S demands payment of 4,000 birr being the remaining price of the car. B refuses to pay the remaining price unless S repairs the motor which was defective at the time of delivery. After a long discussion, B and S agree that on the day of purchase of the car as well as on the day of delivery two pyston-rods were broken which caused the irregular noise of the engine when B tried the car. S argues that he does not have the obligation to warrant B against this defect since he had expressly excluded his warranty since the car is a second hand car and since B knew that something was wrong with the engine when he purchased the car.

   Does B have the obligation to pay the remaining price?

2. B buys a television from S. In the general sales conditions which B has signed, it is provided that all warranties are excluded. In case of a defect, B has only the right to demand repair or replacement of the defective part at his expense. The television does not reproduce any sound. B had it repaired five times at his expense with out any success.

   Can B demand cancellation of the contract?

   Does it make any difference if S, before he sold the television to B, knew of the defect?

80. Contracts of sale and their significance. The definition of a contract of sale in the civil codes (Part I, Art. 237 RSFSR) was taken from the Fundamentals (Art. 39), and at first glance differs little from that given in the first Soviet codes of the twenties. The sole difference is that the earlier codes spoke of the buyer's duty to pay the "agreed price" for property acquired, while the present codes speak of "a definite sum of money."

This seemingly insignificant difference in wording, however, conceals a very substantial change in the relations that assume the form of a contract of sale.

"Agreed price" is price established by the agreement of the parties. The first civil codes were promulgated when private trade was fairly common, private enterprise still existed, and the volume of property deals between private capitalist elements and socialist organisations was quite considerable. Even in those conditions the socialist state pursued a policy of fixing prices, especially for staple foods, but in most contracts of sale the price was ultimately determined by agreement of the seller (vendor) and the buyer.

Contracts of sale are still a very important type of contract in Soviet civil law, but now they are mainly confined to retail trade in which state and co-operative trading enterprises (shops of various kinds) act as vendors and citizens and buyers. The relations between them are commodity-money relations, but they are governed by a major law of socialist economy, that of the planned, proportionate development of the economy. The planned nature of these relations is manifested in particular in the firm fixing of prices of the commodities sold by the state (for details, see Para. 84), which consistently puruses a policy of steadily reducing retail prices. The term "agreed price," therefore, proved to be of little use in the new civil codes.

But contracts of sale do not solely apply to the citizens' buying of goods in retail trading establishments. Socialist organisations are also often involved in retail trade as buyers, acquiring minor equipment, stationery, and sundries. They also purchase goods from small-scale wholesale trading establishments, sell surplus equipment to one another, and so on. Contracts of sale, moreover, are concluded when collective

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farms sell farm surpluses to citizens, and also between citizens, in particular contracts for the sale of houses (see Para. 92 ff). Finally, such contracts are completed in a considerable proportion of the deals between Soviet foreign trade organisations and foreign contracting parites.

GENERAL RULES ON
PURCHASE AND SALE

81. The transfer of property to the buyer's ownership or operative management. In defining a contract of sale the codes stipulated that the "seller shall undertake to transfer ownership of the property to the buyer" (Art. 237 RSFSR). This seemingly inalienable feature of a contract of sale, however, does not apply to contracts in which state socialist organisations act as buyers. That is becuase "the state shall be the sole owner of all state property" (Art. 21 of the Fundamentals) and the socialist state, and not the state organisation, consequently, becomes the owner of property acquired by that organisation. That is why the Fundamentals the traditional definition of a contract of sale by a fundamental provision that "where the buyer is a state organisation it shall acquire the right of operative management of the property" (see Para. 31). Most of the civil codes, moreover, lay it down that certain other buyers, i.e. organisations which under the law or their rules only exercise the operative management of property, though they are not state organisations, also acquire the right of operative management of property purchased rather than the right of ownership. Such buyers, for example, include inter-collectivefarm organisations, the property of which is in their operative management and belongs, according to the law of common property, to the collective farms that have formed them (see Art. 117 RSFSR).

82. The vendor's duties. The seller's (vendor's) main duty is to transfer the thing sold to the buyer. If the vendor does not fulfil this obligation the buyer may demand both transfer of the thing from him and compensation for the damages incurred through the default of transfer; or the buyer may denounce the contract if he wishes and claim damages (Art. 243 RSFSR).

The seller is also duty bound to transfer a thing of a proper quality to the buyer, i.e. such as corresponds to the terms of the contract or to the common requirements if the contract says nothing on this score

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(Art. 245 RSFSR). The demands made on socialist trading organisations in respect of the quality of things sold by them are particularly stringent. Their quality must correspond to the state standards, technical specifications, or samples established for things of this type. This rule is new to the codes and was taken into them from the Fundamentals (Art. 41). Departures from the rule are only possible when that follows from the nature of the given sale contract (e.g. when a work of art is acquired, or when a second-hand article is bought in a commission shop, and so on). The general rule is that the right of ownership or operative management (see Para. 81) is transferred to the buyer at the moment the thing sold is delivered on to him. If the law or the contract, however, makes an exception from this rule, and if the buyer acquires the right of ownership (operative management) prior to transfer of the thing to him, then the vendor must take care of it until its transfer (Art. 242 RSFSR). The expenses connected with this are borned by the vendor unless the contract providedes otherwise.

In some cases, comparatively rare, however, in the conditions of socialist trade, the property being sold may be burdended by the rights of third persons, i.e., it may be pledged, leased, or granted for life use, and so on. The seller must warn the buyer of this when concluding the contract, otherwise the buyer cna claim reduction of the price or cancellation of the contract, and claim and recover damages from the seller (Art. 241 RSFSR).

83. The buyer's duties. The buyer has few duties, and theyare that he must accept the thing bought and pay the seller the established price. If he fails to fulfil any of these duties the seller can demand their performance and compensation of the damages caused by his default. The seller is also given the right to cancel the contract and claim and recover damages from the buyer (Art. 244 RSFSR).

84. Price. As we have already mentioned above, state fixing of the prices for goods sold by socialist organisations follows from the planned nature of the socialist economy (see Para. 80). The Fundamentals (Art. 40) and the civil codes (Art. 240 RSFSR) stipulate that state organisations sell goods "at the established state prices, except in the cases provided for by the legislation of the USSR and, within the limits prescribed by it, by the legislation of the Union Republics." These quite logical exceptions include inter alia the sale of goods

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by Soviet foreign trade organisations at world prices.

The principle of state fixing of prices does not apply to collective farms when they sell their surpluses of farm produce to other co-operative or social organisations, or to citizens. In these cases, and in citizens' sales of property, the price is established by agreement of the parties (Art. 240 RSFSR).

85. Liability for defects in the thing sold. Prior to the Fundamentals and the 1963-64 civil codes Soviet law contained a rule (Claveat emptor) well known in world legislation, by which the vendor was relieved of liability for defects in property sold if these "were known to the buyer during the conclusion of the contract or could have been discovered by him with the necessary care and attention on his part." But already in the pre-war Soviet legal literature attention was being drawn to the fact that this rule did not conform with the moral principles of socialist society. The civil codes now in force base the vendor's liability on a different principle: he is liable for any defects in the property sold except those that he himself has warned the buyer about when concluding the contract (Art. 246 RSFSR).

Insofar as the vendor is liable for any defects he did not explain beforehand, he is also liable for defects he did not know about. This is expressly stipulated in the Civil Code of the Kazakh SSR (Art.235). That Code, moreover, specially points out the mandatory nature of the rules relating to the vendor's liability; any agreement on releasing him from it or limiting it is null and void.

The Civil Codes of the Latvian SSR (Art. 235) and the Moldavian SSR (Art. 253) both make exceptions to the rules on the vendor's liability for the improper quality of a thing in the case of the compulsory sale of property (in execution of a court order, etc.).

The vendor's liability for improper quality can assume various forms, the choice of which is with the buyer. The buyer may elect to demand from the vendor:

--either replacement of the thing if it is defined in the contract by generic characteristics;

--or commensurate reduction of the purchase price and restitution of part of the moneys paid;

--or adjustment or correction of the thing without change;

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--or compensation of his expenses incurred in repairing the thing;

--or cancellation of the contract and compensation of damages.

The rights are all also the buyer's rights if the thing has been bought in a retail trading establishment. But they are then exercised specifically; in particular it is in certain cases the manufacturer and not the trading establishment that replaces the defective thing by another etc. Most of the civil codes therefore provide that when a thing is bought in a retail trading establishment these rights are exercised in the manner laid down by the Republican Council of Ministers (Art. 246 RSFSR). The Civil Codes of the Azerbaijan SSR (Art. 237), Kazakh SSR (Art.234), Tajik SSR (Art. 236) and Uzbek SSR (Art. 264) state that this procedure is laid down by the Republican Ministry of Trade.

86. Complaints and claims about the defects in a thing purchased. The buyer may file claims about defects in a thing purchased (see Para. 85) either directly to the vendor or to a court. In order to reduce unnecessary litigation as far as possible the civil codes regulate the procedure for filing complaints with the vendor in detail. The filing of a claim is the right rather than the duty of a buyer, but the codes establish the periods in which this right can be exercised. A claim must be filed immediately the buyer has discovered the defects, not later than a year after a building has been transferred to the buyer's possession, and not later than six months after the transfer of other things (Art. 247 RSFSR). The Republican Council of Ministers has the right to establish other periods for filing claims about defects in things sold by retail trade establishments, mainly because the statutory periods can prove execessive for certain (e.g.) short-service) goods.

The state standards establish periods of guarantee for certain goods, usually durables, during which the buyer can file a claim (Art. 248 RSFSR). Most of the codes also stipulate that if the guarantee period is shorter than the normal period mentioned above for filing claims, it is the latter that prevails and not the guarantee period.

87. Period of Limitation. A suit in respect of defects in a purchase can be brought against the vendor within six months (Art.249 RSFSR). This period of limitation runs from the date the complaint was laid with the vendor (see Para. 86); but as it is not mandatory to lay a complaint, in cases when one is not laid or when it is impossible to establish the date when it was laid the six-month period of limitation begins from the date when the period established for laying complaints has expired

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(see Para. 86).

88. Liability for dispossession of the buyer on the demand of a third person. The 1963-64 civil codes hardly amended the traditional rules on a vendor's liability for what is known as eviction of the thing sold (Arts. 250 and 251 RSFSR), only intensifying this liability slightly by declaring agreement of the parties to limit or waive it invalid if the vendor knew that a third person had rights to the thing sold and did not warn the buyer of it. The old codes only recognised such agreements as invalid when the vendor "intentionally concealed" the existence of the third person's rights from the buyer. Some of the Republican codes resolve this question in precisely that way. The Kazakh Civil Code (Art. 232), on the contrary, invalidates any agreement on waiving or limiting the vendor's liability for the eviction of a thing from a buyer.

THE SALE
OF GOODS ON CREDIT

89. Legislation on credit sales. The sale of goods on crdit, i.e. with deferred payment, became common in Soviet retail trade in the late fities. The Draft Fundamentals of Civil Legislation published for discussion in 1960 did not mention this type of contract of sale, but all participants in the discussion recognised the need to include it in the Fundamentals.

The Fundamentals (Art. 43) referred the regulation of these relations to the exculsive competence of the Union Republics. The Republican codes accordingly included articles containing rules on the sale of goods on credit to citizens by retail trade enterprises and laid it down that the cases and manner of sales on these terms were to be defined by the Republican governments (Art. 252 RSFSR). So far all Republican Councils of Ministers have issued ordinances regulating these relations in detail; in the RSFSR, in particular, there operate Instructions on the Procedure for Selling Goods on Credits, approved by the Ordinance of the RSFSR Council of Ministers on 9 March 1965.

90. Prices and the manner of accounting. All the civil codes contain a general provision that goods are sold on credit at the prices operative on the day of the sale. If these prices are subsequently altered, the terms of the contract concluded by the parties are not changed, and no re-assessment is to be made (Art. 252 RSFSR).

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The Azerbaijan (Art. 243) and the Lithuanian (Art. 269) Civil Codes contain rules relating to the keeping of accounts between buyer and seller.

The buyer, on receiving goods bought on credit, pays the part of their value established by the ordinances already mentioned (see Para 89) and pays the remainder in instalments. The amount of these and the manner and period of their payment are indicated in the written undertaking that the buyer gives to the seller when concluding the contract.

91. Transfer of title to property. Since the buyer does not pay for goods bought on credit at once the question can arise of the applicability to these contracts of the general rules relating to the moment when title to property is transferred to the purchaser (see Para. 45). The Fundamentals (Art. 43) give an unambiguous answer to this question: title to the goods arises in the ordinary way, i.e. when the goods are transferred unless the law or the contract establishes otherwise. The civil codes reproduce this rule (Art. 252 RSFSR) and do not introduce any special rules on the transfer of title for these contracts.

SALE OF A HOUS (DWELLING)

92. The form of the contract. The civil codes lay down special and, as a rule, more btringent requirements regarding the form of contracts for the sale of dwellings than for other contracts of sale. This is both because of the considerable value of the property sold and becuase the transfer of title to a house involves transfer of the right to use the land on which it stands, and also becuase of the need for a control over the observance of the restrictions established on the sale of dwellings (see Para. 93.).

In monst Republics the form of this contract differs according to whether the house being sold is situated in a town (or urban area) or in a rural locality. In the first case the contract must be certified by a notary if the buyer or seller is a private citizen. And the contract, no matter who concluded it, must be registered with the local authorities, namely the Executive Committee of the local Soviet of Working People's Deputies. In the second case the contract of sale may be made in simple written form but it too must be registered with the Executive Committee of the local (rural) Soviet of Working People's Deputies (Art. 239 RSFSR). The permission to conclude contracts for the sale of houses in simple written form is more convenient for the parties than the former procedure

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which required a deed for any contract for the sale of buildings. The rules of the civil codes in several Republics with a dense system of communications, e.g. Azerbaijan (Art. 230), Estonia (Art.244), Latvia (Art. 248), Lithuania (Art. 255), Moldavia (Art. 240) and the Ukraine (Art. 227), make a deed obligatory in the conclusion of contracts for the sale of a dwelling regardless of its location.

A contract for the sale of a house is deemed concluded only when all the requirements regarding its form have been observed, i.e. from the time of its registration. This point is specially stressed in the Civil Codes of the Armenian SSR (Art. 241), Azerbaijan SSR (Art. 230), and Georgian SSR (Art. 239), Some codes grant a definite period (usually three months) to the parties for registering contract after certification by a notary. Failure to comply with the statutory form of the contract profided for in the codes renders it null and void.

93. Restrictions on the sale of dwellings. Since the value of dwellings is usually considerable, they are more liable than other property to become the object of speculative deals. The old civil codes therefore included a rule by which not more than one house could be sold in the name of an owner, his (her) spouse, and minor children in the course of three years. This rule was retained in the civil codes now in force (Art. 238 RSFSR), but they stipulate that this restriction does not apply to cases when the reason for the sale of a house is the fact that the citizen, his (her) spouse, and minor children happen to own more than one house (see Para. 36).

Practice has shown, moreover, that the need to alienate more than one house during three years can arise for quite valid reasons, e.g. through moving to another locality, illness, etc. Taking these circumstances into account, the Civil Codes of the Armenian SSR (Art. 240), Byelorussian SSR (Art. 234), Estonian SSR (Art. 243), Kazakh SSR (Art. 227), Moldavian SSR (Art. 239), and Ukrainian SSR (Art. 226) stipulate that given valid reasons, the Executive Committee of the local Soviet of Working People's Deputies can permit a citizen to sell more than one house over three years.

The Civil Codes of the Estonian SSR (Art.243) Georgian SSR (Art. 240), Latvian SSR (Art. 247), Moldavian SSR (Art. 239), and Tajik SSR (Art. 247) contain special rules not known in the former legislation,

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relating to the sale of uncompleted dwellings. In order to preclude the use of such contracts to sell a citizen a plot of land owned by the state, for housing construction, it is laid down that an unfinished house can only be sold with the consent of the Executive Committee of the local Soviet. The purport of this rule is apparent in the Civil Code of the Georgian SSR, which prescribes that permission is not required when the uncompleted house is sold for demolition.

Thus all the restrictions on the sale of dwellings contained in the civil codes have a quite definite purpose, that of preventing citizens from deriving unearned income from their property or from land plots granted to them by the state.

94. The sale of a house on condition of life enjoyment or maintenance. The Civil Code of the Estonian SSR (Art. 243) has a very interesting rule on a possible condition in a contract for the sale of a dwelling. Under this rule the contract concerned can provide for the right of the seller or of a third person to use premises in the sold house during his (her) lifetime or for a definite period. This right is preserved when the title to the house is transferred by the buyer to another person.

All the codes, moreover, provide for the possibility of a contract being concluded under which a person who is nonable-bodied through age or poor health transfers a dwelling to the ownership of another party, who contracts to provide to the former owner material maintenance to the end of his (her) life in the form of housing, board, care, and help. The RSFSR Civil Code regards such a contract a kind of contract for the sale of a dwelling (Arts. 253 and 254), but other Republican codes treat it as a special contract. Under Art. 284 of the Lithuanian Civil Code not o only the house but also any other property transferred with it can be the subject of such a contract. In Estonia (Art. 432) and Latvia (Art.276) the purchaser of a house can contract to maintain both the former owner and the non-able-bodied members of his family.

Contracts alienating a house on condition of life maintenance are seldom met in practice. This is explained by the high sclae of the pensions payable to old and non-able-bodied citizens from the state social security funds.

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95. Agreement to conclude a contract of sale. The rules on contracts of sale in the first civil codes of the RSFSR, Ukrainian and Georgian SSRs included norms on agreements to conclude a contract of sale. The codes now in force, however, do not mention this type of contract because it is almost non-existent in practice. That does not mean, of course, that such a contract cannot be concluded. Both the Fundamentals (Arts. 4 and 33) and the civil codes say that obligations can also arise from transactions not provided for in lawif they do not contradict it. Parties, therefore, have the right to enter into an agreement to conclude a contract of sale, guided by the general statutes of obligations and rules on purchase and sale.

The Uzbek Civil Code (Art. 272), however, contain a special provision on agreements to conclude a contract of sale. Such an agreement must be certified by deed after which the parties are given six months to conclude the contract for sale of the house. If one of the parties to the agreement avoids sale or purchase of the house the other party can request the court within this period to order said party to conclude the relevant contract. An agreement to conclude a contract of sale is terminated if on the expiry of six months the contract for sale of the house has not been certified by a notary and neither of the parties has brought an action in court against the other party for such a contract to be concluded.

THE PASSING OF PROPERTY AND RISK IN SALE OF GOODS

A COMPARATIVE STUDY

F.H. LAWSON*

If, after the emptio was perfecta but before the due date of delivery, the subject matter of a sale was destroyed without any fault on the seller's part, Roman law none the less required the buyer to pay the price, and refused him recovery of the price by condictio indebiti, if he had already paid it. As Professor Radin has said, we describe this rule romantically when we say that once the sale was perfect the risk passed to the buyer. Yet although, as stated realistically above, the rule obviously belonged to the law of obligations, and although the Romans were most careful to keep the latter distinct from the law of property, the Romans themselves commonly expressed it in the form periculum est emptoris, and thought of it as an exception to a general principle that the risk of destruction falls on the owner of a thing (res perit domino). French law and the common law as found in the cases and codified in the Sale of goods Act and the Uniform Sales Act, have adopted the same language, but with greater apparent consistency, for in both systems the 'perfection' of a contract of sale passes the property also, though there is a minor variation in the way this second rule is formulated, French law making it a substantive rule which can be varied at will by the parties to the contract, whereas the common law makes it the most important presumption as to the intention of the parties, that intention being decisive as to the moment at which property is to pass.

But the French and common law statements must not be taken at their face value. In practice the position is not very different from the Roman. One cannot formulate the law in such a different way without practical differences appearing at unexpected points, and it may be that the results, say, where goods sold are still in the seller's possession when he becomes bankrupt, are not quite the same; though a careful examination of typical cases might well show that French law is farther than the common law from Roman law. But the unpaid seller's lien prevents a buyer, who cannot or will not pay, from taking advantage of his title, whether by suing on the contract or in virtue of his property in the goods, or by giving a sub-purchaser an immediate right to possessio Moreover, a seller who is left in possession can give a good title to a bona fide second purchaser.

No doubt Sir Mackenzie Chalmers and Professor Williston had all these points in mind when they prefixed to the sections dealing with the passing of property and risk the little remarked heading 'Transfer of Property as between Seller and Buyer', and before the next group of sections the heading 'Transfer of Title'. But these hints, which are not followed up in the actual sections of the Sale of Goods Act and the Uniform Sales Act, which speak of 'property' generally and of the passing of title by 'a person who is not the owner', receive full expression for French law in the actual words of C.C. Art. 1588:

> 'Elle (la vente) est parfaite entre les parties, et la propriete est acquise de droit a l'acheteur a l'egard du vendeur, des qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore ete livree ni le prix paye;

*65 Law Quarterly Review (1949) PP. 352 - 366.

and in the following passage in Josserand's well known treatise:

> 'Notre legislation envisage le probleme sous deux angles differents; 1° entre les parties a l'operation et les personnes assimilees, notamment ou qu'on l'etend jusqu'aux confins du deuxieme; les parties ont signe la convention; elles en connaissent donc les termes; rien ne semble s'opposer a ce que l'accord produise, vis-a-vis d'elle et sur le champ, tous les effets dont il est susceptible, y compris l'effet translatif; mais toute autre est la situation des tiers, lesquels n'ont point ete meles a l'operation; ne serait-il pas illogique et injuste de leur en faire sentir les effets, favourables ou defavorables, aussi longtemps qu'ils n'auront point ete portes a leur connaissance? On peut donc admettre un systeme legislatif dans lequel, par exemple, la vente d'immeuble serait, par elle-meme, translative de propriete vis-a-vis des parties, dans leur rapports respectifs, mais non point a l'egard du public; tel est precisement le systeme de notre droit civil positif francais...'

We shall leave to one side the transfer of immovables, which as regards third parties involves registration. Registration is also required for the transfer of certain corporeal movables, such as ships and aircraft. For all other goods the overriding principle contained in art.2279 of the Code Civil, "En fait de meubles la possession vaut titre', gives adequate protection to third parties. To translate it into common law terms, although the property in goods passes or fails to pass to the buyer in accordance with the terms of the contract, whichever of the parties allows the other to have possession of the goods is estopped from denying the latter's authority to confer a valid title on a buyer who is unaware that he has no property in them. Or, to give the principle its full range, goods are in French law, subject to certain exceptions which have no relevance to the present question, negotiable.

Now this is certainly not the view of the common law, which has firmly refused to draw all the possible implications from the doctrine of estoppel and certainly does not regard goods as negotiable. Both English and American Law allow a seller, who continues or is in possession of the goods, to pass a good title to a bona fide purchaser; but in England, at least, it has been held that where he continues to possess in virtue of a subsequent hire-purchase agreement, he has no such power, since he has become a mere bailee, even though no change has been made in the custody of the goods. We may express the rule by the proposition that nothing in the contract of sale can deprive the seller in possession of his power to pass the title to a third party who is unaware of the contract. English law has gone farther and says that no term in the contract, e.g., a reservation of the right of disposal, can deprive the buyer who has obtained possession with the seller's consent of the power to pass the little to a third party who is unaware of the term. Thus, it is impossible for an English seller, by a term in the contract of sale, to obtain the full effect of the Roman rule that, where credit has not been given, not even delivery passes ownership unless the price has been paid or security given for it; though the

the main practical effect has been to make a distinction between credit-sales and hire-purchase agreements, the acquirer of goods under the former being able, under the latter unable, to pass a title to a bona fide purchaser. American law parts company with the English law here; it has not drawn this further inference in relation to the buyer in possession. On the other hand it has made a most valuable distinction, almost unknown to English law, between negotiable and non-negotiable documents of title, and, whilst conferring no power on the holder of the latter to pass a better title than he himself has, even though he is a seller left in possession of them, gives full security to the holder in due course of a document of the former class. In other words, the Uniform Sales Act substitutes for the negotiable goods of French law negotiable documents of title to goods. Professor Williston has given a most illuminating account of the reasons which led him to enshrine in legislative form the distinction between negotiable and non-negotiable documents of title. But whence come the other divergences?

The starting point is to be found early in the nineteenth century. Within a few years of each other the courts of England and of Massachusetts were faced with the problem, what were the relative rights of a creditor who had been given a security over goods in another's possession and a judgment creditor who had subsequently obtained possession of the goods without notice of the previous security. The Court of King's Bench decided that the judgment creditor must take subject to the prior security; and Parke J. said that the want of delivery under the latter was only evidence that the transfer was colourable'. The Massachusetts courts took the opposite view. Blackburn's remarks in his famous treatise of the Contract of Sale are instructive at this point:

> 'A gentleman of great learning, Mr. Serjeant Manning, ... maintains that the rule that property is transferred by a bargain and sale without any delivery, is contrary to natural right, and is moreover a modern misapprehension arising from a mistaken construction of the civil law. It does not seem evident in what the superior natural justice of the civil law consists. There is certainly nothing iniquitous in the rule of the civil law, "traditionibus dominia rerum non nudis pactis transferuntur", but had the authors of the civil law written, sine traditionibus dominia rerum nudis pactis transferuntur, it would have read as well. Both are rules of positive law, and if we were discussing what the law should most conveniently be, much might be said on both sides; but whether the rule of English law was originally adopted by a misapprehension or not it is submitted that it is not modern, but the ancient rule such as has existed since English law began.'

However, some thirty years later the English courts were faced with a hard case in which a buyer had quite innocently left goods in the seller's possession and, not knowing that there were documents of title he could call for, left those in his possession too, whereupon the seller pledged them to a bank for an advance. They decided in favour of the buyer. Parliament, however, stopped the leak by inserting in the Factors Act, 1877, a provision giving a seller in possession of documents of title to goods power to dispose of the goods to a bona fide purchaser; and it apparently left bound to adopt a corresponding solution where documents of title had come into the possession of the buyer with the consent of the seller. Then, when the Factors Acts were consolidated in the Factors Act, 1889, the opportunity was taken of assimilating the possession of the actual goods to the possession of documents by title. Thus English law reached its present state by the hard way of trial and error. As I have already suggested, what seems to have been in the mind of the legislature was a notion that third parties should not be adversely affected by anything agreed on by the parties inter se in the contract of sale or in the manner of carrying it out, unless they had notice of it. Chalmers gave correct expression to this notion when he headed the sections on the passing of property and risk 'Transfer of Property as between Seller and Buyer'.

Now in Lanfear v. Sumner, the Supreme Judicial Court of Massachusetts reached without legislative aid virtually the same position that English law attained in the Factors Act, 1889, and it is interesting and instructive to see how they did so.

After holding that both the prior giving of security to the particular creditor and the subsequent creation of the judgment debt must be treated as sales, they said roundly that 'The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against everyone but the vendor. When the same goods are sold to two different persons by conveyance equally valid, he who first lawfully acquires the possession, will hold them against the other', For this proposition they cited, first, an earlier Massachusetts decision which is inaccessible to me, but is, it would seem, unimportant since Lanfear v. Summer is always cited as the leading case, secondly, an English case in the Term Reports which a Connecticut judge later held to have been misunderstood, and finally, various texts from the Corpus Juris Civilis and later civilians. Lanfear v. Summer is in fact one of the small band of important cases in which American courts of the early nineteenth century followed Roman in preference to English authority. After some difference of opinion it appears to have set the tone for American law as a whole.

What of the other leading doctrine of Roman law, that, except where credit has been given, the property does not pass even on delivery unless the price has been paid or some security given for it? American law has of course not taken the revolutionary step of accepting this doctrine, but has left the seller to produce its effect by an express reservation of the right of disposal, and it has not, except where negotiable documents of title come into the picture, prevented such a reservation from adversely affecting third parties. We may express the difference between the rules of the Uniform Sales Act and of Roman law by saying that whereas under the latter a presumption that the property does not pass without payment or security is rebutted by an express grant of credit, under the former the presumption is that credit has been granted. So far as cash sales are concerned, the two laws are the same.

The Uniform Sales Act shows even more clearly than the Sale of Goods Act that the common law systems have not been greatly affected by the notion that a buyer should be entitled to rely on the power of a possessor of goods to pass a good title; and indeed a law that refuses, with rare exceptions, to allow a bailee to give a bona fide purchaser a good title to his bailor's goods is entitled without sacrifice of principle to make such derogations as it thinks fit, and such only, from the rule nemo dat quod non habet. We may perhaps think that 16-20 of the Sale of Goods Act conform more closely than 17-22 of the Uniform Sales Act to the heading 'Transfer of Property as between Seller and Buyer', but the heading is only meant to warn the reader that such a transfer will not necessarily operate as against third parties; it does not say that it will never so operate. The sections in question are primarily intended to regulate the transfer as between the parties to the contract; that is all. American law has of course, been able to take this line without damaging credit largely because it has made so full a use of negotiable documents of title, and perhaps English law has done well enough for practical purposes without making its documents of title negotiable, though certain difficulties have arisen from time to time. For in the modern world of commerce the possession of documents of title is much more important than the possession of goods. This is, of course, a development that the Romans never knew. But, this factor apart, how like English law, and still more American law, is to Roman law!.

For, whatever may have been the motive that originally induced the Romans to insist on the use of the recognised conveyances for the transfer of property and to refuse such effect to a mere contract, as early as the classical period no one not a party to a delivery could know for certain whether it had vested ownership in the person who obtained physical control of the goods, or interdict possession or only detention, which was without any juristic significance; and once the validity of traditio brevi manu and constitutum possessorium had been admitted, conveyance by agreement became possible without any transfer of physical control at the moment the property passed. To crown all, Roman law adhered strictly to the maxim nemo dat quod non habet, not

even allowing a bona fide purchaser of goods to perfect by long possession his title to goods obtained from a non-owner except in the very rare cases where they had not been the object of a theft, a term of very wide application. All the same it is clear that, for the property to pass, one of the recognised conveyances was required, mancipatio, in iure cessio, or traditio, whether in its original form of an immediate transfer of physical control or brevi manu, or an attornment to the buyer by constitutum possessorium. But was the conveyance necessary only as against third parties? For this we must examine the connection between the passing of risk and the transfer of property as between seller and buyer. Would it be correct to say that the former is the only effect of the latter? If that is a true statement, we can safely affirm that a conveyance was necessary for a transfer of ownership only as against third parties.

We must first note that risk includes, not only the risk of total destruction, but also of partial destruction and deterioration; and that with the risk goes, by a natural corollary, a right to any benefit accruing since the date when the emptio becomes perfecta, i.e., any enhancement of the value of the goods or any fruits or accessories. Admittedly it is possible for a law to say that unexpected changes in value subsequent to the fixing of the price do not warrant either party's refusing performance of the contract, without subjecting the buyer to the risk of total or even partial destruction; but a law which accepts the latter principle can hardly refuse to accept the former.

If we look at the other effects of the transfer of property as between seller and buyer in the common law systems, we shall see that they are for the most part, if not entirely, illusory. Thus § 66 of the Uniform Sales Act, re-enacting a rule of English common law which, though still in force, is not set out in the Sale of Goods Act, gives a buyer of specific goods the property of which has passed to him an action of detinue or trover against the seller in case of non-delivery. But, in England at any rate, he cannot recover more in such an action than if he had brought an action for non-delivery under the contract; and his chances of obtaining the actual possession of the goods will be no greater if he asks a judge to order restitution in a common law action of detinue than if he sued for specific performance. Moreover, the unpaid seller's lien is a bar to an action of trover brought by a buyer who has not paid the price or is not ready and willing to pay it. Thus, so far as the buyer's remedies against the seller are concerned, he is no better off than if the property had not passed as between them; and, similarly, the Roman refusal of a vindicatio to a buyer against a seller who is still in possession of the goods furnishes no valid argument against the proposition that the property passed as between seller and buyer as soon as the emptio was perfecta.

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If, however, the property may pass as between seller and buyer before delivery, and if a universal successor to either seller or buyer should, as we may think, succeed to the exact position of his predecessor in title, then, it may be urged, the trustee in bankruptcy (at Rome the bonorum emptor), should not be able to retain as against the buyer any goods which, though sold, are still in the seller's possession. But the bonorum emptor could retain such goods, and all the buyer could do was to prove for damages for non-delivery; hence it might be thought that the property did not pass as between seller and buyer by force of the contract. However, it is open to serious question whether we should take so technical a view of the problem. After all, the bonorum emptor derived his title from a sale made on behalf of the creditors and acted much less as a successor to the bankrupt than as a third party; besides which it is very doubtful whether he was considered a successor, except for certain limited purposes. If we look beyond the confines of the Sale of Goods Act and the Uniform Sales Act to the law relating to insolvency, we shall find that the doctrine of reputed ownership in bankruptcy law and the statute 13 Eliz. c. 5 against fraudulent conveyances reduce almost to vanishing point the right of a buyer who has left goods in the seller's possession to claim their full value against the creditors of an insolvent seller; and yet, with a full knowledge of these limitations, both Chalmers and Professor Williston described §§ 16-20 of the Sale of Goods Act and §§ 17-22 of the Uniform Sales Act as governing the transfer of property as between seller and buyer. Indeed, the effect of 13 Eliz. c. 5 is give in § 26 of the Uniform Sales Act, one of the group of sections headed 'Transfer of Title'.

It is therefore very difficult to conceive of any practical consequence as flowing from the transfer of property as between seller and buyer other than the passing of risk, with its corollary, the right of the buyer to receive any benefits accruing after the complete sale.

It would have been, to say the least, unnatural for the Roman jurists to have used the language of the headings in the Sale of Goods Act and the Uniform Sales Act, for a relation arising out of a contract and limited in its effects to the parties to it was completely expressed in terms of obligation, and the language of ownership was confined to cases where a third party might be affected; the Roman law of property was exclusively concerned with iura in rem. On the other hand, in the common law the treatment of the contract of sale as passing the property in goods preceeded in time the recognition of its obligatory effect, debt and detinue being in origin proprietary rather than contractual remedies; hence the difficulty has been to see that later developments have limited the effects of the passing of property to the relations between the parties. However, if we look at the situation as a business man would without juristic parti pris, we may guess that he would regard the property as having passed as between seller and buyer as soon as the contract was perfect; and we may not unreasonably conjecture

that the Roman layman thought like the modern business man on this point. We are no more entitled to assume that the ordinary Roman followed the jurists in their relentless search for the ultimate products of legal analysis than we should be justified in expecting the modern business man to adopt the much less analytical methods of the common law.

The conclusion here submitted is in accord with the, on the whole not well received, theory of Windscheid. He says:-

> 'The reason for this exceptional provision is to be found in the fact that the declaration of intention to sell (Verkaufserklarung) is a declaration of intention to alienate (Entausserungserklarung). That means that its content is not so much that the seller binds himself to surrender the thing sold, as rather that he actually surrenders it. In consequence of this characteristic of the declaration of intention to sell, the thing sold is treated by the law, so far as the relation of the seller to the buyer is concerned, as though it had already been severed from the seller's estate and passed into the buyer's'.

And later on he says:-

> 'The reason for this rule is the alienatory character of sale, which has led to the point of view that the thing sold, so far as the relation between the parties is concerned, is regarded as being, even without delivery, severed from the seller's estate and transferred to the buyer's'.

How otherwise are we to rationalise the Roman rule as to the passing of risk? The suggestion has been made - it was indeed an obvious one to make - that the rule dates back to a time when sales were made by mutual stipulations, the seller undertaking by one contract to deliver the goods and the buyer undertaking by another, separate, contract to pay the price. If delivery became impossible through destruction of the goods, the seller was discharged from his obligation. On the other hand, the buyer could never be discharged, since the payment of money can never become impossible. However, sonner or later, the acceptance of a doctrine of frustration, will bring men to the conclusion that it should apply to both parties. The Prussian, Austrian and German Codes all look at the problem in this way, and they have all departed from the Roman rule and postponed the passing of risk until delivery.

Moreover, the rule that a promise by stipulation is discharged by subsequent impossibility does not look old - it may not be older than the recognition of consensual sale (emptio venditio) - and the praetor would have had no difficulty in allowing a buyer to set up an exceptio doli, if sued by a seller for the price of goods he could no longer deliver. If it be urged that even in consensual sale the Romans were late in recognising

the interdependence of the promises made by seller and buyer respectively, the answer is that they did eventually recognise it by insisting, for example, that the one party could not be required to perform his part of the contract unless the other party was ready and willing to perform his (the so-called exceptio non adimpleti contractus). Either we must regard the rule as to risk as an exception - a very striking and remarkable exception - to this principle, or we must say that it is not an exception at all, since the buyer has, from the time when the emptio became perfecta, acquired the property in a certain sense, i.e., as against the seller.

Perhaps it is for this reason that in English law the doctrine of frustration seems to have left on one side the question of risk in the sale of goods. So far as I am aware, the first occasion on which they have been clearly brought together is in § 2 (5) of the Law Reform (Frustrated Contracts) Act, 1943, which says:-

> 'This Act shall not apply - . . . (c) to any contract to which section seven of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished'.

On this the note of the learned editors of the twelfth edition of Chalmers' Sale of goods Act to the words 'or to any other contract, etc.', is very much in point:-

> 'These words are inserted perhaps to make it clear that the Act does not apply to cases where the property in the goods has passed to the buyer, but have perished before delivery to him, or to cases falling within section 6 of the Sale of Goods Act, though it may be doubtful whether in either of these cases the contract can properly be said to be frustrated'.

Three other possible explanations of the rule are given by Professor de Zulueta in the following words:-

> 'Periculum emptoris expresses the economic object of sale which is that the seller shall get a constant, but the buyer only a variable value, or that the true object of Roman sale is the thing as it is in the seller's hands at the moment when it becomes deliverable, it being the buyer's duty to come and fetch it, or again that deferred delivery of a thing ready for delivery is in the interest of the buyer'.

The last two of these explanations not only are compatible with the notion that the property passed as between seller and buyer as soon as the emptio was perfecta, but may perhaps be considered other ways of expressing it; it is for the buyer to fetch his own goods; it is in the interest of the buyer that the transfer of

physical control, not the property, should be deferred.

The first explanation deserves fuller examination. Doubtless it is the economic object of sale that the seller shall get a constant, the buyer a variable value; except where the value of money fluctuates widly, the buyer is a speculator, the seller a hedger. But this does not cover the case where the thing has been wholly or partially destroyed by accident; and it does not explain why the buyer is entitled, once the emptio is perfecta, to the fruits of the things sold. The statement in Justinian's Institutes, that advantages should go with risk, though doubtless classical in origin, looks much more like a later rationalisation by jurists who regarded the doctrine of risk as a part of the law of obligations than a genuine reason for the rule concerning fruits. A much more probable reason, and one that would commend itself better to a layman, is that the fruits of a thing must be delivered to the buyer because, as against the seller, the thing itself was already his. Moreover, it is a distinct strain to regard destruction of the thing sold as an extreme instance of diminished value. A business man might well complain that in assuming the risk of the latter he did not assume the risk of the former.

If the hypothesis that the property did pass as between seller and buyer when the emptio was perfecta is sound, an additional explanation may be given for another rule of the Roman law of sale which has never received a completely satisfactory solution. A seller was not bound to make the buyer owner of the thing sold, but merely to give him vacua possessio, and to warrant him against eviction. The rule might lead to awkward consequences: thus, if after the seller had sold a thing in good faith, the buyer obtained certain evidence that it belonged to another person, he must, whether or not the owner seemed likely to assert his title, accept delivery and pay the price; and the warranty against eviction might be worth little to him if the seller fell on evil days. Hence many attempts have been made to explain the rule. It has been suggested that a contract to which foreigners were commonly parties could not contain a term binding the seller to make the buyer owner, since the full Roman ownership (dominium ex iure Quiritium) could not be vested in a foreigner; and similar difficulties would arise, for example, where the thing sold was provincial land, of which no private person could be dominus. But to this it has been answered that in the contract of exchange (permutatio) ownership had to be given; that the buyer had to make the seller owner of the price, and that the difficulties relating to foreigners and provincial land were more appropriately met by special rules. We must therefore conclude that, although the rule proved convenient from this point of view, it had another origin. Another explanation is that the rule 'dispenses the seller from having to prove title and that business is thus facilitated.' But to this it has been answered that 'in business one does not demand proof of title unnecessarily; we are obliged to demand it under our difficult English land law, but we do not habitually demand proof of title to goods, in spite of the fact that the seller of goods warrants - it is a "condition" - that he has a right to sell'. In other words, an obligation to give a good title does not imply an obligation to prove a good title to the satisfaction of the buyer; that is something that the buyer must stipulate for expressly. An obligation to give a good title is in practice a warranty of title, which operates when the title is shown to be bad.

The implied warranty of title appeared very late in English law - as late as the first half of the nineteenth eentury. In Roman law it was from an early date customary to stipulate expressly for a penalty of double the price or (in effect) for unliquidated damages in case of eviction, but only at a relatively late date was a warranty against eviction implied in a contract of sale. Thus there are two questions to be answered, namely, why did the customary stipulations take these forms rather than that of a warranty of title, and why did the obligation to deliver not imply a warranty of title? The answer to the first question is probably to be found in the historical circumstance that the liability of a person who had mancipated property to be sued in an actio auctoritatis for double the price was regarded as delictual and accrued only when the alienee was evicted: most warranties in early times are against eviction. This action did not lie against one who alienated property by traditio, and so it was necessary to make an express stipulation; but naturally the buyer bargained for a remedy equivalent to the actio auctoritatis. By the time the stipulation for quiet enjoyment, giving rise to an action for liquidated damages, was introduced, this mode of thought had become inveterate, and so the warranty eventually implied in the contract of sale came to be against eviction and not of title. But why did the obligation to deliver not itself operate as an obligation to give a good title? I submit that the true reason originally was that the purpose of delivery was not to transfer the property, which had already passed as between seller and buyer when the emptio became perfecta -probably the only transfer of property that interested the parties -but to effect 'delivery' in the common law sense of the term, i.e., to give the physical control of the thing to the buyer. The Latin word for 'deliver', tradere, often has this wider meaning. Delivery would, of course, automatically pass full ownership, if the seller was owner.

We might perhaps have expected the jurists, when they came to frame a coherent body of doctrine, to treat the obligation to deliver as an obligation to give a good title; but the customary stipulations stood in the way. To imply them in the contract was quite possible, but it was not easy to extend their operation so as to warrant title, since their very form seemed to deny the appropriateness of a warranty of title; and the very need for their existence seemed to show that without them delivery would not even imply a warranty against eviction, much less a warranty of title. The jurists were, however, able to insist that the possession transferred by delivery must be free from incumbrances - an important point which would commend itself to the layman - and, as the doctrine of possession became clarified, that it must be such as could not be attacked by an interdict.

F. H. Lawson.

Taken from "Transfer of Ownership of Movable
Corporeal Goods under Contract of Sale"

By Haile Fesshaye

". RULES PROTECTING POSSESSION IN GOOD FAITH

Having considered in the previous chapter how ownership of movable corporeals is transferred under a contract of sale, let us now examine to what extent this property may be oppossed against third parties who acquire the property in good faith.

I. DEFINITION AND PROOF OF GOOD FAITH POSSESSION

Article 1161 states that "[W]ho-soever in good faith enters for consideration into a contract to acquire the ownership of a corporeal chattel shall become the owner thereof by virtue of his good faith when he takes possession of such chattel." Four elements must be satisfied to give effect to this Article:

1) there must be a contract for consideration - in which case gift is not protected; and of course, the contract must be valid;

2) there must be good faith;

3) the contract must be to acquire ownership - in which case loan or lease is not protected;

4) the third party must take possession of the thing.

It must be noted that if the above four elements are satisfied ownership passes through the effect of law (Article 1161 cum 1184.). As a result, the good faith acquiror can validly transfer ownership to a third party; and it is immaterial whether the third party was in bad faith. Such would be the case where a depositary, in breach of trust, sells the thing to a person who acquires it in good faith. The good faith acquiror inturn sells the thing to a third party who knows that the depositary did not have the authorization to sell the thing. The fact that the third party was in bad faith does not affect the ownership to pass from the good faith acquiror to the third party as it does not depend on good faith acquisition, but on transfer of a valid title by agreement. A good faith acquiror obtains valid title through good faith acquisition; and therefore, he can validly dispose of his property as he wishes.

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What is meant by good faith possession? Our Code attempts to define good faith by stating that "[w]hosoever acquires a corporeal chattel shall be deemed to be in good faith where he believes that he is contracting with a person entitled to transfer the thing to him." [42] Yet, a clear statement as it may seem from a glance, this definition is yet very confusing and ambiguous. The problem is that the legislature has not explicitly stated whether the standard used in this article is an "objective" standard or a "subjective" one. The words in Article 1162 which say "...where he believes that he is contracting with a person entitled to transfer the thing to him," [43] might indicate that the legislature has taken a "subjective" standard (save its intentions). However, a purely "subjective" standard would create odd results in cases where the third party is negligent.

Let us take the following hypothetical case as an illustration: A, a wealthy business woman, instructs her servant B who is very poorly dressed to take her diamond ring to a jeweler for a repair. On his way, B encounters C, a simple minded credulous person, and asks him (C) to buy the ring at a very cheap price. C, to use the words of Article 1162 (1), "...believing that he is contracting with a person entitled to transfer the thing to him," buys the diamond ring.

If we are to take a "subjective" standard, C is entitled for a defence of good faith acquisition. However, an "objective" evaluation of the above facts would lead us to an opposite result. Objectively speaking, C was negligent in that, first of all, he should have known that a person who is very poorly dressed could possibly not own an expensive diamond ring; and secondly, the very cheap price that B asked could have been an indication that B was not the owner thereof. Under these circumstances, a reasonable person would not have entered into contract with B; as a result, we say that C was negligent. By way of analogy, negligent acts are punishable under Art. 59 of the Penal Code. Art. 59 sets a "reasonable" person standard in deciding the existence of negligence. A person can not be relieved from punishment even if he really "believed" that his act was not punishable, if that act is negligent in the eyes of a reasonable person.

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However, there are also several provisions in the Code that have adopted subjective standard. Among these, for instance, is Art. 2036(2). "The standard applied is subjective and seems germene to the 'morality' requirement additionally contained in Art. 2030(1)...." [44]

Perhaps such anomalous situation could have never been intended by the legislature. Or, who knows, the legislature might have intentionally put a subjective standard in Article 1162(1) so as to offer a good faith acquiror with the maximum protection available. With such uncertainty, we can never be sure of the legislature's intention. The author submits, however, that an objective evaluation of the facts and not a subjective one must be required in order to establish the existence of "good faith" in Article 1162 (1). The need for protecting good faith acquirer must have some limits; they must only be protected to a point where a "reasonable" person would have done the same thing as they have acted. Yet, there is no need in portecting their negligence when a "reasonable" person would have done otherwise. Besides, how could the court know, for instance, that the so-called good faith acquiror really "believed" the facts or not. One can never be sure what one really "intends" or believes," since it is purely a subjective one.

2. EFFECT OF PUBLICITY UPON GOOD FAITH

If the existence of a certain right is given publicity, for instance by registration, then the general presumption of good faith is defeated; and consequently, the knowledge of the existence of such rights can be reasonably imputed to third parties. Such would be the case, where A sells a thing to B with ownership reserved; such agreement has been dully registered. B sells the thing to C who buys it in good faith. C can not be a good faith acquiror since he should have checked in the registry before he concluded the contract. [45] The effect of publicity is that the law pressumes that every body knows of the registered right.

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Our Code provides the good faith acquiror with yet another protection. Since good faith only exists at the time of taking possession,[46] the good faith acquiror's knowledge or discovery of the fact that the person with whom he contracted was not the owner is of no effect after he entered into possession of the thing.[47] What is more, the climant has the burden of proff of bad faith since good faith is always presumed. This flows from the general maxim "with regard to movables possession equals title" embodied in Article 1193 (1) of the Code.

3. WHEN OWNERSHIP CAN NOT BE RECALAIMED

The general Roman rule that "nemo plus iure's transfere potest quam ipse habet," which means that a person cannot transfer a better title than he has, has been completely superseded by Article 1161(2) and 1164 (2). These Articles protect a good faith acquiror where he contracts with a person having no title or was not authorized to sell or acted fraudulantly.

The general maxim "where you have put your faith, there you must seek it" is embodied in Article 1164 (1) which states that "[w]hosoever voluntarily relinquishes his [possession][48] of a corporeal chattel may not claim it from the possessor who has become owner thereof in good faith." This article operates in every case where the person voluntarily relinquishes possession of a thing be it under a contract of lease, pledge, loan or safe custody. "The justification for such a drustic restriction of ownership is that in a modern movement of goods, it is more important that the purchaser should be forced of the necessity to investigate the title to the goods which he buys than that the owner should be protected in the enjoyment of his absolute title."[49] Indeed, "if the original owner has mistakenly placed his trust in another and delivered possession to him, then a third party who has acquired in good faith should not suffer for the owner's misplaced confidence."[50] The victim of such misplaced confidence is limited only to an action in personum against the unfaithful borrower, depositary or lessee.

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4. WHEN OWNERSHIP CAN BE RECLAIMED

I. STOLEN CHATTEL

The Code provides for the right of revindication of stolen goods from a good faith acquiror.[51] Theft, being a fraudulent abstraction of the property of another, does not despoil a person from his ownership. The justification for this could probably be attributed to the fact that society has a negative reaction against theft.

An action of rvendication can only be made within 5 years.[52] A question might arise as to whether this limitation period applies to claims against a good faith acquiror or against the thief himself. It seems that this limitation period is menat for claims against a good faith acquiror and not against the thief. The general limitation period of ten years[53] (for movable goods) must therefore apply to claims against a thief.

We have seen that the exisgencies of commerce has necessitated the protection of good faith acquisition; on the other hand, action of revendication of stolen goods could possibly endanger the security of transactions. With this dilema, our Code has taken a middle way - in that it attempts to protect both the owner and the good fiath acquiror by requiring the owner[54] to indemnify the good faith acquiror where the good faith acquiror acquired the thing from a tradesman dealing in similar articles in an open market, or at a public auction.[55] The result of Art. 1166 is then" one who purchases an object through the normal commercial channels is very seldom affected in practice by the defective title of his transferor, since the original owner will seldom be anxious to recover the object at the cost of reimburesing the possessor. This system fully secures the interest of purchasers.[56]

Although a movable good may have been originally stolen, a good faith acquiror has a right to possession of it against all except the rightful owner. However, he does not have the right of ownership until the period prescribed by Art.1165(2) elapses;[57] as a consequence, he could only have a possessory action under Art.1149 and not a proprietory action under Art. 1206 in cases of revindication.

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The Code has adopted an important exception to the general rule that the owner has the right to follow his movable goods in cases of theft. In cases of currency or securities to bear the right to follow is not permitted where the person acquired them in good faith or where the person acquired them from a third party in good faith even if it has been stolen.

II. LOST CHATTEL

We have seen how stolen goods could be followed by a rightful owner. But what happens in cases where the movable good is lost? The Code is silent on this point.

It could be argued that according to Article 1164 (1) a person cannot reclaim a movable good from a good faith acquiror where he voluntarily relinquishes possession. Reason a contrario a person who involuntarily relinquishes possession may claim it from a good faith acquiror. Thus, since a person invluntarily relinquishes possession in the case where the thing is lost, he can reclaim it from any person who holds it so long as the prescription period laid down in Article 1192 does not lapse.

However though reasoning a contrario in Art. 1164 (1) might probably leads us to the conclusion that an owner has the right of revindication in cases of involuentary relinquishment of possession, the legislature has only selected to give remedy in cases of theft owing to the society's reaction against theft and the breach of peace involved.

Even then, the legislature has restricted such right by prescribing limitation period (5 years) and by giving right of indemmity to the good faith acquiror. These limitations were done becuase it was felt that the security of transactions could be endangered by the possibility that the good faith acquiror could be deprived of the good in an action of revendication. Even if it is admitted that the owner has the right of revendication in cases of lost things, the argument would fail as it does not attempt to protect transactions as is done in the case of stolen goods. It is possible that the legislature does not want to protect the "negligence" of an imprudent owner who should have kept his goods safely. Thus, the owner has only an action in personum against a finder.

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And not an action in rem against a good faith acquior.

III. PUBLIC DOMAIN

The general rule, embodied in Art. 1161(1), that a person acquires ownership of movable goods where he in good faith buys the thing and takes possession, is not without qualifications.

Not all movable goods are subject to good faith acquisition. The Code clearly states that "[p]roperty forming part of the public domain may not be acquired by possession in good faith or usucaption."[58] The Code attempts to define which movable goods are part of the public domain by stating that "[m]ovables which are placed at the disposal of the public by a public service or entrusted to the custody of a public service shall be deemed to form part of the public domain."[59]

Therefore, a book stolen from the National Library, or an ancient cross stolen from the National Meseum can never be acquired in good faith. It also flows that the prescription period laid down in Art. 1192 would not apply to movable goods forming the public domain.

Footnotes

43. Compare also the French version which is similar.

44. G.Krzechzunowicz, The Ethiopian Law of Extra-Contractual Liability (Addis Ababa, Faculty of Law, 1970), p. 113.

45. Of course this assumes that we take the objective standard in establishing good faith.

46. Art. 1163 (1)

47. Art. 1163 (2)

48. The English Version of Art. 1164 (1) is erroneous; the word "ownership" should be read as "possession." See the French version.

49. B. Nicholas, An Introduction to Roman Law (Oxford, at the Clarendon Press, 1965), p. 130.

50. K.W. Ryan, Introduction to the Civil Law (Sydney, The Law Book Co. of Australasia, 1962), p.169.

51. Art. 1165.

52. The English version of Art. 1165 (2) is erroneous. The limitation period should read "5 years" instead of "3 years" Cf. both the French and Amharic texts.

53. Art. 1192.

54. The English and Amharic versions of Art. 1166 have been erroneously translated. The word "seller" should read "owner". Cf. the French text which syas ".....il pent exiger de l'auteur de la revendication qui l lui rembourse le prix par lui paye pour la chose." (emphasis has been supplied). Perhaps it is argueable whether amending the official version of the law (the Amharic text) by referring the French version is warranted by law. See G.Krezeczunowicz, "Statutory Interpretation in Ethiopia, Journal of Ethiopian Law, Vol. 1, No.2. (1964).

55. Art. 1166.

56. Ryan, p. 169.

57. In which case ownership still remains with the rightful owner.

58. Art. 1455

59. Art. 1448.

SELECT PROBLEMS IN THE CIVIL LAW

THE LAW OF REDHIBITION IN FRANCE AND LOUISIANA*

[Editor's Note] The following material comprises an experiment in comparative law. In the belief that French solutions to legal problems arising from the interpretation of code articles common to both our civil law systems may provide valuable answers and alternatives for Louisiana, the Review is publishing the translation of a recent French case particularly relevent to an area of increasing legal concern in this state. Following the text of the case appears a translation of the "Note" to the case by a French legal scholar. Notes of this type accompany selected cases in the French reporters and are considered persuasive authority. Finally, Justice Mack E. Barham, of the Louisiana Supreme Court, comments upon the case, comparing the law of redhibition in France with that of Louisiana.

It is the Review's hope that this project will be of practical benefit both to the Louisiana judiciary and to the parctitioner, thereby effecting a positive influence on the development of the law of this state.

SPOUSES NICHOLAS V. MIRAN, Cass, civ. com., Feb. 27, 1973, D.S. 1974 jur. 138, note by Malinvaud.

THE COURT

On the first ground in its first aspect: Article 1165[1] of the Code civil considered. Whereas, according to the holdings of the challenged decision, the spouses Nicholas had entrusted to Miran the care of selling machines they manufactured, machines intended to clean the tiles used by the breeders of oysters in their oyster-parks to collect the spat; whereas Miran sold to Bertho one of these machines which he himself had just bought from the spouses Nicolas; whereas Bertho complained about the bad results obtained with that piece of equipment, asserted that it will ill fit for the purpose it was made for and, therefore, brought an action before the commercial tribunal against both Miran and the spouses Nicolas;

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1 Article 1165 of the French Civil Code reads as follows: Agreements have effect only between the contracting parties; they do not operate against third parties and do operate in their favour only in the case provided for by Article 1121.

All other references cited by the Court and the Note writer have been omitted. Translations by A. Levasseur, Associate Professor of Law, Tulane University.

* Tulane Law Review, Vol. 49 (1974-75), pp. 372-89.

Whereas the Court of Appeal allowed the action against the spouses Nicolas not only with respect to the payment of damages but also on redhibition, when, in light of the two sales intervening in succession, Bertho, subpurchaser, had no direct action to rescind the sale against the spouses Nicolas, original vendors, and could only act to that end by means of the oblique action; it follows therefore, that in ruling as it did, the Court of Appeal violated the article cited above. For these reasons...quashes,..and...sends the parties before the Court of Appeal of Caen.

NOTE by Ph. Malinvaud, Professor, University of Paris-South

I. Granting that it is rather delicate to render decisions, it is often just the same to comment upon them and appraise their precise scope. Such is the case with the above decision of the Commercial division which controverts a stream of well-established case law that had not aroused any special criticism.

Indeed, up to this time, it was accepted that in successive sales, the last purchaser could bring the action in warranty against vices either against his immediate vendor, or against the manufacturer, the original seller, or even against any one of the links in the marketing chain of the product.

In fact, it had become common practice to sue everybody, sellers and manufacturer, before the same court; this course of action had the advantage of resolving the entire case in one proceeding, pin-pointing the person or persons liable as well as their securities and avoiding a series of actions in warranty.

When nothing, either in the case law or in the doctrine, enabled one to suspect the least beginning of a reversal, here is, in a very common case, the Commercial division denying a subpurchaser the direct action against the manufacturer, allowing him only the right to resort to the oblique action.

Is this decision, which has already provoked various comments of approval and criticism, only a simple mishap? One is allowed to wish it is. If it is not, a conflict is to be anticipated between the trial courts and the Court of Cassation, if not even between the first Civil division and the Commercial division of that same Court. In this conceivable conflict, the ruling of the Commercial division does not appear to us to be satisfactory either from the point of view of juridical technique or from that of juridical policy.

II. With respect to the juridical technique, the Commercial division relies upon Code civil article 1165, which lays down the principle of the relative effect of contracts, to deny the subpurchaser any "direct action in rescission" against the original vendor.

Now, it has been established, for quite some time, that the principle of the relative effect of contracts is far from being unrestricted, that it suffers exceptions among which precisely appears the assignment of the action in warrantly for vices to all the successive purchasers.

Several explanations have been given of this assignment and we shall briefly restate them: To justify the direct action of the subpurchaser, Aubry and Rau state that the action in warranty becomes identified with the thing sold, becomes its accessory, and is automatically transferred with it. This explanation may seem convincing to the extent that such a warranty is of interest only to the present possessor of the thing; it is, in any case, the explanation which the decisions accept more readily. A number of other writers see in this assignment of the action the result of a stipulation for the benefit of another, "stipulation pour autrui," or else the transfer of a creditor's right.

Regardless of the explanation, case law and doctrine were in agreement until now to grant the subpurchaser a direct action in warranty against the manufacturer. The decision of the Commercial division runs counter to this solution, but without justifying the reversal. Are we thus to understand that all the previous juridical analysis has crumbled?

It would appear that the Commercial division wishes to draw a distinction between the petition for rescission of the sale, which could take place only between purchaser and vendor, and the petition for damages, which could be made directly by a subpurchaser. In his comment on the decision, Dean Savatier approves the distinction, on the ground, mainly, that the price paid by the subpurchaser (and, therefore, returned to him) would be higher than the price paid by the middleman to the manufacturer. But, as M. Cornu quite rightfully notes, this reasoning flows from a misunderstanding. To say that the subpurchaser benefits from a direct action against the manufacturer is to say that he can bring directly against the latter an action assigned to him by his vendor either as an accessory to the thing or as a creditor's right. He ought, therefore, exact from the manufacturer only a refund of the wholesale price and not the retail price, save his right to claim the difference as damages from the same manufacturer or from the middleman.

It would not make a lot of sense to implement the distinction suggested by the Court. Do we earnestly want the subpurchaser to sue his vendor for rescission and the manufacturer for damages, or to sue the manufacturer alone, directly in damages and "obliquely" in rescission should the conditions for the oblique action be met?

III. These last remarks impel one to think that the solution of the decision is also questionable from the point of view of juridical policy. A century of case law cannot be upset without weighty arguments; before hand, it would be appropriate to ensure that the reasons underlying that law have disappeared. These reasons, which were considered strong enough to warrant that a check be placed on article 1165 of the Code Civil, are

basically of a practical nature. The direct action granted to the subpurchaser avoids a series of successive actions up the marketing chain-without skipping any link-all the way to the manufacturer, assuming that we are dealing with a defect in the manufacture of the object. The very existence of these successive actions in warranty establishes that, in French law, the liability of middlemen involved in commercial transactions is only an intermediate liability between the victim purchaser and the manufacturer.

In fact, the outlook of the action in warranty against vices has changed drastically over the last years. Due to the seriousness of the injuries caused by defects, the aspect of rescission of the contract and return of the reciprocal prestations has receded in significance behind the liability aspect. The breaking of a piece of inexpensive equipment due to defect occasionally results in prejudicial consequences incommensurable with that amount. The failing of an altimeter worth some hundred francs may provoke the loss of a jumbo jet and the death of its four hundred passengers, without taking into consideration the damage on the ground. Let us recall also the matters of the Stalinon, the Thalidomide, the Morhange powder, the Cinq-Sept, and the tragedy that could have ensued from the fire at Orly airport. The size of the damage here changes the nature of the problem and bars one from distinguishing, in the action in warranty for vices, between the claim for rescission and the claim for damages in order to submit them to two different juridical rules. Accessorium sequitur principale, except that in this domain, rescission has become the accessory to the liability. In this tornado, the principle of the relative effect of contracts is swept away like a straw, leaving to the jurist hardly any time to explain why and how. The legislature well understood it, as shown in the area of sale of buildings to be erected, where it laid down the rule that "these warranties benefit the successive owners of the buildings." Additionally, with respect to the liability for vices of the object, the idea of a "pipelining" of the liability on the manufacturer's head asserts itself more and more.

In such a context, it is surprising to see the Commercial division resort to article 1165 of the Code civil to deny the subpurchaser the redhibitory action against the manufacturer.

Even if this judgment can be explained by the special circumstances particular to the case, which the decision, on account of its conciseness, did not disclose, one is entitled to hope that it will be shortlived and will not give rise to a new legal controversy which would increase the complexity of the question of the manufacturer's liability.

REDHIBITION: A COMPARATIVE COMMENT

MACK E. BARHAM*

The recent French case of Spouses Nicolas v. Miran, decided in the Commercial Division of the Court of Cassation on February 27, 1973, focuses upon a problem that French and Louisiana jurists have been wrestling with for years. The result of that case appears to be a regression in the French jurisprudence on the rights of a vendee upon discovery of redhibitory vices in merchandise. Because of the growing concern in Louisiana and other jurisdictions about protection of consumers, and because of the close relationship between our own Civil Code and the French Code Napoleon (Code civil) a, comparative analysis of this recent French case may prove instructive.

THE LAW ON REDHIBITION IN FRANCE AND LOUISIANA

In both France and Louisiana a seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells. These obligations are set forth in article 1603 of the Code Napoleon, which is the immediate source for Louisiana Civil Code article 2475.[1] Article 1625 of the Code Napoleon and article 2476 of the Louisiana Civil Code provide that the warranty due from the vendor is twofold: the first is the peaceable possession of the thing sold, and the second is against secret defects of the object such as would annul the sale, Article 2476 of the Louisiana Civil Code terms the secret vices "hidden defects...or...redhibitory vices." Louisiana Civil Code article 2520, derived from articles 1641 and 1643 of the Code Napoleon, states the following:[2]

> Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

It is inherent in a redhibitory defect that it must be latent or "secret." Further, it must have existed prior to, or at least at the time of the sale.[3]

* Associate Justice, Supreme Court of Louisiana, Law clerk Cynthia Shoss Wall, J.D. 1974, Tulane University; Member of the New Orleans Bar; collaborator.

1 La, Civil Code art. 2475 (1870) reads as follows:
The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells.

2 C. civ. arts. 1641, 1642 (1804); La. Civil Code art, 2521 (1870).

3 C. civ, art. 1641 (1804); La. Civil Code art. 2530 (1870). In the latter, a vice which appears within three days is presumed to have existed before the sale.

If a redhibitory vice exists, the buyer has two options: (1) he can institute a redhibitory action for the resolution of the sale, return the object he purchased, and recover the price he paid as well as the expenses occasioned by the sale;[4] or (2) he can institute an action in quanti minoris, whereby he is permitted to retain the merchandise and the seller is required to remit a portion of the purchase price. The prescriptive period for an action in redhibition is "a short interval" under the Code Napoleon, and one year in Louisiana except where the seller had knowledge of the defects.

One of the most difficult questions that has arisen in the law of redhibition is the issue of the rights of a subvendee against his predecessors in the chain of title other than his immediate vendor when he finds his purchase to contain a redhibitory vice. There is no Code provision dealing with this issue in either the Code Napoleon or the Louisiana Civil Code, but there is considerable jurisprudence on the subject in both jurisdictions. This was the primary issue in Spouses Nicolas v. Miran.

ANALYSIS OF Spouses Nicolas v. Miran

The spouses Nicolas were manufacturers of machines which were used for cleaning tiles of the sort used by oyster breeders. They sold one of these machines to M. Miran, who in turn sold it to M. Bertho. M. Bertho brought a redhibitory action against both Miran and the spouses Nicolas. The court of appeal allowed his action against the Nicolases as to damages as well as to redhibition. However, the Commercial Division of the Court of Cassation overruled that decision, holding that, because of the intervening sale, the subvendee had no direct action to rescind the sale against the original vendors and could only achieve that end by means of the oblique action.

4. C. civ. arts. 1644, 1646 (1804); La. Civil Code art. 2531 (1870). Article 1645 of the Code Napoleon and article 2545 of the Civil Code provide that a seller who knew of the vice of the object and omitted to declare it is answerable to the buyer in damages as well.
5. C. civ. art. 1644 (1804); La. Civil Code art 2541 (1870).
6. C. civ. art. 1648 (1804).
7. La. Civil Code art. 2534 (1870).

Without assigning any reasons as to why it chose to do so, the Court of Cassation in this case held contrary to over a century of French jurisprudence to the effect that a subvendee can bring an action in warranty against either his immediate vendor or against the manufacturer, original seller, or any one of his predecessors in title, upon discovery of a redhibitory vice. The only Code authority cited by the Court was article 1165, in which can be found the principle that "[a]greements have no effect but between the contracting parties..."[8] However, there exist several well-recognized exceptions to this maxim. An obvious one is the stipulation pour autrui, established in Code Napoleon article 1121.[9] Another exception, not provided for in the French Code but well-established juris-prudentially, has always been the assignment of the redhibitory action to all successive purchasers. Although the commentators have not been in agreement on the theory upon which this assignment was premised,[10] there had never been any conflict as to its actual existence until Spouses Nicolas v. Miran was decided.

Restricting a subvendee to an oblique action against all but his immediate vendor forces him to proceed up the chain of title case-by-case until he finds a solvent link. Then that party, if held liable, must proceed further up the chain in order to assign liability to the party responsible, i.e., the manufacturer in most cases. The oblique action is an action whereby a creditor exercises his debtor's right through the debtor, or in place of the debtor, e.g., when the debtor is abstaining from exercising his rights and is thereby injuring his creditors. The action is provided for in the Code Napoleon by article 1166; no similar provision exists in the Louisiana Civil Code.[11]

8. Note the similarity of La. Civil Code art. 1889 (1870):
No one can, by a contract in his own name, bind any one but himself or his representatives; but he may contract, in his own name, that another shall ratify or perform the stipulation which he makes, and in this case he shall be liable in damages, if the contract be not ratified or performed by the person for whose act he stipulates.
9. That article is the source for La. Civil Code art. 1890 (1870).
10. For a discussion of the conflicting theories see text at notes 16-35 infra.
11 The oblique action of Code Napoleon article 1166 was included in the Louisiana Civil Code of 1808 as article 66; however, it was suppressed by the Projet of the Civil Code of 1825. See comment following article 64, Projet of the Civil Code of 1825, in 1 La. Legal Archives 263 (1937); comment following article 1969, Compiled Edition of the Louisiana Civil Codes 1122-23 (J. Dainow ed. West 1972). Therefore, it is at least arguable that no such action exists in Louisiana.

The oblique action is an indirect action because the creditor is acting in the name of his debtor rather than in his own name, as he would, for example, if it were a revocatory action.[12] The purpose of the oblique action is to preserve the security of all the creditors upon a debtor's property; therefore, a judgment orders the property to be rendered to the debtor, since the action was in his name, and it then becomes the common security of all his creditors, subject to equal distribution according to the law.[13] In the context of redhibition, the oblique action is exercised on behalf of the buyer's immediate vendor as an action in warranty in that vendor's name against his preceding vendor. The vendee thus can proceed up the chain.

The direct action, on the other hand, avoids insolvency of intermediate transferors and preserves the action in warranty for a transferee, even if he has no right of action in warranty against his immediate transferor, for example, if the object was a gift.[14] The avoidance of a series of actions up the chain of title is desirable because the intermediate vendors are merely conduits, especially in those instances when ultimate responsibility for the redhibitory vice rests in the manufacturer.

Spouses Nicolas v. Miran will probably not long remain the law of France on the subject because of the Court's failure to consider the totality of the French Code and jurisprudence and because it is so contrary to the trend of consumer protection and prior jurisprudence. In Louisiana, there has never been a case which restricted the subvendee to a remedy in the nature of the oblique action against all but his immediate vendor,[15] but the jurisprudence on the subject of the subvendee's rights and remedies is quite confused and confusing. The courts and the legislature have apparently been trying to resolve the question in Louisiana by attempting to reach the result that obtained in Frence prior to Spouses Nicolas v. Miran. The route to that end, which has not yet been completely achieved, has been contorted and arduous.

12. Comment, The Revocatory Action, 9 Tul. L. Rev. 422, 434 (1934).
13. Id. at 430.
14. 2 M. Planiol, Treatise on the Civil Law No. 1498, at 835-36 (11th ed. La. State L. Inst. transl. 1939) [hereinafter cited as Planiol].
15. But see McEachern v. Plaucher Lumber and Constr. Co., 220 La. 696, 57 So. 2d 405 (1952).

THEORIES BY WHICH THE "PRIVITY OF CONTRACT" REQUIREMENT HAS BEEN WEAKENED

In the civil law, warranty arises only out of contract; the warranty flows from the obligation contracted by the seller to the buyer in the contract of sale,[16] even though there may also exist tort liability with its own conditions and effects.[17] Because of the contractual basis of warranty, granting a subvendee a direct action against prior vendors has been questioned nn the ground that the vendee has no contract with any but his immediate vendor; therefore, no privity exists and the prior vendors have no obligation to him.[18] Indeed, the Court in Spouses Nicolas v. Miran appears to have drawn a distinction between the subvendee's petition for rescission of the sale, or redhibition, and his petition for damages. Under the Court's holding, the former action can be had only by a vendee against his immediate vendor, possibly because of the privity requirement; the latter action is permissible by the subvendee directly against any party who might be responsible. Prior to this case, privity was never a significant problem in France. Several theories were espoused by the commentators which circumvented the privity requirement, and under which a subvendee thus might proceed directly against any of his predecessors in title.

The Stipulation Pour Autrui Theory

A well-established exception to the privity requirement for recovery under a contract is the stipulation pour autrui, or third-party beneficiary contract. The articles in the French and Louisiana Civil Codes permitting a person to stipulate for the benefit of a third person are virtually identical.[19]

16. R. Pothier, Treatise on the Contract of Sale No. 103, at 62 (Cushing transl. 1839) [hereinafter cited as Pothier]. Contrast this with the confusion in common law jurisdictions over whether to characterize warranty as tort, contract, or public policy.
When a subvendee seeks damages, he usually prefers to proceed against the original vendor, because if his immediate vendor was in good faith, no liability for damages can attach to that sale. La. Civil Code art. 2531 (1870).
17. Rabel, The Nature of Warranty of Quality, 24 Tul. L. Rev. 273, 280 (1950). See, e.g, LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1953).
18. 2 Planiol, supra note 14, No. 1498, at 835.
19. C. civ. art. 1121 (1804) is the source for La. Civil Code art. 1890 (1870), which provides:
A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favour, the contract can not be revoked.

However, Code Napoleon article 1122, which states that "[a] man is deemed to have stipulated for himself and for his heirs and assigns, unless the contrary be expressed, or result from the nature of the agreement,"[20] has no counterpart in the Louisiana Civil Code. This Code article provides the French with a vehicle by which they can more easily stretch the stipulation pour autrui to rationalize a subvendee's direct action against prior vendors. The lack of any such Code authority in Louisiana renders the same conceptualization more difficult. In fact, in Louisiana there is a strong judicially-created presumption that unless a contract contains an express stipulation for the benefit of a third party, it is not made for the benefit of a third party.[21] Obviously, such an express warranty for the benefit of a third person seldom appears in sales contracts. Therefore, application of the law of stipulation pour autrui in order to justify a subvendee's direct action against prior links in the chain of title is not really tenable unless the law in that area is distorted and the requirement of express stipulation ignored on those occasions when it is applied in this particular situation.

The Transmission Theory

Under this theory, the right to sue for a breach of the warranty against redhibitory vices is transmitted with the object of the sale as an accessory of that object,[22] This theory gives the consumer a right of action against every vendor above him in the chain of title because each vendor passes to the next all of his rights against all previous vendors, the ultimate consumer thus acquiring all the rights. This theory has never been expressly adopted in Louisiana, but there is some authority for it in Civil Code article 246:

> The sale of a thing includes that of its accessories, and of whatever has been destined for its constant use, unless there be a reservation to the contrary.[23]

20. Emphasis added.
21. Allen & Currey Mfg. Co.v. Shreveport Waterworks Co. 113 La. 1091, 37 So. 980 (1905). See also Smith, Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui, II Tul. L. Rev. 18, 50 (1936); 14 Tul. L. Rev. 295 (1940).
22. 2 Planiol, supra note 14, No. 1498, at 835; 10 T. Huc, Commentaire theorique et pratique du code civil, no. 154, at 209 (1894); 17 G. Baudry-Lacantinerie & L. Saignat, Traite theorique et pratique de droit civil, no. 432,at 368-69 (2. ed. 1900).
23. La. Civil Code art. 2461 (1870) (emphasis added). There is no direct counterpart in the Code Napoleon. See also La. Civil Code art. 2490 (1870), which provides:
> The obligation of delivering the thing includes the accessories and dependencies, without which it would be of no value or service, and likewise everything that has been designed to its perpetual use. (emphasis added).

The result reached by the Louisiana Supreme Court in the case of Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.,[24] that a distributor who was neither the immediate vendor nor the manufacturer and who had no contractual relationship with the ultimate consumer was liable for breach of an implied warranty to the consumer, might have been better achieved under the transmission theory rather than by resorting to common law jurisprudence as the court did.[25] In Media Production, our court held that, for the American consumer, the distributor in this instance occupied the position of a manufacturer and that, therefore, the knowledge of a defect in a product that is ordinarily imputed to a manufacturer[26] should be imputed to this intermediary. The court held that privity is no longer a requirement for products liability cases in Louisiana and that recovery of pecuniary loss from an unusable vehicle is allowable when there exists an implied warranty but no privity.[27]

Actually, in Media Production, our court stated a public policy of the state which aligns Louisiana with the common law states in supporting a strong consumer protection rule. In finding implied warranty without privity, the court cited as authority numerous common law cases. However, the case can be read so that the common law authorities are merely cited to substantiate the present custom of protecting the consumer which has replaced the earlier doctrine of caveat emptor throughout this country. It would perhaps have been better to have made a positive statement in the case that we look to the source of our redhibitory action, the Code Napoleon, and apply the doctrine that has long existed in France. The same practical result that was actually reached in Media production could be reached as well under the theory that the implied warranty was purchased by the consumer as an accessory of the object and that, therefore, he purchased a right of action against all of his predecessors in title, including the distributor.

The Subrogation Theory

Chapter 6 of Title VII of the Louisiana Civil Code sets forth the Obligations of the Seller. This chapter is divided into three sections: (1) Of the Tradition or Delivery of the Thing Sold; (2) Of the Warranty in Case of Eviction from the Thing Sold; and (3) Of the Vices of the Thing Sold. Article 2503 is found in section 2, with the Code articles considering warranty against eviction. It provides:

24. 262 La. 80, 262 So. 2d 377 (1972).
25. Id. at 90, 262 So. 2d at 381.
26. See, e.g, Doyle v. Fuerst & Kraemer, 129 La. 838, 840, 56 So. 906, 907 (1911).
27. 262 La. at 90, 262 So. 2d at 381.

> The parties may, by particular agreement, add to the obligation of warranty, which results of right from the sale, or diminish its effect; they may even agree that the seller shall not be subject to any warrantly.
>
> But whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others.28

The second paragraph of article 2503 was added by amendment in 1924, and in at least one case, the Louisiana Supreme Court noted in dicta that the act amending it was an enactment of the view of the French authorities that a buyer can proceed against any preceding seller in the chain of title by means of an action in warranty.29

Actually, the Louisiana courts have used article 2503 in much the same manner as the French use articles 1121 and 1122 of the Code Napoleon to modify their article 1165. However, the manner in which the French use those articles is provided for explicitly in article 1165, whereas the Louisiana courts have merely reached over from one section of the Code, i.e., that dealing with redhibitory vices, to another section, i.e., that dealing with eviction, in order to extend article 2503 and thereby avail the consumer of the subrogation that exists in the section on eviction, but is lacking in the section on redhibition. A leading case so holding was McEachern v. Plauche Lumber & Construction Co.,30 which applied article 2503 to a subvendee's suit without any real discussion of the grounds upon which it did so.

Extending article 2503 in this manner meets the problem of the privity requirement, because the subvendee is subrogated to all the rights of his immediate vendor when he purchases the object from him and is therefore entitled to bring any action the vendor could have brought against his vendor. However, there are several problems encountered in extending the article as the courts have done. For an action in redhibition to be possible, the defect must have existed at the time of the sale.31 A subvendee is subrogated to the rights of his vendor and his vendor's warranty against redhibition from the vendor who sold the object to him, and so on up the chain of title. However, the "sale" contemplated by the original warranty was that to which the original vendor, or the manufacturer, was a party. Moreover, if the immediate vendor's right of action in warranty has prescribed against his vendor, the subvendee's right of action by subrogation has also prescribed.32

28. La. Civil Code art. 2503 (1870), as amended, La. Acts 1924, No. 116 (emphasis added)
29. Carpenter v. Herndon, 173 La. 239, 246, 136 So. 577, 579(1931).
30. 220 La. 696, 57 So. 2d 405 (1952).
31. See note 3 supra and accompanying text.
32. Hermeling v. Whitmore, 140 So.2d 257 (La.App. 1st Cir. 1961)

Rather than extending article 2503 as the courts have tended to do in the past, an alternative, consonant with civilian methodology and our heritage of civil law, would be to analogize to the warranty against eviction in article 2503 when dealing with a case involving a warranty against redhibitory vices. Article 2475 states that the seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells. It is arguable that these two obligations are conjunctive and indivisible because delivery constitutes title,33 and eviction or redhibitory vices result in the buyer not having bought what he intended to buy, and, figuratively speaking, he is dispossessed of title in the thing he thought he had purchased. Thus, if an object purchased is unfit for the use intended, the end result parallels dispossession and is analogizable thereto.

The seller is bound to two specific warranties by the Code: warranty of the buyer's peaceable possession and warranty against redhibitory defects.34 The first guarantees title and possession, and assures that the buyer will not lose these through an action in eviction. Usually any defects in title are potentially as well-known to the buyer as to the seller by means of examination of the public records; yet the seller is still obligated under the Civil Code to guarantee title.35 With regard to the second warranty, which guarantees that the thing can be used as contemplated and has no redhibitory defects, no public records are available for the buyer to check; he can ordinarily rely only upon his own external examination of the object. Although the Code provides for subrogation in regard to the warranty against eviction, it would seem that the rationale behind that provision is not as strong as would be the argument for allowing subrogation in regard to the warranty against hidden defects. By analogy, then, subrogation to the seller's warranty against redhibitory vices is permissible.

Even if subrogation can be justified by analogy, however, some of the same problems discussed above that arise when article 2503 is extended would continue to present problems when the reasoning behind that article is analogized into the redhibition area. This theory still seems less viable and less practical than the transmission theory.

33. See La. Civil Code arts. 2477, 2478 (1870).
34. La. Civil Code art. 2476 (1870).
35. Read together La. Civil Code arts. 2503-05 (1870).

THE NATURE OF THE LIABILITY

Once it has been established under any of the above theories that prior vendors are liable to a subvendee, the nature of that liability must be determined. The crux of the issue is whether or not the liability is solidary. By restricting the purchaser to an oblique action against his manufacturer, the Court of Cassation in Spouses Nicolas v. Miran precluded the application of solidary liability to the prior vendors. The leading Louisiana case of McEachern v. Plauche Lumber & Construction Co. held that although the buyer is subrogated to his vendor's right of action in warranty against all prior vendors by virtue of article 2503- he is not given a solidary action against all previous vendors; therefore, a buyer, having chosen to sue his immediate vendor, has no right of action in solido against a prior vendor.[36] However, the holding in McEachern denying solidary liability has been overruled sub silentio by Breaux v. Laird,[37] in which a judgment in solido against prior vendors was permitted, and by Media Production, in which the retailer and the independent distributor were held to be solidarily liable for the price of the automobile.[38]

When an obligation in solido exists, all the solidary codebtors are obligated to perform the entire obligation, so that each one may be compelled for the whole, and when one tenders payment, the obligation is extinguished as to all of them insofar as the creditor is concerned.[39] A solidary obligation cannot be presumed but must be expressly stipulated.[40] The exception to this requirement of express stipulation occurs when the obligation in solido takes place by virtue of some provision of the law.[41]

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36. 220 La 696, 707, 57 So. 2d 405, 408 (1952). The specific language was:
> We concur in the ruling of the trial judge that although the buyer is subrogated to the seller's right to action in warranty against all others ...he is not given a solidary action against all previous vendors; and therefore the plaintiff, having chosen to sue his vendor, has no right to an action in solido against the Construction Company.

37. 230 La. 221, 88 So. 2d 33 (1956).
38. 262 La. 80, 262 So. 2d 377 (1972).
39. La. Civil Code art. 2091 (1870). The source for this article is C. civ. art. 1200 (1804).
40. La. Civil Code art. 2093 (1870), derived from C. civ. art. 1202 (1804).
41. La. Civil Code art. 2093 (1870).

In spite of the express stipulation requirement,,if the parties are each bound as a matter of fact to pay the whole debt, the debt should be interpreted as a solidary obligation. The jurisprudence to the contrary in this state[42] does not appear to be in accordance with doctrinal authority on the corresponding articles of the Code Napoleon.[43] According to Planiol,[44] and Aubry and Rau,[45] the purpose of the prohibition that appears in the French equivalent of Louisiana Civil Code article 2093 is not to prohibit the characterization of a solidary-in-fact obligation as solidary, but rather to aid in the determination of whether two or more persons bound together are joint or solidary obligors.[46] Therefore, the mere fact that the various contracts of sale in the chain of title do not expressly stipulate that all prior vendors are to be held solidarily upon each subsequent seller's warranties, express and implied, should not prevent each obligation from being solidary.

An issue which is coroallary to the question of the nature of the liability is whether each of the prior vendors in the chain can be held liable for return of the retail price paid by the ultimate consumer, which includes the profit of each subsequent vendor, when each of them may have sold the object for a lesser price. This issue was resolved in Media Production by means of imputing the manufacturer's liability to the intermediary distributor. Since the manufacturer would have been liable for the excess in damages because he is presumed to have knowledge of latent defects in his product[47] and this knowledge, albeit presumed, renders him a bad faith vendor liable for damages,[48] the distributor was held to the same degree of liability. The identical result can be reached without going beyond our Code. Under article 2092, an obligation may be solidary, even though one of the debtors is obliged differently from the other.[49] Under this article, then, the

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42. See Wooten v. Wimberly, 272 So. 2d 303 (La. 1972); Cox v. Shreveport Packing Co., 213 La. 53, 34 So. 2d 373 (1948).
43. Wooten v. Wimberly, 272 So. 2d 303, 307, 311 (La. 1972) (dissenting opinions).
44. 2 Planiol, supra note 14, Nos. 715, 735, 736, at 391,396,397.
45. 4 C. Aubry & C. Rau, Cours de droit civil francais, no.298b, at 17 et seq. (6th ed. La. State L. Inst. transl. 1965).
46. This is significant because under La. Civil Code arts.2080, 2081 (1870), joint obligors are only responsible for their virile shares of the obligation, whereas solidary obligors may each be compelled to pay the entire obligation.
47. See note 26 supra and accompanying text.
48. See La. Civil Code art. 2531 (1870).
49. See, e.g, Wilks v. Allstate Ins. Co., 195 So. 2d 390 (La. App. 3d Cir. 1967), in which Justice Tate, then sitting on the Third Circuit as judge, held that an insured can collect all the proceeds due him from any of his insurers who are solidarily liable to him, leaving the insurers their right to contribution among themselves.

subvendee can proceed against any of the prior vendors who are solidarily liable to him, leaving the issue of profits or the quality of their solidary obligations to be settled among the codebtors according to the facts and/or any contractual provisions between them on that point.

LIMITATIONS OF WARRANTY

A discussion of the seller's obligations in warranty would not be complete without addressing itself to the issue of limitation of those obligations. Articles 1764 and 2503 are authority for the principle that the warranty which is implied in every sale may be modified or renounced. This authority to modify is qualified somewhat by articles 2504 and 2505, which prohibit a seller from contracting that he is not accountable for what results from his personal act and hold him liable in case of eviction to a restitution of the price, unless the buyer was aware of the risk at the time of the purchase.

The courts require that all modifications of warranty conform to the following rules:[50] (1) the attempted limitation must be express;[51] (2) both parties must consent to it;[52] (3) the seller must have made the modification in good faith;[53] and (4) the limitation must not be inconsistent with public policy.[54]

50. See generally Comment, Modification or Renunciation of Warranty in Louisiana Sales Transactions, 46 Tul. L. Rev. 894 (1972).
51. See, e.g. Radalec, Inc. v. Automatic Firing Corp., 228 La. 116, 81 So. 2d 830 (1955); Crawford v. Abbott Auto. Co., 157 La. 59, 101 So. 871 (1924).
52. See, e.g. Stevens v. Daigle & Hinson Rambler, Inc., 153 So. 2d 511 (La. App. 1st Cir. 1963). See also La. Civil Code art. 2474 (1870).
53. La. Civil Code art. 2548 (1870); Macarty v. Bagnieres, 1 Mart. (o.s.) 149 (La 1810); Roby Motors Co. v. Price, 173 So. 793 (LA. App 2d Cir. 1937).
54. La Civil Code art. 11 (1870). See American Hoist & Derrick Co. v. Frey, 127 La. 183, 53 So. 486 (1910).

The most important recent case under the requirement of express stipulation of nonwarranty was Prince v. Paretti Pontiac C.,[55] in which it was held that warranty limitation provisions in "Buyer's Order" documents and automobile service mannuals have no effect on the implied warranty against redhibitory defects. The Louisiana Supreme Court in that decision cited Media Production, as well as Civil Code articles 1764(2) and 2548, as authority for the holding.[56] Shortly after the decision in Prince, the Supreme Court denied certiorari in the case of Anderson v. Bohn Ford, Inc.,[57] which concerned a waiver of the warranty of fitness by the purchaser and by the dealer to the manufacturer. In Anderson, the purchaser's waiver was contained in the buyer's order, which was signed by him; however, the appellate court held that because the waiver was not brought to the buyer's attention or explained to him, under Prince, he did not waive the warranty merely by signing the buyer's order.[58]

The waiver of warranty between dealer and manufacturer presented a somewhat different question. The waiver language was clear and unambiguous, but there was no evidence that it had been brought to the dealer's notice. However, the appellate court held that the notice requirement was less stringent between a manufacturer and a dealer than between a purchaser and a dealer or manufacturer because it could be presumed that the dealer would be more aware of the contents of such an agreement. Therefore, it was held that the fact that the dealer signed the document was sufficient acknowledgment that the waiver was brought to his attention, and that he accepted its conditions. The court drew a distinction between persons established in business such as a dealer or a manufacturer and persons with less business experience such as the purchaser in this case.

A similar distinction has long existed in France where a professional vendor, whether or not he is the manufacturer of the things he sells, by virtue of his public profession, renders himself responsible for the quality of the merchandise which he sells for the use to which it is purchased.[59] This presumption of a vendor's knowledge of defects in the products he sells, similar to the presumption existing in our law as to manufacturers, is premised on the rationale that a vendor ought to have knowledge of his wares and to sell none but those of good quality. Under this theory, responsibility can be imposed upon a vendor who cannot be put in the position of a manufacturer, the approach used in Media Production. Moreover, no distortion of facts is required because an intermediary professional vendor profits from delivery of merchandise to consumers in much the same manner as does the manufacturer or distributor and could, therefore, he held to the same standard of professional responsibility.

55. 281 So. 2d 112 (La. 1973).
56. Id. at 116-17.
57. 294 So. 2d 829 (La. 1974).
58. Anderson v. Bohn Ford, Inc., 291 So. 2d 786 (La.App.4th Cir.1973).
59. Pothier, supra note 16, No. 214, at 132.

Attached to the denial of certiorari in Anderson were two concurrences and two dissents, which addressed themselves to the public policy issue involved. This writer's concurring opinion considered the possibility that the waiver forced on the dealer might be shown to be an illegal waiver of fault contrary to the Code. That is, a redhibitory vice might be considered analogous to fault, which cannot be anticipatorily waived. Justices Tate and Calogero dissented, being of the opinion that certiorari should have been granted to determine the issue of whether or not public policy invalidates the waiver against defective manufacture which the manufacturer exacts from the dealer. Their reasoning was that under Louisiana law the retailer is responsible to the consumer for a redhibitory defect, and his right of recourse against the true causer of the harm should not be subject to such a limitation.

Justice Dixon, concurring in the denial of writs, suggested that the dealer's complaint addressed itself to the legislature, and apparently in response, the legislature in July of 1974 amended Civil Code article 2531[60] to provide in pertinent part the following:

> In any case in which the seller is held liable because of redhibitory defects in the thing sold, the seller shall have a corresponding and similar right of action against the manufacturer of the thing for any losses sustained by the seller, and further provided that any provision of any franchise or manufacturer-seller contract or agreement attempting to limit, diminish or prevent such recoupment by the seller shall not be given any force or effect.

Therefore, a waiver such as was present in the agreement signed by the dealer in Anderson is no longer permissible under our law. Although the amendment of article 2531 deals only with commercial transactions, it may indicate strong public policy support for jurisprudential limitation of the application of waivers in noncommercial transactions.[61] It also could serve as support for the transmission theory of warranty by forcing

60. For an analysis of the amendment to article 2531 see 49 Tul. L. Rev. 484 (1975).
61. La. Civil Code art. 2503 (1870), as amended, La. Acts 1924, No. 116, provides the following:
> The parties may, by particular agreement, add to the obligation of warranty, which results of right from the sale, or diminish its effect; they may even agree that the seller shall not be subject to any warranty. But whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others. (emphasis added). The corresponding French article in the Louisiana Civil Code of 1825 provides: Les parties peuvent par des conventions particulieres ajouter a l'obligation de garantie qui resulte, de droit, de la vente, ou en diminuer l'effet; elles peuvent, meme convenir que le vendeur ne sera soumis a aucune garantie. (emphasis added). The source article in the Code Napoleon, article 1627, also uses the word "particulieres". Among the definitions for "particulieres" are: private, special, intimate, personal. Cassell's French-English, English-French Dictionary (5th ed. 1951).

the manufacturer's warranties to accompany the object, actually as accessories to the object itself, and by precluding the manufacturer and other vendors from stipulating otherwise.

By considering the legislative intention behind the amendment of article 2531 and by looking to the French sources of our law on redhibition, Louisiana courts should be able to extricate themselves from the problems that have been created by extending article 2503. If so, the results will be greater protection for consumers in Louisiana and clarification of an area of the law much in need of a new approach.

Questions

1. How would you solve the problem under Ethiopian law?
2. What is an action in quanti minoris?
3. Can a buyer bring an action in quanti minoris under Ethiopian law?
4. What is caveot emptor? To what extent, if any, does it apply under Ethiopian law?

Taken from - "Transfer of Risk under Ethiopian Law of Sales"

By Zenna Debassu

(Please read carefully, it is not proof read)

RISK UNDER ETHIOPIAN LAW

Principle of risk under sales law

Transfer of risk:-

The basic principle relating to transfer of risk is given in article 2323 of the civil code. It embodies what is practiced in other laws "RISK PRIMA FACIE PASSES WITH PROPERTY" In other words, the goods are at the risk of the party in whom the property is. This article expressly lets the risk to be transferred to the buyer and obliges him to pay the price whether the things is lost or its value altered. Its implied application looks like that if the risk is not ransferred to the buyer then it is the seller who retains it. Therefore from the very provision, one can arrive to a conclusion that 'risk' and 'property' go together, which means, if one can show that the property has passed, the risk in its face' is in the person in whom the property is. As opposed to the Roman law soviet law and the like ownership in the Ethiopian law is transferred by delivery in addition to the conclusion of the contrat except for other exceptions.

In principle risk and property' generally go together, the two are insparable. Sometimes 'risk' may be in one party and property in the other. Article 2325 (1) itself recognizes one instance of a case of this kind. It expressly lets the risk to be transferred in case of his delay. Or in the other way, the close reading of the provisions of the article will be taken to mean as that, if delivery have been delayed through the fault of either party the goods are at the risk of the party at fault.

By virtue of the sales law of Ethiopia we have seen that risk and property go together. In order for a property to pass from one person to another one of the many ways is contract of sale and in the sales contract parties are expected to perform delivery of the thing and

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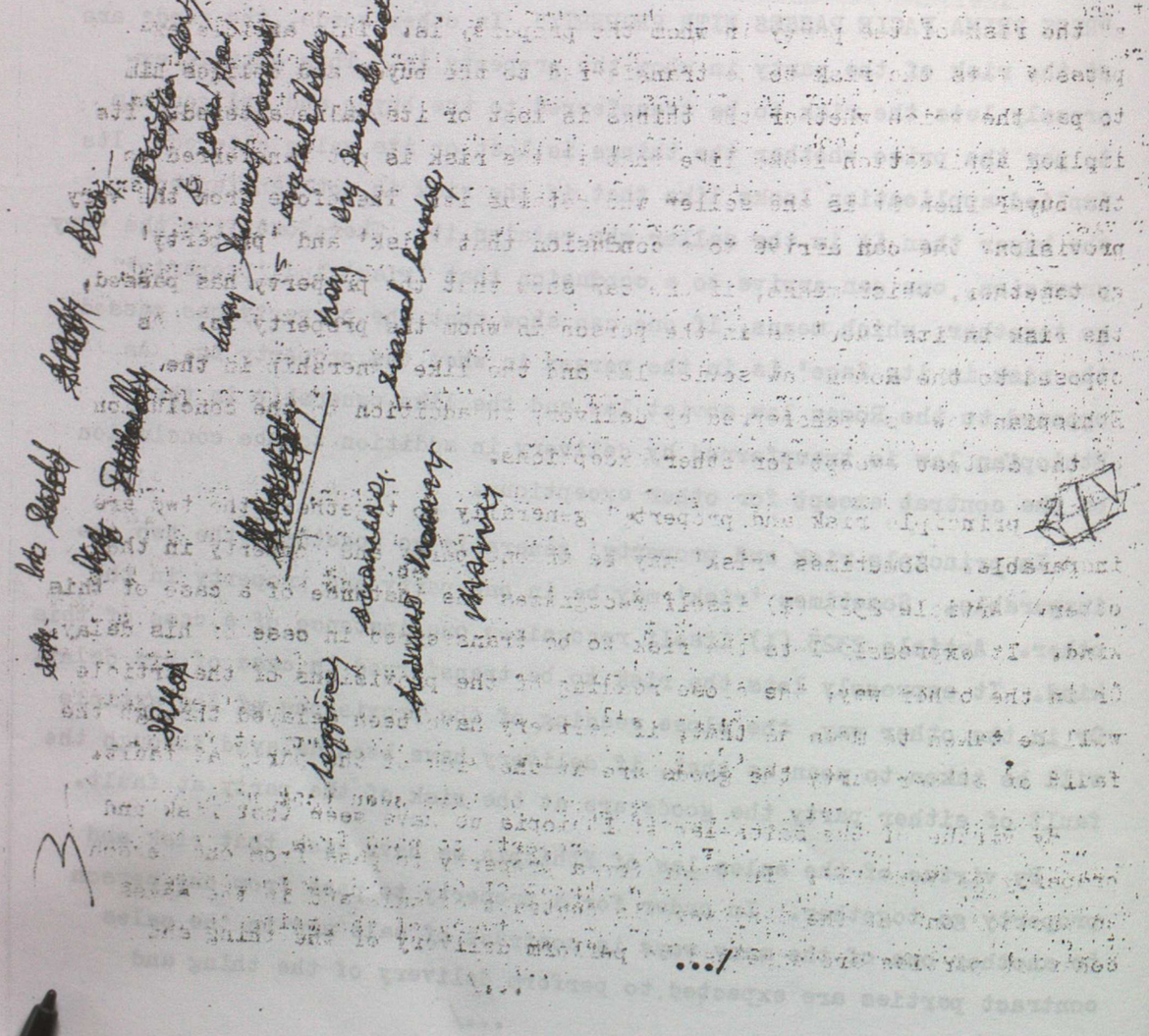
payment of the prices imutaneously (Article 2278 of the civil code). The very article allows parties to such contract to agree other wise. The close reading of this article shows us that the parties can agree to perform their contract in the manner they want to. Thus they can fix everything which favours them such as separating risk and property pursuant to their agreement. Whether the seller agrees to deliver the goods at his own risk at a distant place, from where he himself and the buyer are, or in a different manner from this, failing this, that is, if the agreement of the parties is in a position not to solve any dispute between the parties, it will be the task of the law and the court to fill the gap of the provisions of the contract concluded between the parties.



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Relation of risk with delivery

The concept of delivery as voluntary transfer of ownership is manifestly based on the idea that, where the seller has put the goods out of his control into the hands of the buyer there is strong evidence that there are no further duties on the part of the seller. Delivery, then in fact represents the last of the acts which the seller is to perform.

A contract to sell goods necessarily looks forward to an ultimate transfer of the possession to the buyer. It can not be denied however, that the seller's obligation on behalf of the transfer of possession, or in the legal sense, his duty to deliver is the most vital one, and all-laws on sale emphasize the great importance of the seller's delivery of the goods. Thus, codified provisions in addition to provisions of individual contracts regulate, the time, place and manner of delivery. Primarily nothing else than due delivery enables the seller to defand an action for non delivery and if the buyer's promise is not subject to any particular qualifications, performance of delivery also entitles the seller to claim the price whether the goods delivered are lost or deteriorated. This impliedly shows us that risk passes with property.

The close reading of Articles 1758 in the general contracts part and 2323-25 in the special part of the code shows us that there is a strong inference that insofar as the risk of loss attaches to the seller, he has not yet fulfilled his obligation with regard to the forwarding of the good. Thus contrary to the ordinary interpretation that the risk passes when the seller has fulfilled his principal obligation under the contract, the seller's liability to deliver seem to cease with the transfer as risk. This, then, is not merely a question of what is logical, namely, that the seller can not be liable beyond the time when the risk of loss has passed to the buyer, but what is more important unless a different intention arises the seller's duty also appears to continue up to the very moment of the transfer of risk. In a reasonable way, the seller thus has to watch over the goods which is ordinarily a part of his duty to deliver, just until his right to claim the price has definitely matured by transfer of the risk.

More over one can see that the precise manner in which the point of delivery is commonly fixed, whether in statutory provisions or in forms of contract, indicates that the question of risk governs the question of delivery.

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The Crucial Time

It is obvious that when parties conclude any contract specially of a sale nature, it is for both benefit that they give their agreement thereto, the buyer to pay the exact price for the value the goods worth at the time of the contract, and the seller to present the subject matter of the contract pursuant to their agreement and in accordance with the provisions of their contract. This is to mean that the goods to be sold which are subject to their agreement should be presented as they are, whether new or used. In the wordings of the civil code the goods have to be in conformity with the agreement. If there is no conformity as it is put in Article 2288 of the civil code, that the good delivered is only part of the whole or, greater or lesser quantity than the seller undertaken to deliver (2288(a)) or if the goods are different to that provided in the contract, for example if the agreement stipulates for a delivery of SANYO 3- ban radio Japan made, instead the seller delivered Sanyo 3-band Radio Korea made (2288(b)). The other is defect in the good as it is put in Article 2289 of the civil code. This happens when the goods do not possess the quality required for its normal use or commercial explication (2289(2) or do not possess the quality required for its particular use as provided expressly or imliedly in the contract (2289(b)) or do not passess the quality or specificiations provided expressly or impliedly in the contract (2289(c)). To illustrate this let us take the previous example, that in accordance with their agreement the radio is Sanyo 3 band Japan made, but instead of having two speakers' where every 3 band Japan made Sanyo radio of this particular made have, it has only one, will be in a position to say that the radio does not passess the quality, which means it has adefect within itself.

Moreover what the writer is trying to point out in this section of his paper is that unless at the time of transfer of risk, there is the ascertainment of the conformity of the goods, with the contract and the absence of defects, the motive behind agreements of synallagmatic contracts having rectiprocal obligations will be defeated. And it has to be understood that, the time of the transfer of risk is the crucial time that the provisions of a contract and the goods to be sold whether they conform or are free from defects has to be made known to both parties, this is in accordance with Article 2290(1) of the civil code. If on one hadn the seller do not disclose what he is supposed to, and if there

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is a latent defect the risk of loss or deterioration will be on the buyer. And on the other hand if the defect is obvious that the buyer should have seen at the time of delivery or before, then it makes him bear the consequence. This is the reason why the code-specifically puts it as the crucial time, becuase if the risk once is transferred to the buyer he has a simultaneous duty of paying the price, as in the wordings of Article 2323, where transfer of risk is understood as that the buyer must perform his part of the sales contract and pay the full agreed price even though he does not receive the goods or receives them only in a damaged or deteriorated condition. It appears to be a universal rule that whoever must suffer the loss has at the same time the advantages of all appreciate in the goods.

CONSTITUTUM POSSESSORIUM (CONSTRUCTIVE POSSESSION)

This concept seems to denote the legal situation of a person who has transferred possession of the thing to another but continued to hold it under another title. Possesory protection is consequently given to the new passessor (Article 1148 of the civil code). For instance constructive possession is deemed to take place when the seller of an immovable remained there in as a tenant.

In order to enable the seller to obtain the full agreed price from the buyer, the less or damage which has occurred must in any case, have happened without fault of the seller in possession of the goods after the risk has passed by law to the buyer. In almost every system of law, the seller has to be free from willful fault and gross negligence. He is generally held to a standard of reasonable care or to the same degree of deligence he should in his own affairs, at least in theory, but the question of how to prove the standard and burden of proof being matters which differ according to the procedural laws in the various countries.

Understanding constructive possession to be one of the exceptions to delivery, before a seller sells his thing and declares himself as a holder it is taken as that he han the "animus" and the "corpus" with him. Therefore in this exception he will only be left with the "CORPUS meaning he has only the physical control over the sold thing that pursuant to the contract of sale concluded between him and the buyer he has transferred the animus, rather he ceases to be a possessor.

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Such would be the case where "S" sells a casscte player to "B" and "B" for the reason that he will be leaving soon for a trip asks "S" to hold the radio for him and "S" agreed to do so. This in accordance with Article 1145(1) is what we call constructive possession where it is taken to mean by law transfer of ownership is made, even if there was no delivery.

The presumption of the law here is that the risk passes to the buyer as soon as delivery is effected Article 2324(1), regardless of the thing delivered does not conform to their agreement or whether the buyer has neither cancelled or required the cancellation of their contract nor required the replacement of the thing Article 2324(2).

The question however is if the law presumes the transfer of risk with delivery, whatever form it has, in this case constructive possession, is it trying to say risk of loss or deterioration which will occur after delivery is going to be borne by the buyer or does the law provide a remedy for this or is it correct to say such kind of a gap should be filled by the parties to the contract and it is not necessary for the law to go on defining the duties of parties and it is left for to on their own way in creating smooth relationship between themselves without going out from the scope of the law.

The writer upholds the latter view in that as stated above, sellers in constructive possession who delcare, themselves to be holders are expected to presseve the thing in a good and reasonable manner. Therefore, sellers after they declare to be holders of things sold, and if they fail to act as the are expected to, the risk of loss or deterioration of the goods will be born by them.

In one case in the high court of Addis Ababa, the defendant bought 440 quintals of a 'product of oil seed' (YENDG CHIMAKI, FAGULO) for 5.50 birr per quintal. The defendant paid the whole of the price prior to the delivery of the thing and asked the plainiff to hold this thing for him. Some days later the defendant seller sent a message to the plaintiff buyer to take the goods which he has in his ware house at a place separated from other goods which makes easy for effecting, delivery. The plaintiff buyer in stead send back a message that he hasno place to the

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goods and in addition to this he declared that he does not' care if the defendant seller sells the goods that he, will get back, his money, which makes the seller free from being the holder of the thing.

Later on the plaintiff buyer had an agreement to sell these goods to a third party believing that he had his oil seed product under his ownership. He asked the defendant seller the delivery of the oil seed product which he refused. The plaintiff buyer in order to fulfil his obligation to the third party bought the very 'product' for 13.00 Birr each per quintal from another place and claimed the difference from the defendant seller.

Judgement:- The court held that the defendant seller is not liable for the damages incurred by the plaintiff buyer for the reason that he has no obligation to the preserving of the goods since the plaintiff buyer declared by himself that he does not care if the defendant seller sells the thing. The defendant seller will only be liable for only the goods sold at the first time of the transaction. For the details of the case ------see ANNEX No1.

TRADITION BREVI MANU:

" A contrary change of a possessory situation when the actual holder of a thing (defentor) acquired possession thereof is tradito brevi manu, since the thing was not delivered over by traditio but remained in the detention of the same person.[53]

This is the other exception of delivery which occurs when the trnasfer or the would be buyer already held the thing. Here the buyer is already under the physical control of the thing, it might be due to a contract of lease or others and it will only need a simple agreement to transfer ownership.

Understanding delivery as handing over of a thing, one questions whether there exists any sort of delivery in 'brevi manu traditio,' Actually one can argue that if in Ethiopian law ownership passes by conclusion of a contract plus delivery, and if risk passes after delivery has been effected, or to put it in another way it is understood as "risk and property passes with delivery". Therefore if a simple agreement lets ownership pass from one party to the other, by the same taken, one can say that risk can also be transferred at the same time. This means that from the moment of the agreement onwards it is the buyer who bears the risk because the very agreement in brevi manu tradition has different purposes than that of transferring ownership and risk, and as a mode of delivery at the same time.

TRADITIO LONG MANU

This is a form of delivery where the handing over of a thing is made to a person other than the real acquirer with the consent of the real acquirer or the would the thing to be transferred to the would be buyer is placed with his knowledge and consent in his sight so that he will take possession thereof whenever he pleased.

Lona manu traditio is in no way different from the normal delivery, but what makes it so is that instead of the buyer himself it is another person who is designated by the buyer to which delivery is effected.

Therefore, for any risk of loss or deterioration going to happen on the goods, it will be the buyer who is going to suffer the consequence

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Therefore the principle; 'risk passes with property' in tradtio per chartam depends upon the agreement of the parties and if their agreement fails to provide this, one will conclude that as soon as the document of title reaches the buyer it is deemed to be said that he can exercise his right of ownerships and if it is so, any sort of risk of loss or deterioration on the goods will be covered him.

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so long as he himself i.e., the buyer by his own free will made the designated person his exculusive representative for this purpose of accepting the delivered thing.

TRADITIO PER - CHARTUM

It has been made a full use of negotiable documents of title and the delivery of such documents always satisfy the seller's obligation. Moreover, by usage or by the parties intention other mercantile documents may receive the same recognition as representative of the goods. For instance in a contract to sale an immovable property or any property (movables) requiring registration, a seller is deemed to have delivered his property through handing over of a written deed of conveyance of property to the buyer. Article 2144(1). Therefore such documents like bills of lading warehouse receipts, dock warrants and the like representing the goods when transferred operates as a transfer of possession in favour of the transferee which means, that the moment a document reached the buyer will automatically make him the owner of the goods.

This is what at least the law presumes. But is it really possible to say transfer of title by the document also transfers the goods to the buyer even if he has no physical control? What if the goods reach before the document or the document before the goods?

The opinion of the writer is that if the document reaches whether before or after the goods it will make the buyer the owner of the goods sold. But without the document of title the buyer is prohibted from any act of disposal as an owner. An exception to the rule as provided in Article 1144 (2) gives preference to the actual holder of the goods than the holder of the document. The writer doubts the application of this sub-article to all sales transaction concerning those which require transfer of documents, for instance such would be a case where an owner of a car sold it without transferring the document to the new acquiror, where the document of the car is taken to be an accessory to the car which means the document is considered as part and parcee of the car. The above sub-article might have an application in things under voyage.

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THINGS UNDER VOYAGE

Where the sale relates to a thing under voyage, the risks shall be transferred to the buyer from the day when delivery has taken place by the thing having been handed to the carrier (Art.2326(1))., with an exception that if the goods had perished or damaged being with the seller and with his knowledge at the time of making the contract, the risk will not pass to the buyer (2326(2)., but it remains with the seller.

This mostly happens where the seller is under a contract to send the goods to the buyer and they have been consigned to him, delivery of the goods to a carrier (Art.2326(1))., is regarded as constiting delivery to the buyer himself. In this case the carrier is then held to be the agent of the buyer to receive the goods.

The reading of the provisions leads one to say that the delivery will not be completed until the seller has relinquished his control of the goods. However according to the parties' intention and the facts in regard to the loading facilities it will not be possible to make any detailed statement as to the precise time when the seller has parted with the possession of the goods and hence one syas the property and the risk passes as soon as the goods are taken care of by a carrier or other person as a forwarding agent for the purpose of transmission to the buyer.

Of course the presumption that delivery to a carrier is equivalent to a delivery to the buyer may be rebutted. Thus when the document of transportation controls the possession of the goods, since the document reach the buyer, the goods cannot properly regarded as having been finally delivered to the buyer until the document is transferred to him. This is what happens not only when the bill of lading provides that the goods are deliverable to order of the buyer, but the same is apparently true also when the case whenever the custom of carrier in fact requires a surrender of the document.

"In principle risk/ownership passes in FOB
sales -. Free on Rail/ Free on Truck connotes
the transfer to the buyer as soon as the
goods pass the rail /truck; however to this
can be dita/cted when the words, Stowed, and/or
Trimmed are affixed in which event the FOB

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seller despite transfer of risk and ownership would be held liable for any damages and consequences thereof as a result of lack of proper 'Stowage and/or Trimming depending on the nature of such commodity."

In Ethiopia most of the C&F-FO (cost and freight free out) and C&F liner terms are experienced. The former is when the seller agrees to bring the goods from the country of the origin of the goods upto the destination and it is the buyer who is expected to take delivery of the goods which includes the lifting up of the goods from the ship be it by a crane or the like where as the later i.e., C & F linear terms is taken is taken to mean an agreement where the seller is obliged to bring the goods from the place of origin and put the goods properly on what is known as the key i.e. the seller himself has obligation to life the goods up from the vessel and put it on the 'key' of the port of the buyer in which the buyer is to take delivery.

Pursuant to their agreement risk passes whenever the buyer takes delivery (2274 cum. 2395) as far as the practice is concerned the application of Art. 2325(1) that is if one of the partiesis in delay there is no possibility for the transfer of risk except that the one who is late in taking or effecting deliverywill be penalized. This implies that if at sueh a moment if the goods sold face deterioration or the like the risk will not pass to the party who is late, since there is no delivery made to the buyer.

In actual fact and in the normal course of transaction on international basis FOB sales i.e., Free on Rail/Free on truck/ and the like puts the buyer under obligation to take delivery from the country of the origin. The seller having the responsibilities up to the time the goods are carried upto the port of the origin and are passed on to the vessel. Additional requirements expected from the seller is to properly pack the goods and place them in the vessel in a very proper manner so that the goods will be transported safely.

If after delivery is affected, the goods are damaged for the reason of improper packing or misplacement it will be the seller who is liable for the risk of the loss.

.../

Therefore a more delivery of the goods does not relieve the party from liability unless it is the fault of the buyer that he has brought a ship which is not sea worthy or fit for the normal carriage of goods by sea.

.../

DELAY OF THE BUYER

A contract of sale is one of the few special contracts as it is put in the civil code of Ethiopia. It has not its own characters. A seller undertakes to deliver a thing so that he transfers ownership to a buyer who on the otherside undertakes to pay the price of the thing which is subject to their agreement when the delivery is affected except in some exceptional situations.

In contract of sale therefore delivery, to transfer ownership and risk, consideration of a price expressed in money and payment of the price as a reciprocal obligation to the delivery of the thing are cumulative elements of sales contracts in general. Articles 2266,2273 cum. 2281,2287,2303 etc.

There are of course lots of points to be discussed here but in order to come to the point, the writer will limit himself to what the result would be ifone of the parties is late in effecting or taking delivery.

Delivery, as we had come across the above sections plays a very determining role, as key for transfer of ownership and risk, it can be also said that it is a boundary line which indicates us whether a thing belongs to a buyer from a certain time on wards or to a seller upto such and such time unless otherwise provided in their agreement to that affect.

Fixing time and place of delivery is very important in the agreement of parties. Failing to include this will make them toresort to the code provisions where Article 2276 gives the seller a discretion to deliver the goods as soon as the buyer requires him to do so for the reason that the time of delivery is not fixed. In accordance with the law it will be the seller who is to fix the date or time of delivery unless the surrounding circumstances makes the buyer to do so Article 2277.

Taking into consideration the place and time of delivery if the buyer is late in taking delivery the risk will immediately pass to him Article 2325(1) (The last phrase of this ssb article in the code should be read as "taking delivery" instead of "paying the price."

.../

This might be due to a translation error, and pursuant to the original French master text it has to be read as indicated above. Moreover when one considers the phrase"... paying the price" it can not function as a mechanism to transfer risk and ownership but it of course is one of the determining factor in a sales contract. But the phrase "... taking delivery" operates as a bridge to transfer risk and ownership pursuant to 1143 cum. 2274 and 2395 of the civil code Ethiopia.

Not proof read, watchout for a mistakes (Seifu Feleke)

Rights of the Buyer against the Seller for damages which arise as a consequence of a defect in the thing.

Part II

BUYER'S PROTECTION UNDER ETHIOPIAN LAW

A Brief Setting of The Ethiopian Sales Law; Seller's Obligation for Defects, Byers duties and other Restrictions.

1. **The Setting**

Ethiopia's modern sales law is contained in its equally modern Civil Code of 1960 which is barely six years old. It is in Book V of the Code under the caption of Special Contracts* to distinguish it from Contracts In General that Sales Law 'proper' is covered generally in Chapter 1-Sale-of Title XV with "Contracts Allied to Sales" and others following in subsequent chapters and titles of Book.V. Sales Proper, which also includes special provisions for sales of animals, is covered by Chapter 1 and runs from Article 2266 through 2407 inclusive. It is further divided into Sections and Paragraphs with separate series of reference numbers.

As is apparent from the subject of this paper, our main concern being restricted to finding what remedies in the form of damages are available to the buyer against the seller as a consequence of a defect in the thing bought, the starting section of our discussion under the Ethiopian law of sale will, of necessity, be section 2 of Chapter 1 captioned "Performance of Contract" i.e. sales contract. Paragraph 1 of that section with the title of Obligations of the Seller evidently assumes immediate relevance as the real take-off point for the consideration of the subject of this paper. This will presently follow under its own heading.

2. Obligations of the Seller

(a) The basis of Warranty Against Defects

As pointed out earlier, section 2 in chapter 1 of Book V entitled Performance of Contract deals with obligations of each party as well as those which are common to both in its various Provisions dealing with Contracts in General are in Title XII of Book IV.

sub-divisions of Paragraphs. For our purpose, Paragraph 1-Obligations of the Seller - is where the substance of our discussion should begin. The very first provision under this Paragraph is contained in Article 2273 which is headed General Provision and is hereinunder quoted in full.

Art. 2273 General Provisions:

(1) The seller shall deliver the thing to the buyer in accordance with the provisions of the contract and of this Code.

(2) He shall transfer the ownership and the thing to the buyer and warrnt him against certain defects in the thing.

(3) He shall in addition be liable for any other obligation imposed upon him by the contract of sale.

The import of this article evidently appears to be simple enough. Sub-article (1) makes it a duty of the buyer to "deliver" the thing in accordance with the provisions of the "contract"and the "Code". Sub-article (2) follows it by making "transfer of ownership"*- and "warrant against certain defects" a compulsory duty imposed on the seller while subarticle (3) makes liability on any additional obligation imposed upon the seller by the contract of sale to be emforceable. In summary, "delivery" must be done in accordance with "Contract" and "Code" provisions. Transfer of ownership and warranty against "certain defects" as well as liability on additional contractual obligations, which will be importantly relevent later in our discussion, may be, for the time being, deferred.

Sub-article (2) of 2273, as we have seen, only refers to the duty of the seller to warrant the buyer against "certain defects."

*For transfer of ownership see Articles 1184 et.seq.

The next logical question to consider will then be as to what the so called "certain defects" are under the law.

The answer to the question paused is found under "C" of paragraph 7 in section 2 specifically entitled "Warranty Against Defects In The Thing." This section of the law of sales in the Ethiopian Civil Code, which we will call sub-paragraph C for convenience, contains within it Articles 2287 through 2300 inclusive. It is in these articles that the provisions dealing with warranties and other allied duties of the parties imposed by law are found. We shall confine ourselves at this stage to those provisions dealing with the seller's obligation in respect of warranty against defects, leaving for later consideration those provisions dealing with duties imposed on the buyer and other restrictions on the effective application of warranty pro-provisions.

To begin with, Article 2287 contains the basic principle in providing that "The seller shall guarantee to the buyer that the thing sold [delivered] conforms to the contract and is not affected by defects. There are, in substance, two fundemental requirements in this article. These are, firstly, that the thing delivered should be in conformity with the terms of the contract and, secondly, it should be free from defects."

On the question of conformity, Article 2288 in its two sub-articles provides that difference in quantity, greater or smaller, and that of type or "species" than agreed under the contract constitutes absence of conformity. It must be noted here that questions of conformity assume special importance particularly with regard to remedies available to the buyer.* This being, however, not strictly relevant for our purpose, observation made so far will suffice as a matter of general information on the setting of the law on the subject.

*See, for example articles 2308 and 2343 civil code.

Now we come to the second important point of Article 2287 which further talks, in addition to conformity and the further provision of Article 2288 in relation to it, about the seller being under duty to also "guarantee to the buyer that the thing.... is not affected by defects" (Emphasis Supplied). Further provisions regarding it are found in Article 2289, which Article is perhaps the most directly relevant as the primary legal basis of our subject. Its contents are here below quoted in full:-

> Art. 2289 Warranty against defects
>
> The Warranty shall become effective where the thing:
>
> (a) does not possess the quality required for its normal use or commercial exploitation; or
>
> (b) does not possess the quality required for its particular use as provided expressly or impliedly in the contract; or
>
> (c) does not possess the quality or specifications provided expressly or impliedly in the contract.

The above quoted provisions of the sale's law constitute the fundamental legal basis giving rise to possible remedies by way of damages to a buyer injured as result of a defect in the thing bought. We shall now examine each of them in some detail.

(i) Normal Use or Commercial Exploitation

As we have seen, sub-article (a) of Art. 2289 quoted above makes the warranty mandatorily operative when the thing delivered "does not possess the quality required for its normal use or commercial exploitation".

This provision des not seem to depend soley on agreement, express or implied, made between the parties under the contract as appears to be the case in the latter two provisions of article 2289 quoted above.

In other words, the law does not seem to require the possesion of the required quality for "normal use" or "commercial exploitation" to be dependent on strict terms of agreement, implied or expressed. Neither the buyer need prove even implied agreement nor the seller disprove such allegation. Rather, if the delivered item under the sale contract does not possess the qualities for what is ordinarily considered to be its normal use or commercial exploitation, the warranty under 2289 (a) becomes operative and the thing delivered obviously treated as defective under the law.

This provision, it seems to me, is of vital importance and one of highly practical significance. In view of the general discussion, particularly in the section of the influences of growth in commerce and industrial economy in part I of this paper, it is not difficult to contemplate the multitude of problems consumers will have to face. For example consider the problems which ordinary consumers making a number of purchases, big or small, would face practically every day, if they were required to prove the existence or disprove the non-existence of terms relating to quality of ordinary or commercial use of things they buy every time anything goes wreng and redress under thelaw is sought. It is rarely that one would ask for a box of matches that "light-up", for a candle that "burns," for a tooth paste that is "usable", for a mill (in a restuarant) that is "not poisoned", for a bicycle that 'rides' etc. All these items and many more are, in the markets of our present-day world, placed before the consumer to buy and put them into use for which they have been specifically designed and produced. Often time, the consumer is often "educated" through advertisments as to the use of some new products or other ostensibly offered to fill some "determined" needs of his. Sometimes such "education" may also relate to improvements made on already existing goods of specific uses. We can thus see at once the substantial validity of the now very common saying of the commercial world that "advertisment creates market."

It may also be useful at this juncture to refer to what in the common law system is called "M erchantability." The principle is in general similar to that of article 2289 (a) we have so far been discussing.

Although the provision in By-section 14 (2) of the Sale of Goods Act of England which deals with "merchantable quality" contains requirements such as the goods being bought from "a seller who deals with goods of that description,"* its application and consequently the results it is being increasingly made to produce through interpretation by the courts seem to warrant the conclusion that there is substantial similarity of purpose. The essential requirement of the provision is that the goods shall be of "merchantable quality." The words simply mean that the goods "must be suitable for the purpose for which they are normally used."**

Sub-section (2)-(c) of the Uniform Commercial Code 2-314 also provides that "Goods to be merchantable must be at least such as... are fit for the ordinary purposes for which such goods are used; ...". It is also interesting to observe that the International Code too states, under Article 33 (1)-(d), that "the seller shall not have fulfilled his obligation to deliver the goods where he has handed over.... goods which do not posses the qualities necessary for their ordinary or commercial use;"***(Emphasis Added).

It should by now be clear that the seller is held liable for defects affecting the normal or commercial use of the article delivered upon purchase. In the former case a box of matches which do not light up evidently fail to satisfy the ordinary or normal use requirement for which matches are invariably used. In the latter case too, it is obvious that there are articles that are bought and sold for purposes of commercial exploitation or use and not for ordinary domestic-type consumption.

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*Also expressly adds, subject to examination by the buyer, "Whether he be the manufacturer or not"

**Law of Contract, Cheshire and Fifoot, p. 136.

***Note the striking similarity with Article 2289 (a) of civil Code of Ethiopia. Also see Yale L.J. Vol. 74 No. 2 (1964) page 284.

A person may, just as in the box of matches situation, order for an expresso-coffee making machine in order to operate a coffee bar. That machine would in all probability be required to at least have the coffee-making quality, that such machines are ordinarily deemed to possess. Failing that, the warranty under article 2289 (a) should become operative as, to recapitulate, its crucial requirements are only that the article delivered should possess the "quality required" for its "normal use" or "commercial exploitation." Neither the box of match nor the coffee machine as given in our examples possessed the required qualities for normal and commercial use when failing to light up or make coffee respectively.

In the opinion of this author "commercial exploitation" is only added with the view to specifically include cases where articles for use in further commercial and trade activities areinvolved and not either confine its application to things of direct domestic consumption or create uncertainty as to that point. It is quite obvious that it would have left considerable room for argument if specific mention of such nature were not made though this author would ten to beleive that "commercial use" as used in the relevant part of the International Code would have been preferable. Nevertheless, the difference is only that one relates to articles used for immediate direct use and the other for those intended for further exploitation or use, if you will, in commercial activities. It is thus only a matter of areas of their use and that the crucial point that each must be fit for the purpose to which it is applied or customarily accepted to be such within their respective functional areas.

Here we must end our discussion of Aricle 2289 (a) and proceed to attempt to explain the rest of the provisions, viz., sub-articles (b) and (c). This will be rather brief as our somewhat lengthy discourse of sub-article (a) stand us in good stead to understand and appreciate the rest with comparative ease.

(ii) PARTICULAR USE EXPRESSED OR IMPLIED

We have so far talked about normal use under the terms of sub-article (a) and, as we have seen, sub-article (b) (both of Artiele 2289)

refers to "particular use" of the thing as expressly or impliedly provided for in the contract. It is a condition that should be agreed upon expressly or must be capable of bing inferred from the surrounding facts to constitute an implied agreement.

It may be useful at this point to consider the possibility of an article being in actual fact capable of having more than one use which may be regarded, as a matter of custom, to be of ordinary or normal character of which we have been talking in our discussion of article 2289 (a). In such events, if not specifically agreed to either expressly or impliedly between the parties, the courts in England have considered the delivery satisfactory if the article was free from defects in respect of just one of these and spplied By-Section 14 (2) of the Sales of Goods Act which we have seen to be the counter part of Article 2289 (a) in the Ethiopian Civil Code.

The provision in the Sales of Goods Act which will be generally comparable to that of Article 2289 (b) is found in sub-section 14 (1) and in part provides that "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required.....there is an implied condition that the goods shall be reasonably fit for the purposes."*1 (Emphasis added)

The case of Manchester Lines Ltd. V. Rea, Ltd.,*2 demonstrates in large measure the essence of these provisions in terms of "particular purpose" requirement. This is a case where the plaintiffs ordered a bunker of coal for use in a named steamer, the Manchester. The defendants supplied the coal which, though fit for many other steamers, was unfit for the S.S. Manchester because she had "natural draught furnaces". The House of Lords applied Sub-Section 14(1) and gave judgement for the plaintiffs (the ship owners) on the ground that the order for coal was of a type suitable".....for the use of a particular

*1 Cheshire and Fifoot, Law of Contract, Ibid at p. 136

*2 (1922) 2 A. C.74

Steamship, and it must therefore be assumed that the respondents know the nature of her furnaces and the character of the coal she used; for it was this coal they [defendants] contracted to supply."

It is clear that where a seller asks for, say, a tooth brush or a box of matches the purpose is quite obvious. But where he asks for goods which may be normally used for more than one purpose, the buyer will be better off*1 if he tells the seller for which particular purpose hewants the thing so that the presumption of knowledge in raised on the part of the seller. Failing this, it would seem adequate that the thing delivered serves one of the purposes to which it is commonly put. It is, therefore, easy to see that mention of the name of the article or its patent name would not be adequate for the application of the provision in question. The calling of the name or reference to the common identification used puls the particular purpose for which it is intended would appear to be necessary.

(iii) QUALITY OR SPECIFICATIONS IMPLIED OR EXPRESSED IN CONTRACT

Sub-Article (c) of Art. 2289 appears, at least to this author, to be somewhat superfluous. It should not be hard to see that any other "quality" which is not "normal" is not only covered by Sub-Article (b) but also by the genral terms of Article 2273 (2) and the general principle in Article 2287. Whereas common and usual specifications can come under sub-Article (a) of Article 2289 within the broad meaning of the word "normal", others could be well protacted, if expressly or impliedly agreed upon, under Sub-Article (b) as one of the qualities making the thing intended for a "particular purpose". This author also admits his failure to find a comparable provision elsewhere. These provisions do not also exclude the enforcement of agreed terms under the contract and hence it is difficult to see the need for Art. 2289(c).

It may be, perhaps, that the draftsmen or the legislathsre or both wanted to reaffirm that other terms, whether of particular use or not, of quality and specifications are not meant to be excluded

*1 Cheshire and Fifoot. Law of Contract, Ibid at p. 136

and that they were carried by their desire to give no ground for uncertainty.

As to the legal implications of this provision, there is hardly any thing that can be added to what its plain words apparently convey i.e. that the absence of "the quality or specification" provided expressly or impliedly in the contract constitutes a defect. This is, however superfluous, one of the three legal bases of warranty against defects in things that are subject to contracts of sale.

iv) Forms of Sale

Before we pass to another important section in this part of our discussion, viz; the duties of the buyer with regard to defects, we should perhaps briefly and generally mention that there are seven distinct forms of sale that the code specifically provides for. Of these, Sale by Sample (Articles 2377 et. seq.) and Sale by Auction (Articles 2406-7) have some bearing on the subject under discussion.

In a sale by sample or pattern Article 2377 in its sub-article (1) provides that "the thing shall conform to these of the sample or pattern", while in the egent of discrepancy or difference between the discription of the thing given in the contract and the sample, sub sections(2) and (3) respectively provide that in the former (discrepancy between sample and discription) that of the sample "shall prevail" and in the later (difference but no discrepancy) "the thing shall combine the qualities of the sample and those of the discription."

In a sale by Auction Article 2406(1) requires of the seller in a voluntary auction(public) to gives the same warranty as in ordinary sale while sub-article(2) altogether exempts the seller in a compulsary public auction from any warranty.*1 Article 2407(1) also makes the distrainer, a person at whose request the auction takes place even if he is not the owner, responsible for warranty in respect of "conformity of the thing with the discription given of it in the conditions of sale".

*1 The terms "voluntary" and "compulsory" public auction obviously refer to auction sale of voluntary nature such as arts or antiques sale while those of compulsary nature will prosumably be those of liquidation or bankruptcy resulting from court orders.

(B) DUTIES OF THE BUYER WITH RESPECT TO DEFECTS

We have so far considered, in perhaps what might be described as general terms, the legal basis of warranty for defects in the "thing" that is a subject of a contract of sale. We have seen, in our discussion so far, that for our purpose, a seller is legally bond to warrant the buyer against defects of, firstly, normal or commercial use; and, secondly, the particular use as well as qualities or specifications expressly or impliedly provided for in the contract of sale. We will now consider the duties, if any, imposed on the buyer, in order that these warranties become effective and if such duties exist, to what extent they act to limit the operation of the provisions against the defects under discussion. In other words how much and what degree of limits exist under the code on these warranties will depend on what duties are imposed on the buyer and what consequences may ensue in case of failure by the buyer to comply with or fulfil these duties.

(i) DUTY TO EXAMINE AND NOTIFY

To begin with the "time when defects are to be considered" is also determined by law. Article 2290 basically lays down that "transfer of risk"*1 as a rule will be the point in time from which defects are to be considered as defined in its sub-Article (1) to which Sub-Articles (2) and (3) are, in general terms, exceptions. The former provides that where transfer of risk does not take place as a result of declaration of cancellation or replacement of the thing having been Required "regard shall be had to the time when the risks would have been transfered, had the thing been in conformity with the contract," And the latter makes the seller to be held to his warranty where "non-conformity" or "defects" occur later and "are caused by the seller or person for whom he is liable". Within these broad limits as regards "time when defects are to be considered" the buyer has the following important duties imposed on him by law in respect of defects:-

*1 See Article 2323 et. seq. for transfer of risk

Firstly, Examination of the thing:

Article 2291 in its three Sub-Articles provides, (1) that the buyer shall examine without delay as soon as he has the opportunity to do so; (2) that, unless otherwise agreed, such examination shall be made as provided by the usage of the place of examination; (3) that the buyer, where he intends to avail himself of the results, shall in due time invite the seller or his representative to attend unless the thing is likely to perish.

Secondly, with regard to notifying the seller, Article 2292 provides; (1) that the buyer shall notify the seller without delay, non-conformity with contract or defects discovered by examination and, (2) that he (the buyer) shall, with respect to defects, indicate its "nature" in accordance with "custom and good faith."

It can thus be easily seen that the import of these two articles is that the buyer should examine the thing without delay and that it should be done according to custom unless agreed otherwise. The seller or his representative should also be invited to be present where the buyer intends to avail himself of the results of the examinations.

The buyer's duty, as we have noted, does not just end with examination. He has the further duty of notifying the seller of the defects, including conformity with the contract in other respects, disclosed by the examination, also without delay, and indicate its nature in accordance with custom and good faith.

The buyer's duties, with regard to inspection or examination of the thing and notification of the seller under the Ethiopian law as outlined heretofor, are simple enough and hardly need any further elaboration for the purpose of this paper. With these considerations of the duties of examination and notification imposed on the buyer, we shall now proceed to briefly mention what the consequences of non-compliance with them would entail for the buyer.

(ii) Absence of Notification and Buyer's Negligence.

With respect to consequences resulting from absence of absence

of notification, Articles 2293 in effect provides that the buyer who has not notified the seller as provided in Artilce 2292 may no longer avail himself of the defects unless:

(a) Seller admits their existence

(b) They are defects, being incapable of discovery by normal process of inspection, subsequently discovered and seller was notified accordingly, without delay.

(c) the seller has interntionally misled the buyer.

As a general rule, the buyer suffers the consequences of not being able to "avail himself" of the defects if he fails to give notice to the seller. This rule does not apply nor will the buyer suffer the consequence thereof in the three exceptional situations indicated above.

Before we pass on to considering the consequences of negligence and his having knowledge of the defects, we should also note that, in addition to the above, Article 2294 provides that in the event of warranty given for a specified period of time, "it shall be sufficient for the buyer to inform the seller of the defect before the expiry of such period." This too seems to be an exception to the examination and subsequent notification "without delay" requirements and quite obviously subject to the consequence of the general rule of Art. 2293 refered to above in the event of failure to notify the seller of any defect before the end of the guaranted period.

With respect to negligence on the part of the buyer and the consequences thereof, Articles 2295 and 2296 together provide that the seller shall not be held liable on his warranty, even if express warranty is given, where he can prove that the buyer knew of the defects (Art. 2295) as well as in situations where the defects are so obvious that the buyer "could overlook them only as a result of gross negligence" (Art. 2295). The latter, however, does not apply where the seller

"expressly declared the thing was free from defects or he has expressly warranted certain qualities". While the essence of these provisions should be quite easy to grasp, what is "obvious" will apparently be determined from the surrounding circumstances and the rature of the thing and that of the defects disputed.

With a passing reminder of the existence of periods of limitations on the buyer's action in Articles 2297-2299 to which readers may wish to refer, we may only briefly mention the last important part, viz. agreements restricting warranty against defects, fefor we conclude our discussion under Part Two. In this connection Art. 2297 appears to be the only relevant provicion to warranty against defects*. It states that "Any provision excluding or restricting the warranty shall be of no effect where the seller has fraudelently concealed from the buyer the defects in the thing".

Under the terms of this article, it would appear to be permissible for the parties to agree on terms restricting warranty liabilities of the seller except that such agreements will have no effect in the event of fraud by the seller. This would, however, seem to be capable of modification by the application of Art. 1738 (2) through Art. 1676 of the law of Contracts in General.* The former, Art. 1738 (2), provides that stipulations inserted in "general provisions, models, or forms" of contracts prepared by one party "shall be interpreted in favour of the other party". With this, we conclude our discussion of this part of the paper and it is now possible to move to part three, the last and most important part of the subject under consideration.

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* For dispossession see Art. 2284.

* See also Art. 1704 of Contracts in General and compare it with Art. 2297 of sale.

Creditor-Guarantor Relationship Under Ethiopian Law

> The lender must first claim his property from the borrower, and claim it from the guarantor only if the debtor does not pay him . . . . The lender must (first) sue the debtor and (then) the latter's guarantor.[1]

That was the basic principle of suretyship according to the Fetha Negast, the ancient law of Ethiopia, from which much of our customary law also derives.

The secular principles laid down in the Fetha Negast being largely of Roman origin, the precepts embodied therein naturally reflected the prevailing state of Roman law at the time of the writing of the original Arabic version. (This date is generally placed between the fifth and ninth centuries A.D.[2]).

Quite evidently, this was long after the Romans abandoned their harsh practice whereby a creditor could hold a guarantor hostage until the defaulting debtor (or the guarantor himself) performed the obligation. Confronted with a situation where few would be willing to guarantee any debt under those conditions, the Romans had to swing to the other extreme: the guarantor would be proceeded against only after the creditor sued the principal debtor and failed to recover the debt. Essentially, therefore, the guarantor guaranteed against the insolvency of the principal debtor.

As far as the creditor is concerned, this was of course an adverse development. He was not spared the trouble of pursuing an uncooperative debtor by first resorting to the guarantor, the latter usually being the more solvent and, in the judgment of creditor, the less difficult to deal

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with. (As the saying goes, creditor does not choose the debtor but his guarantor).

That, then was the law of suretyship that was imported into Ethiopia around the middle of the fifteenth century through the Fetha Negast. The new legal arrangement worked tolerably well for a largely peasant society where the individual's mobility was limited and most transactions took place among people whose whereabouts and background were generally known to one another. Besides, the influence of traditional institutions on their members were strong enough to facilitate enforcement of contractual obligations. With increased modernization, however, the influence of these institutions diminished and people's mobility increased considerably. Especially with the growth of large urban areas, transactions took place among "faceless" individuals.

This change in social and economic conditions, in turn, necessitated a mechanism that would restore reliability to contractual relationships. To that end, modern business practice has evolved various means among which the use of commercial documents is now widespread. Yet, for the great majority of people those are simply too technical so that the remedy had to be sought in the old and familiar mechanism of suretyship. Hence, the pendulum swung once again, this time in favour of the creditor. If business transactions in the impersonal world of today should not be hampered, it was believed that creditors should be provided with a more reliable guarantee.

Surety is a form of insurance which a creditor takes out so as to minimize the risk of non-payment. Non-payment, in turn, generally occurs for one of two reasons: either because the debtor is insolvent or he is down right unwilling to discharge his obligation. The question is,

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therefore, whether a simple guarantor undertakes to pay on behalf of the debtor under both those circumstances.

As noted earlier, the history of suretyship under Roman law has been shifting from one extreme to the other, dictated by social and economic developments of the times. It has gone through distinct phases: the early times when a guarantor's obligation was absolutely primary gave way to a period when the guarantor's obligation was strictly subsidiary. When it was discovered that even this was out of step with social and economic developments a movement toward the earlier arrangement was effected.

But there would be no going back to the ancient position that was extremely harsh on the guarantor. That would not have served the purpose of stimulating business trnasactions. Hence, a compromise arrangement was worked out whereby the creditor would be protected not only against the insolvency of the principal debtor but also against a mere non-performance, for whatever other reason. On the other hand, the guarantor would be armed with the necessary means to compel the creditor to proceed against the principal debtor before asking him to discharge the obligation.

It is this compromise arrangement, which will be explained subsequently, that is currently the law of suretyship in most European countries, including France. The present Ethiopian law of suretyship being largely copied from the French Civil Code, it reflects essentially the same characteristics.

Yet, over two decades after a modern Civil Code came into force in Ethiopia, the influence of the Fetha Negast, and hence the traditional conception of suretyship, lingers on. Too many judges and litigants still believe that a simple guarantor could not be compelled to perform unless

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it is established that the principal debtor is unable to discharge his obligation. In effect, the creditor should first bring action against the principal debtor and fail to recover before he could proceed against the simple guarantor.[3]

While this is another example of the tension between local custom on the one hand, and the imported body of law, on the other, one may also attribute the incongruency between the law and the practice to the fact that a great majority of our judges and members of the legal profession are not trained in the modern law. (In 1981, only 6% of the judges and 7% of the advocates had law degrees).

In this paper an effort will be made to shed some light on one aspect of the Ethiopian law of suretyship - i.e., the relationship between the simple guarnator and the creditor. It will be argued that the 1960 Civil Code has radically altered the old concept of the law of suretyship so that the creditor can bring action against the guarantor without first suing the principal debtor.

The Obligation of the simple guarantor

It is no longer a subject of controversy that the obligation of the simple guarantor is subsidiary to that of the principal debtor. He undertakes to discharge the obligation, "should the debtor fail to discharge it" (Art. 1920).

But the central question as to when the creditor can proceed against the guarantor very much depends on our construction of that last phrase of Art. 1920. In other words, when is the principal debtor deemed to have failed to discharged his obligation? At least three time references can be considered:

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1. Soon after performance is due
2. After debtor has been placed in default
3. After creditor brings action against debtor and fails to obtain performance.

Let us first consider the last possibility. As noted earlier, the Fetha Negast prescribed that the creditor should first sue the debtor before he proceeds against the guarantor. It has also been noted that conception of the law of suretyship still lingers in the minds of many Ethiopians.

Het, Art. 1920 talks about debtor merely failing to discharge his obligation. In the literal and direct interpretation of this term (this mode of interpretation is preferred where the language of the law is not ambiguous) a debtor fails to discharge his obligation soon after the date of performance fails due. (Period caculated in accordance with Arts. 1857 ff).

Unlike earlier laws, the Civil Code does not talk in terms of debtor being unable to discharge his obligation nor does it anywhere require the creditor to first bring action against the debtor before he could proceed against the guarantor. As a matter of fact, Art. 1934(1) repeats the term by stating that a "(simple) guarantor shall not pay the creditor unless the principal debtor fails to discharge his obligation."

This line of argument also finds support in other provisions of the code. One among these is Art. 1933 which brings out the distinction between a simple guarantee and a joint guarantee very clearly. Under a joint guarantee situation, creditor "may sue (the guarantor) without previously demanding payment from the debtor ..." (Emphasis added). One may note the careful use of the words sue and demand payment in the same sentence of

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this provision. One privilege of a creditor who gets the obligation of the debtor secured by a joint guarantee is that he could bring action against the guarantor before even demanding payment from the debtor. In other words, where the guarantee is not a joint guarantee the creditor may not sue the guarantor before demanding payment from the debtor. A guarantee that is not a joint guarantee is clearly a simple guarantee. Thus, the foregoing deduction from Art. 1933 applies to a simple guarantee situation. Hence, our conclusion that in a simple guarantee situation creditor may not sue the guarantor without previously demanding payment from the debtor. A further deduction, would lead us to a final conclusion: as long as he first demands payment from the debtor, the creditor can sue the simple guarantor before he sues the debtor.

Thus, Art. 1933 gives us more clue as to what is meant by 'fail' in Art. 1920. For the purpose of bringing action against the guarantor, the debtor is deemed to have failed to discharge his obligation if he does not perform in spite of the creditor's demand to that effect upon the expiry of the time fixed for the payment of the debt (Art. 1932 (1)).

What constitutes "demanding payment"? Is a simple reminder by the creditor that the time for payment has lapsed adequate or should he properly place the debtor in default before he sues the guarantor? From a reading of Art. 1772, which is in the nature of a mandatory provision, with Art. 1932 (2 & 3), coupled with a consideration of the social and economic purposes underlying the requirement of notice, we should be inclined to conclude that, where notice is necessary (Arts. 1772-1775) the creditor should first place the debtor in default before he can proceed against the simple guarantor. (Of course he should also realize the real securities at his disposal.).

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If placing in default and realizing the real securities are the only conditions the creditor needs to fulfill before he could sue the guarantor, wherein lies the compromise earlier noted? It lies primarily in the concept of benefit of discussion.

Benefit of Discussion

We have noted above how recently the European jurisprudence shifted in favour of the creditor so that he could proceed against the guarantor without first suing the principal debtor. But it has also been observed that this move was accomplished without depriving suretyship its accessory character. The apparent anomaly was resolved by arming the guarantor against whom action is brought with a devise known as benefit of discussion. Per this mechanism the guarantor can compel the creditor to first seize the property of the debtor and recover what is owed him from its proceeds before bringing action against him (Art. 1935). In effect, the creditor would be forced to suspend his action against guarantor and proceed against the debtor.

If the guarantor could, with such ease, force the creditor to first proceed against principal debtor, what then is the purpose of entitling creditor to sue the guarantor before suing the debtor?

At the outset, it should be noted that it is not all that easy for the guarantor to exercise the benefit of discussion. He has to fulfill a number of conditions which include indicating to the creditor debtor's assets located within the country of payment and not subject to litigation. He should also advance sufficient money to cover expenses creditor may have to incur in his effort to discuss the property of debtor.

Thus, the burden of identifying debtor's property that can be discussed and covering the cost of discussion are borne by the guarantor - a

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compromise arrangement that neatly distributes responsibilities between creditor and guarantor.

When should guarantor exercise the benefit of discussion? In the words of Art. 1935 (1), "as soon as he is first proceeded against." That is also the case in France where it is considered "a dilatory plea that must be raised in limine litis, before issue joined."[4] Thus, it must be pleaded in the form of a preliminary objection lest it be deemed to have been waived (Art. 244 (3) of C.P.C.) once the court embarks upon the task of framing issues.

If all goes well, and the guarantor effectively exercises the benefit of discussion, the court would, pursuant to Art. 278 (2) (b) of the C.P.C., suspend the suit against guarantor and grant the creditor permission to institute fresh action against the principal debtor.

The creditor may later on revive his action against the guarantor and demand payment from him only to the extent the value of the discussed property may fail to satisfy the claim.

Joinder of Principal Debtor and Guarantor

Is joinder of both the principal debtor and the guarantor in the same suit probably the simplest solution to the above raised issues? As a matter of fact, the substantive laws of some legal systems expressly provide for this solution (Art. 3051 of Louisiana Civil Code, for instance).

In Ethiopia, it is the procedural law that provides for the possibility of joining two or more defendants in the same suit for a variety of reasons. Where, for instance, two or more persons are "severally or jointly and severally liable on the same contract" plaintiff may join them as parties to the same suit (Art. 36 C.P.C.). Under the procedural law, therefore, it is conceivable for the principal debtor and the guarantor to be joined in the same suit.

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Nevertheless, the fact that our substantive law does not stipulate joinder of debtor and guarantor, gives rise to a number of questions. Most notably, can any one of the parties successfully object to a move to join debtor and guarantor? Creditor can argue that he is, on the basis of the more specific law, entitled to sue the simple guarantor without suing the principal debtor. This law being of a procedural nature tailored to govern a particular legal relationship, the argument should go, prevails over the much more general provisions of the Civil Procedure Code. By so insisting, creditor may wish to force the guarantor to invoke the benefit, of discussion whereby the latter will have to indicate debtor's discussible assets as well as advance the necessary funds.

On the basis of essentially the same arguments, the guarantor may also refuse to remain a co-defendant by invoking his right to compel creditor to first discuss the property of the principal debtor. If he does so, the court, as noted earlier, would have to suspend the suit against guarantor. The smae case would be revived only if the creditor cannot fully recover the debt after having seized all the discussible property of the debtor. Therefore, guarantor has good reason why he may choose to stay out of the first round of proceedings. He may never have to litigate the case as the creditor may succeed in recovering from debtor.

There is yet another reason why an enlightened guarantor may be adverse to being joined as a co-defendant with the principal debtor. As indicated above, he can remain in the suit having waived his right to exercise the benefit of discussion. The question is, once the court passes judgment against both defendants, can the guarantor urge that the judgement be first executed against the principal debtor?

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Under Louisiana law, the creditor is entitled to join the debtor and guarantor in the same suit and upon judgment being passed against both, guarantor can move that the judgment be first executed against the principal debtor.[5]

One should, however, note that the Louisiana law on this point is fundamentally different. It radically deviates from the French law of suretyship - on which it is largely based - by providing in the substantive law that creditor could join debtor and guarantor in the same suit. By so doing, it undercuts the benefit of discussion. But having done so, the Louisiana law had to restore the balance by enabling the guarantor to retain his right to invoke the benefit of discussion even at the stage of execution of judgment. In effect, the Louisiana law simplifies matters by first determining creditor's right against both debtor and guarantor in one action, thereby eliminating the possibility of two separate proceedings, while at the same time preserving guarantor's right to compel creditor to first collect from the principal debtor.

But the Ethiopian law of suretyship, which is also based on French law, remained loyal to the original. Hence, the benefit of discussion should be invoked in limine litis. Once issue is framed it is deemed to have been waived.

Thus, if a guarantor acquiesced in being joined in the same suit with the debtor and judgment is passed against both, there is no substantive law which would enable him to compel creditor to first execute the judgment against debtor. As a matter of fact, a guarantor who remains a defendant is presumed to have waived his right to invokde benefit of discussion.

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CONCLUSION

The point has been made that over two decades after the Ethiopian Civil Code came into force, many people, including some judges, still adhere to the old rule that a guarantor cannot be resorted to without the creditor first suing the principal debtor.

But the present law of suretyship, which is largely based on the Civil Code of France, has radically changed that rule. In the words of Planiol, "The surety can be sued first before the debtor."[6]

Yet, the modern laws have not been without their effects. The principles embodied in the Fetha Negast - which greatly favoured the guarantor - have been tempered by our procedural laws - (which incidentally seem to be much more readily absorbed than the substantive laws). Consequently, the current practice is that creditor invariably joins the principal debtor and the guarantor in the same suit. It has, however, been shown that this practice is tolerated only because the modern law of suretyship is not yet fully understood by many litigants.

After judgment is passed against the co-defendants, it is also current practice that the judgment is first executed against the principal debtor. Once again, this practice finds no support in our law of suretyship.

On the other hand, there is a lot to be said in favour of the present practice. As noted earlier in relation to the Louisiana law of suretyship, it eliminates the possibility of multiple suits without depriving the guaranty its subsidiary character. To that extent, the practice is more modern than our modern law.

But, since the divergence between law and practice cannot be tolerated indefinitely, it should be removed, perhaps by adopting the same approach as that of Louisiana. ...

REFERENCES

1. The Fetha Negast, The Law of Kings, as translated by Abba Paulos Tzadua, 1968, p. 163.

2. Id., pp. XV-XVI.

3. The prevalence of this mode of thinking among judges and attorneys was brought home to the writer during a one month study of Sidamo court cases in 1981. Even in Addis Ababa, where judges and practising lawyers are generally more enlightened, numerous cases reveal that the same attitude is wide spread. See, for instance, the following cases:

   Mulato Debro vs. The Law Enforcement Department of Sidamo (Civil Appeal Case 15/69 Hamle 19/1969, Addis Ababa) where both the lower court and respondent understood Art. 1920 as requiring guarantor to discharge the debt only where the debtor "is unable to discharge" the same.

   Sebatta Muncipality vs. Ijigu Ayalew and Ayalew Gube, (Civ. Case No. / 600/70, 13/7/71, Addis Ababa High Court) where the court gave the following interpretation:

   > "A simple guarantor would be liable only where the principal debtor's assets are not adequate to cover the debt fully or partially."

   Deneke Yashu vs. Ministry of Education, Keffa Office (Civ. App. No. 2090/72) 13/5/74, Supreme Court, Addis Ababa - where the lower court ruled that a simple guarantor would be held liable only where the principal debtor is "unable" to discharge his obligation.

4. R.Slovenko, Effects of Suretyship, American Journal Comparative Law, v. 9 No. 1, 1960, p. 57.

5. Art. 3051 of the Lousiana Civil Code.

6. M. Planiol, Treatise on the Civil Law, v. 2, Pt., 2., p. 341.

ADDIS ABABA UNIVERSITY

FACULTY OF LAW

Sales & Security Devices

Zekarias Keneaa

" OF PLEDGE"

BY

RALPH SLOVENKO

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(Footnotes Omitted

watchout for mistakes)

Pledge, the subject of Title XX of the Louisiana Civil Code of 1870, is " a contract by which one debtor gives something to his creditor as a security for his debt" (LCC 3133) The Pledge is one of the oldest of security devices. During the Middle Ages the loan on pledge was a principal form of credit as it was not subject to the canon prohibition of usury. In modern times the usefulness of the pledge security device has been greatly increased by the development of intangible property. The Civil Code recognizes the pledge of incorporeals, but this has not been entirely adequate to meet the needs of modern financing. Since the promulgation of the Civil Code, important transformations have taken place in the economic structure. The Code Napoleon marked the commencement of the era of industrial capitalism and with it the great development of credit. The great utility of the pledge device was actually discovered after the adoption of the Code Napoleon. A number of the Civil Code provisions on pledge, however, were cramping to a credit economy, and so they have been ignored or changed, paralegally for the most part. To promote the extension of credit, the law needs to protect the security of acquistions of the financer and at the same time to allow the borrower's use of his collateral. The pledge device, as modified, has been used in Louisiana and elseqhere to achieve this desideratum. It remains to be seen what is left of the old-style pledge.

The pledge, both new and old style, is perhaps the most important of the contracts of security. Of the contractual security devices provided for in the Civil Code, the others being suretyship and the mortage of immovables, the pledge has been the most useful in financing. The pledge is generally considered preferable to the security device of suretyship, because, for one thing, individuals are reluctant to bind themselves for the debt of another, and the corporate surety is expensive. Furthermore, in the words of an old adage, "the surety resists, but the pledge pays." As compared to the security afforded by the contract of mortgage, the pledge is generally considered preferable because of its relative simplicity and wider range of applicability.

The contract of pledge creates a real right to secure the performance of an obligation. The mortgage and the privilege are other forms of real security, whereas suretyship is a personal security in the form

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of a guaranty of payment of a debt. The distiniction between pledge and privilege (lien) lies in the origin of the security. The privilege arises by operation of law by virtue of the nature or quality of the debt, whereas pledge is contractual in origin and can arise on any type of debt. The mortgage partakes of the nature of both the pledge and the privilege: it may be conventional, arising by agreement of the parties, or it may result by operation of law, as, for example, the wife's legal mortgage on the husbands' property for his indebtedness to her. The pledge differs from the mortgage in that pledge requires a transfer of possession of the property to the creditor, whereas in mortgage the debtor is not dispossessed of his property. The pledge is made effective against third persons by the pledged property being taken away from the pledgor and put in the possession of the pledgee, whereas the conventional mortgage is made effective against third persons by recordation in the public records. In Roman law the symbol of the pledge was the creditor's fist over the property.

In Anglo-American law the chattel mortgage was developed side by side with the pledge. Furthermore, the security device of conditional sales is available in the common law states to serve the purposes of credit in the field of sales. In continental countries, the hypothec of personal property (chattel mortgage) was introduced under the influence of the Roman law in the last centuries of the Middle Ages, but the nineteenth century Civil codes know nothing of the mortgage of chattels, but only of the mortgage of immovable property. Under the French Civil Code and the Louisiana Civil Code, the security device of pledge, involving a transfer of possession to the creditor, is the only method by which movable property can be contractually engaged to secure an obligation. In many situations it may be undesirable or impractical to transfer possesion of the property. Relatively recently, in 1912, by virtue of special legislation, the use was authorized in Louisiana of the chattel mortgage security device. In continental countries as well, a series of laws has made possible the hypothecation of various types of personal property. Notwithstanding this legislation, the pledge remains, as in Roman law, the best form of security for property which is easily possessed by the creditor and which can be taken from the debtor's possession without interfering with his business operations. Furthermore, because of advantages of the pledge security device over the chattel mortgage,

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interpretations have been given to the pledge security device in Louisiana and other states to provide pledge protection for novel contemporary transactions.

According to the Civil Code, there are two types of pledge: "pawn" and "antichresis." Pawn is the pledge of a movable thing; antichresis is the pledge of an immovable (LCC 3135).

In modern usage the term "pawn" generally indicates the pledging of goods with a pawnbroker. Today, however, the pawnbroker's activity is a very small part of the business embraced under the legal topic of pawn. In fact, the agreement with the ordinary pawnbroker is often made in the form of a sale wit the right of redemption, rather than in the form of a pawn. The security transaction of pawn is primarily employed today by loan and security companies, banks and trust companies.

The term "pledge" is used interchangeably with "pawn" but technically speaking, pawn refers to movable property, whereas pledge includes both pawn and antichresis (LCC 3135). Actually, there is little harm in equating the term "pledge" with "pawn," inasmuch as the contract of antichresis has fallen into disuse. The security device of antichresis is seldom resorted to because the change of possession of land is particularly awkward. The mortgage is used instead.

It is significant to note that the term "pledge" is used to signify as a result of the paucity of the legal language, both the contract and the thing given as security under the contract. Furthermore, the word "pledge" is used in the Civil Code to designate the right of all the creditors of the debtor on his property (LCC 3183), but this is simply a stylistic expression. Pledge, in the technical sense of the term, is a cause of preference accorded to one of the creditors. The pledge affects certain property, and not all of the debtor's property. In providing that the property of the debtor is the "common pledge" of the creditors, LCC 3183 simply means to say that all the property of the debtor can be seized by the creditors and payment obtained from its sale.

Title XX of the Louisiana Civil Code on pledge is not a carbon copy in form of the corresponding section of the French Civil Code. Louisiana Title XX opens with three articles on definitions (LCC 3133-3135), then there is a chapter entitled " General Provisions" (LCC 3136-3153) setting

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forth rules applicable to both pawn and antichresis, followed by a chapter on pawn (LCC 3154-3175) and a chapter on antichresis (LCC3176-3181), a total of 49 articles. The corresponding title on pledge ((nantissement) pf the French Civil Code contains only 21 articles, consisting of an introduction of two articles, chapter on pawn (gage) of 12 articles, and a chapter on antichresis (antichrese) of 7 articles. The Louisiana Civil Code of 1808 contains 27 articles, about half as many as the present Louisiana Civil Code. There is room for economy in the Louisiana provisions on pledge and it can be achieved without loss of pedagogic value. The arrangement of Title XX also leaves much to be desired. There are in effect two general parts. In addition, a number of the articles which appear in the special parts on pawn and antichresis belong more properly in the general part. From the standpoint of draftmanship, apart from the question of substance, it can fairly be said that, of the forty titles in the Louisiana Civil Code of 1870, the title on pledge represents the nadir of civilian legislative technique.

CHAPTER 1. GENERAL PROVISIONS (LCC 3136-3153)

Articles 3136-3153 are general provisions on pledge, covering both the pawn of movables and the antichresis of immovables.

1. The Accessorial Nature of Pledge

A pledge may be given to secure any type of obligation provided it is a valid obligation. Pledge, like suretyship and mortgage, is an auxiliary obligation dependent upon an underlying lawful obligation. The accessory nature of the contract of pledge can be noted from the definition of pledge in LCC 3133: the pledge is a contract by which one debtor gives something to his creditor as a "security for his debt." As a result of the accessory nature of pledge, the nullity of the principal obligation necessarily involves that of the pledge; but, conversely, the nullity of the pledge does not involve that of the principal obligation, because a principal obligation can exist without an accessory.

The Louisiana Civil Code states in three articles:

LCC 3136; " Every lawful obligation may be enforced by the auxiliary obligation of pledge." LCC 3137: "If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it."

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LCC 3138: "If the obligation is null, so also is the pledge."

Upon the termination of the principal obligation, whether by virtue of a condition or by nullity from its own nature, the pledgor is entitled to the restitution of the pledge. However, when the pledge is made to secure a debt arising out of an illegal or immoral transaction, for example, a gambling obligation, the court as a rule will not assist the pledgor in recovering his property from the pledgee, although the pledgee has no legal right to keep it. The Roman law principal in pari delicto potior est conditio possidentis prevails in both the civil law and common law. The court as a rule leaves both parties in the condition where their own conduct has led them. As the pledgee has no legal rights in the property against the rest of the world, it would appear that the pledgor's creditors could treat the property still as the pledgor's, and reach it by attachment. Furthermore, the court may entertain the pledgor's claim of restitution when the unlawful object of the principal obligation has not been carried out and the pledgor seeks to repudiate the agreement.

As to the guaranty of natural obligations, LCC 3139 provides that the obligation of pledge annexed to a natural obligation is valid only when the natural obligation is confirmed and becomes executory. A natural obligation, however, is a sufficient consideration for a "new contract." The act by which the "new contract" is created can be the act of a third person, as well as that of the natural obligor. A third person can give a pledge, or mortgage, to secure the natural obligation, or he may bind himself personally for the obligation by acting as surety. In effect, the third person in this situation is acting as an insurer, taking the risk that the debtor will pay him or the creditor. LCC 3139 applies to the case where the pledge is invalid for the same cause as the principal obligation, as for example, in the case of a pledge made by an incapable to secure his own contract. The natural obligor, as long as incapacity continues, cannot enter into a "new contract."

LCC 3140 carries on with the thou h of LCC 3136 that "every lawful obligation" may be secured by a pledge. "Every lawful obligation" include both money debts and "to do or not to do" obligations. The source of the principal obligation may be a contract, a judgment, a statute or a tort.

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Thus, the obligation of a lessee to keep the leased premise in good condition, as well as to pay the rent, may be secured by a pledge given to the lessor. A surety may be secured by a pledge against the consequences of his contingent liability.

"hen the pledge is given to secure the fulfilment of an obligation other than a money debt, as for example, when the obligation consists in doing something, the pledge usually secures the payment of damages in the event the pledgor fails to perform his principal obligation. The amount for which the pledge is given must be fixed in the contract of pledge, it being important for persons who deal with the pledgor to know the extent to which his property is already encumbered. Thus, a contract of pledge given to secure the faithful administration of a corporation officer must state the sum to which the pledge will answer.

2. Who can pledge

To constitute a valid pledge, the general principal is that the pledgor must have an ownership interest in the thing given in pledge and must have the contractual capacity to alienate property. The pledge can be given either by the debtor himself or by a third person for the debtor (LCC 3141), but in either case, the pledgor must have a right in the property and the capapity of alienation.

The French Civil Code provides: "The pledge may be given by a third party on behalf of the debtor." The Louisiana Civil Code in Article 3141 contains the same provision: "A person may give a pledge, not only for his own debt, but for that of another also". This rule is simply an application of the provision in the general law of contract that a person may become a guarantor of another by undertaking that the latter will do something. One who gives a thing in pledge to guarantee the debt of another does not oblige himself personally, but he may, of course, also sign as a surety and thus be personally respnsible for the obligation. By so doing, his contract of suretyship is secured by the pledged property.

One who pledges a thing for the obligation of another resembles a surety, with the difference that the surety answers with all his property because he is held personally, whereas a person who gives a thing in

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pledge for a debt not his own does not engage himself personally but only the thing that he gives to the creditor: res non persona debet. From this point of view, the pledge by a third person is less onerous than surety.

When a third person pledges property for the debtor, there are two legal relationships: the relations between the third-person pledgor and the creditor, which are governed by the law of pledge, and the relations between the pledgor and the debtor, which are governed by the law of suretyship. It is generally held that the personal surety's right of discussion when sued by a creditor does not belong to one who furnishes a real security for the debt of another. In a Louisiana case in which the creditor gave the debtor more time to pay without the consent of the third-person pledgor, the court said that the extension-of-time which discharges a personal surety is not applicable to the third-person pledgor. It can be maintained, however, that the Civil Code articles on suretyship on the relations between the creditor and surety should apply to the pledgor for another's obligation. After all, the pledgor for another is in effect a "real surety," and the similarity between the personal surety and the real surety is sufficiently close to permit the same effects vis-a-vis the creditor. It is generally agreed that the real surety, as the personal surety, has an action against the debtor for indemnity, but this situation deals with the relations between the pledgor and the debtor.

A debtor may give in pledge whatever belongs to him. He gives what rights he has in the property. Encumbrances on the property at the time of the pledge follow the property in pledge; the pledgee stands in the shoes of the pledgor with regard to the pledged property. LCC 3142 provides: "A debtor may give in pledge whatever belongs to him. But with regard to those things, in which he has an ownership which may be divested or which is subjected to encumbrance, he can not confer on the creditor, by the pledge, any further right than he had himself.

The determination of ownership for the validity of a pledge is made as of the time of the pledge. LCC 3143 provides: "To know whether the thing given in pledge belonged to the debtor, reference must be had to the time when the pawn was made." The time of the pledge is the crucial

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date. However, according to LCC 3144, if at the time of the contract the debtor had not the ownership of the thing pledged, but has acquired it since, by what title soever, his ownership relates back to the time of the contract and the pledge stands good. The increased rights of the pledgor in the property accrue to the benefit of the pledgee. Similarly, it is provided in the law of mortgages that if a person grants a mortgage on property of which he is not the owner, the mortgage will be valid if the debtor subsequently acquires the ownership of the property by whatever right. This is the so-called doctrine of after-acquired title. To illustrate: A son gives in pledge his mother's jewelry. The mother later dies, with the property passing to the son. The subsequent accrual makes the pledge good.

Instead of the situation of after-acquired property, consider the opposite case. The pledgor, after making an effective pledge of the property, sells the property to another. The pledge being good and in the pledgee's hands, the encumbered property is all that passes. The right of the creditor on the property is not removed by the pledgor's sale. The purchaser cannot obtain the property in an unencumbered state until the pledgee is paid.

One may pledge the property of another with the express or tacit consent of the owner, but naturally, for a finding of tacit consent, the facts must be so strong as to leave no doubt of the owner's intention. This is the subject of seven code articles, LCC 3145-3151.

Mere possession of movable or personal property, without more, is not sufficient to give authority to pledge. Although a number of articles in the Louisiana Civil Code presume that one in possession of movable property is the owner, the doctrine of la possession vaut titre has not prevailed in Louisiana. However, as long as the true owner refrains from claiming the property, the person who has given it in pledge cannot have it restored until his debt has been entirely discharged. It is the owner who must demand the return of the property.

The general principle is that the debtor cannot confer on the creditor by the pledge, any further right than he had himself (LCC 3143). There are exceptions to the rule, namely, a) in the case of rights of a creditor

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of the pledgor outranked by a pledge of the property; b) in the case of agency; and c) in the case of negotiable instruments, where the pledgor may not own the negotiable instrument, but the pledgee may be a holder in due course and thereby acquire greater rights than the pledgor. These three exceptions will be taken up in order.

a) The pledge may have the effect of ranking the pledge creditor over the other creditors of the debtor. The pledge may have, the effect of rendering ineffective the existing encumbrances on the debtor's property against the pledge creditor.

The transfer of possession out of the hands of the pledgor may terminate or subrogate the rights of creditors in the property, thereby giving the property to the pledge creditor free of the encumbrance. Privileges, or liens as they are most frequently called, which are dependent on the debtor's possession are killed by the change in possession. The case of Pierson V. Carmouche is the leading decision on the effect of a pledge on the vendor's privilege. The vendee of a movable, which was purchased on credit, pledge it to another. LCC 3227 provides that the vendor has a preference on the price of the property sold only so long as the property remains in the possession of the purchaser. The court held that the pledge vested in the pledgee a right superior to that of the vendor, and in effect to that of the pledgor in the property. The "Privilege" of the pledgee, being a special privilege on a particular thing, primes the general privileges. The case of Pierson V. Carmouche stands for the rule that the privilege of the pledgee ranks the special privilege dependent upon the debtor's possession.

b) A pledge by an agent confers rights in the property upon the pledgee which the agent did not possess. Actually, however, the aforelisted exception of the case of agency from the rule of LCC 3143 that the debtor cannot confer on the creditor by the pledge any further right than he had himself is more fictitious than real. The agent is, by definition a representative of another, and hence it is the principal of the agent, rather than the agent himself, who is the actual pledgor.

An agent can give in pledge the property of his principal when he has his consent or an express power to that effect (LCC 3149) Possession of

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the property by the agent with authority to do something else is not authority to pledge. A general authority to mortgage the property of the principal includes that of giving it in pledge (LCC 3149), but authority to sell property does not include the power to pledge it. For example, in the case of Frantz & Co.V. Winchill & Co., a jewelry repairman was occasionally entrusted by his principal with jewelry for the purpose of selling it for a certain price. The repairman took two pieces on pretense of having a customer for them and, through a friend, pawned them. In a suit by the principal to recover the jewelry or its value from the pledgee the court held that the pledge was invalid and that the pawnbroker acquired no right to hold the property as against the owner. The pledgee had to give up the security which he had received for the loan. Under the general law of agency, if an agent sells the principal's property but fails to turn the money over to the principal, it is the principal's loss if the agent had authority to sell, and similarly it should be the principal's loss if an agent has authority to pledge and fails to turn over the borrowed money to the principal. In the Frantz case, the agent was in possession of property with power to sell. He had no power to pledge. However, if the agent had had real or apparent authority to pledge, the pledgee would have been protected in his security.

A factor is an agent with the power to sell the goods intrusted to him; but a factor, as such, does not have the actual or the apparent authority to pledge, unless perhaps for charges on the goods themselves. The factor may have an interest in the goods intrusted to him for sale, such as for his commission and expenses of keeping the property, and a person may give in pledge whatever belongs to him (LCC 3141). The factor may pledge the goods to the amount of his interest in them. Furthermore, the principal may ratify the act of pledge done by his agent without authority.

c) The delivery of a negotiable bill of exchange or promissory note, with or without indorsement, constitutes an effective pledge of the debts they represent. Although the property may be of another, the pledge of a negotiable instrument is valid, by virtue of the law of negotiable instruments. Neither express nor tacit consent to pledge is necessary. The pledgee who acts in good faith under the NIL has his protection

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under that law, even though the pledgor may not have had the same rights. As a pledgee, he necessarily gives value, but if he is not in good faith, he does not obtain the benefits of negotiability, and his rights are those of the pledgor.

The representatives of estates cannot pledge the property of their administrations. Tutors of minors and curators of persons under interdiction, curators of vacant estates and of absent heirs, testamentary executors and other administrators named by the court cannot give in pledge the property confided to their administration, without being expressly authorized by the court (LCC 3148). Similarly, as just pointed out, an agent (attorney in fact) cannot pledge the principal's property without the latter's consent, but if the agent has a general power to mortgage he may pledge (LCC 3149).

Cities and other political corporations can pledge property only when authorized by their charter, and then only by following the statutory procedure (LCC 3150). Usually, a political corporation may pledge anticipated revenues to secure bonded obligations. In a word, the pledge must be authorized by the act of incorporation, and, if so, the proper procedure must be followed.

The widespread issuance by private corporations of watered securities in the latter part of the nineteenth century led to the adoption of restrictive constitutional and statutory provisions governing the issuance of corporate stocks and bonds. The provision in the Louisiana constitution is typical: "Corporations shall not issue stock or bonds except for labor done, or money or property actually received; and all fictitious issues of stock shall be void; and any corporation issuing such fictitious stock shall forfeit its charter." Under provisions of this type the question has been raised as to the legality of issuing corporate bonds for pledge, since ordinarily the pledged bonds substantially exceed in face value the amount of the loan received by the corporation. Most doubts were resolved by a decision of the United States Supreme Court construing the Arkansas constitutional provision where in the Court stated that the provision required only that "the transaction (be) a real one, based upon a present consideration, and having reference to legitimate corporate purposes. Subsequently, the courts of the various states have generally

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held, under the general powers of corporations to mortgage their property, borrow money, and issue notes, bonds and other evidence of indebtedness, that a pledge of mortgage bonds of a corporation as security for a loan to the corporation is a valid issue of the bonds, even though the bonds are pledged substantially below par. Ordinarily, the pledge of corporate property is authorized by resolution of the board of directors, but the general manager of the corporation may be given blanket authority to pledge in the usual course of business. If a manager pledges property without the boards's consent, and the board is inactive or does not repudiate the pledge, it may be held that by accepting the benefits of the loan, the board has ratified the pledge which secures it.

The right of a bank to pledge is subject to limitations. A bank has the power to pledge a certain amount of its assets to secure loans. A phenomenon characteristic of the period after the First World War was the pledge of bank assets to secure deposits as well as loans. The judicial problem was presented when receivers of closed banks demanded return of the collateral, without an offer to restore the deposit in full, requiring the court to determine whether the pledge was ultra vires, and if so, its effect. As in other states, it was provided by legislation in Louisiana that banks may pledge assets to secure deposits of the federal and state government and of governmental units, but they may not pledge assets to secure private deposits. A liquidator may pledge assets of a closed bank under specific authority from a court to secure a debt. The power of national banks to pledge is governed by federal law. As in the case of state banks, national banks have no power to pledge to secure private funds, but a pledge can be made to secure deposits made by governmental agencies. National Banks may pledge assets to secure deposits of states and state agencies if the law of the state in which the bank is located authorizes such pledges. Statutory authority for national banks to pledge property for public money extends to business corporations in which the federal government owns the stock.

One partner of a partnership cannot pledge partnership property for his personal obligations without the consent of his associates. In a like manner he cannot pledge partnership property for a debt of the partnership without the consent of his associates, unless he is the managing partner.

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In commercial partnerships, each member has managing authority. LCC 3151 provides in two paragraphs:

" A partner cannot for his own concerns, give in pledge the partnership property without the consent of his associates. He can not do it even for the partnership concerns, without such consent, unless he be vested with the management of the copartnership.

" This rule admits of exception in matters of commercial partnership."

Property of the ordinary partnership, therefore, can be charged only by all the partners or by the managing partner whereas the commercial partnership can be bound for a partnership concern by any partner. The second paragraph of LCC 3151 setting out an exception in matters of commercial partnership probably refers only to the second sentence of the first paragraph dealing with partnership debts. This interpretation, however, that a partner of a commercial partnership cannot pledge the partnership property for his own concerns, has the effect of restricting the second paragraph of LCC 3151 to a mere restatement of the general principle that each member of a commercial partnership has managing authority.

3. Dispossession of Pledgor

Under the Civil Code, delivery and retention of possession of the thing pledged are essential to the contract of pledge (LCC 3152). There is a good basis for the rule: The law abhors secret encumbrances. Purchasers and creditors of the pledgor, were he allowed to create a pledge and still retain possession of the property, would be misled by an appearance of property in the pledgor which he did not have. The delivery of possession to a pledgee serves to give notice of the encumbrance to third persons. The important contrast between the pledge and conventional mortgage is the method by which they are made effective against third persons, namely, possession as contrasted with registration in the public records.

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The rule that the pledgee must have possession of the thing pledged prevails in the common law as well as in the civil law. As the United States Supreme Court once said, "The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

It has been contended that, as between the parties, there may be a pledge without a transfer of possession; that is to say, the element of possession is necessary for the pledgee's rights against third persons, but, as between the parties, the pledgor cannot complain that there is a want of possession in the pledgee. On the occasion, the Louisiana Supreme Court said in passing, "Article 3162 of the Civil Code, requiring actual physical delivery to and possession in the creditor (or to a third person) of the pledged movable, credit or other instrument in order for the privilege to subsist, is not applicable as between the parties to the pledge. This position is without support. Pledge is a real contract. It is formed by the delivery of the thing. The rule is applicable not only with respect to third persons (existence of the privilege) but also between the parties (existence of the contract). Until the creditor (or thirdparty custodian) has possession, the pledge exists neither between the parties nor with regard to third parties. The pledge is a contract by which one debtor gives something to his creditor as a security for his debt (LCC 3133). The simple accord of the will does not suffice to create the pledge.

What is the reason for the requirement of dispossession and delivery as between the parties to the contract? For one thing, there is real security only if there is a right of preference. Without a right of preference, the contract is useless. A right of preference means a right against a third person. Furthermore, a security left in the possession of the debtor is useful only if there is a droit de suite (right to follow the property), and a pledge does not confer this right. In a sale, the contract is perfected between the parties simply by their agreement, but this is not the case in pledge, and there is no reason that it should be, as sale and pledge are different conceptions.

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In addition to the requirement of delivery, the law requires a written instrument for the validity of the contract with regard to third persons. This formality is required only with regard to third persons and not between the parties (LCC 3158). Article 3158 says that the privilege exists only when there is a written instrument, and a privilege is involved only with respect to third persons, and not between the parties. The question of proof, if between the parties the contract is contested, is determined by the usual rules of evidence.

4. Return of the pledged Thing

The fact that a person has handed back the pledge is not sufficient to raise a presumption that the debt has been released (LCC 2204). The principal obligation continues without the benefit of the security.

Quite frequently, placing the goods in the hands of the pledge creditor is a burden to him. Furthermore, taking the goods away from the borrower may handicap the operation of his business. At a time when Louisiana was without the chattel mortgage security device, a limited purpose doctrine was developed to give the creditor the benefit of the pledge security device although the physical possession of the thing was returned to the pledgor. Under the doctrine as developed, pledged property which has been delivered to the pledgee can be returned to the pledgor temporarily, as agent for the pledgee fon a special limited and commercially valid purpose, and the pledge will still be good against seizing creditors of the pledgor.

The pledgor has the property temporarily in his possession under a so-called "trust receipt". Under the trust receipt, it is the fiction that the possession remains in the pledgee under the existing pledge. The subject of the return of the pledged thing on trust receipt was carefully examined and the pledgee protected in the important case of Canal-Commercial Trust & Savings Bank v. New Orleans, T. & M.Ry.Co. In this case, a vendor sold to X on credit a carload of sugar and gave to his order a negotiable bill of lading of a railroad carrier. Then X pledged and delivered the bill of lading to the plaintiff-bank as security for a loan. The plaintiff immediately re-delivered the bill of lading X under a trust receipt so that he could receive the shipment either for sale, applying the propeeds of the sale to the debt owing the bank, or for storage in

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a warehouse and handing over the warehouse receipts to the bank. Discovering that X was insolvent, the vendor stopped the shipment of goods in transit. The plaintiff-pledgee bank, which had regained possession of the bill, sued the carrier for shipment or its value. The railroad company defended on the ground that the plaintiff by returning the bill of lading to X had lost its rights as pledgee. The court held that even though the bill of lading was in the pledgor's possession when the shipment was stopped, a valid pledge had been created by delivery of it to the plaintiff, and the temporary return of the bill of lading to the pledgor under trust receipt for a commercially valid purpose did not defeat the pledge as against one who did not rely on the debtor's possession of the bill of lading.

The rule of the case is that a creditor who returns a pledged thing to the debtor temporarily for some commercially valid purpose maintains his right of pledge against competing creditors who have not relied on the returned possession in extending credit to the debtor. The attaching creditor in this case was the pledgor's vendor, and consequently was not misled by the possession of the thing in the hands of the pledgor. The English common law and most American jurisdiction similarly protect the pledgee in the case of re-delivery for a special purpose. In the leading English case on the subject, the pledgee returned a bill of lading representing merchandise to the pledgor to permit the pledgor to obtain and sell the goods on the pledgee's behalf. The pledgor took the bills of lading on trust receipt and sold the goods. The proceeds were arested by other creditors. The House of Lords, holding in favor of the pledgee, stated that the civil law of Scotland and the common law of England are identical on the point.

Realistically speaking, the "trust receipt" doctrine departs ffom the rule of LCC 3162, which states that the thing pledged must remain in the possession of the creditor or a third-party custodian. Under the trust receipt doctrine the thing is returned to the debtor any yet the pledge subsists. The impairment of the rule of LCC 3162 has been justified by the needs of the market place. However, the return of the thing must be a momentary one. Moreover, creditors and purchasers who innocently rely on the returned possession of the thing pledged are protected. For this reason, the trust receipt is in Louisiana a risky

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security device. This risk can now be obviated by the use of the chattel mortgage security device. The chattel mortgage, however, may be unsatisfactory. Although the chattel mortgage has always been available in the common law states, the trust receipt has nonetheless been used. The freedom from recordation in the trust receipt is advantageous where the credit advanced is on a short-term basis or where it is extended by a large financer covering many separate and distinct transactions. In addition, as the lender has legal title as security under the trust receipt rather than some form of lien, compliance with formalities of foreclosure in case of default is unnecessary. From the viewpoint of the borrower, the trust receipt has the advantage of allowing him to keep his financial status secret.

The case of Commercial National Bank of New Orleans v.Canal Louisiana Bank & Trust Co. illustrates the risk involved for a financer in the use of the trust receipt. The court held that the trust receipt was inoperative against a second pledgee. In this case, the bankrupt Breuil & Co. held bills of lading for cotton and pledged them to the Canal Bank for a loan. The Canal Bank returned the bills of lading against a trust receipt giving power of sale and also power to warehouse the goods. The bankrupt got the cotton from the carrier, had it picked up and stored in a warehouse, and took negotiable warehouse receipts to its own order which in breach of its duty under the trust receipt the bankrupt pledged to the Commercial Bank. The bankrupt later withdrew the warehouse receipts from the Commercial Bank against a similar trust receipt. It then withdrew the goods, and upon the bankruptcy, the trustee in bankruptcy obtained possession of the cotton not disposed. The holder of a trust receipt is protected as against the trustee in bankruptcy, but the question is which bank has superior rights in the goods, the entruster-pledgee or the second pledgee? The court held for the Commercial Bank, the second pledgee, while the negotiation of the warehouse receipts constituted a wrong on the bankrupt towards the Canal Bank, nevertheless, the Commercial Bank, a bona fide pledgee, acquired thereby a valid right in the goods. Although the court reached its decision under the provisions of the Warehouse Receipts Act, the conclusion would be the same had the bills of lading themselves rather than the warehouse receipts been repledged. The fact that the Commercial Bank also permitted the bankrupt to get possession

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of the cotton under a trust receipt did not result in a loss of its rights, for there was no further negotiation of the warehouse receipts.

It may be noted that the pledgee retains his rights in the goods as long as they can be identified and that labor spent upon them by the borrower, the signer of the trust receipt, does not impair his rights. Thus, as the court held in one case, the holder of a trust receipt was not affected by the labor of the signer of the trust receipt in putting 100 bales of cotton through a pickery turning them into 150 bales of cotton. However, if an outsider is employed to do the work, he would probably obtain a superior lien upon the goods for the value of his services. This rule would simply be an application of the principle that the rights of the pledgee who gives back possession of the thing to the pledgor are subordinated to the claims of creditors relying on the returned possession. It has been seen that the court has ruled in favor of a bona fide purchaser and in favor of a second pledgee against the claims of the pledge creditor who returns the property to the pledgor giving him the appearance of an unqualified owner.

Unlike the orthodox trust receipt, the transactions in the cases of Canal-Commercial Trust & Savings Bank v.New Orleans T. & M.Ry.Co.and Commercial National Bank of New Orleans V.Canal Louisiana Bank and Trust Co., above discussed, involved the sending of a bill of lading directly to the purchaser by the seller of the goods, and the bill of lading was given to the lender by the purchaser at the time of negotiating the loan and then re-delivered to the purchaser under the trust receipt. The orthodox is one in which the lender finances a purchase and sale of goods at distant point under a letter of credit, and the bill of lading is made out by the seller to the order of, and indorsed to, the lender, who thereafter delivers the bill to the buyer under a trust receipt. The expression "trust receipt" first gained general currency in the United States at the turn of the century in transactions involving the importation of goods. It is to be noted that there is no trust in the equitable sense of a trustee holding the legal title for the benefit of a cestui que trust. The term is simply an expression of the fiduciary obligation that is assumed by the signer of the receipt. In the "pure" trust receipt device,

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which involves a tripartite arrangement of seller, lender (entruster), and buyer (trustee), full legal title is said to be obtained by the entruster directly from the original seller to whom the entruster pays the purchase price.

To illustrate: Suppose that an importer wishes to obtain coffee from Brazil for sale in this country. He applies to his local bank for issuance of a letter of credit authorizing the coffee merchant in Brazil to draw drafts upon the local bank for the price of the goods. In this tripartite arrangement, it will be noted, title to the goods which serves as the bank's security was not at the outset in the importer. Upon the arrival of the shipment, the importer obtains from the bank the bill of lading upon his signing a trust receipt by which he acknowledges that the property turned over to him belongs to the financer and under which he agrees to hold it in trust and according to the terms of the instrument. Under the trust receipt, the importer obtains the bill of lading from the financer for the purpose of entering the goods at the customhouse and placing them in a warehouse. The entry and warehousing of the goods is done in the name of the financer as agreed upon in the trust receipt. The importer then gives the warehouse receipt to the financer, and the trust receipt is canceled. The financer itself could have performed the entry and warehousing, but it avoided this trouble by having it performed by the importer. Of course, if the importer has a purchaser for the goods at the time of its arrival, there will be no need for warehousing them. When the importer finds a purchaser, he obtains from the bank the warehouse receipt or the bill of lading, as the case may be, giving in return a trust receipt. The goods are delivered to the purchaser, who in most cases is unaware of the interest of the bank in the transaction. The importer, in accordance with the trust receipt, collects the proceeds and turns them over to the bank, which pays itself in full and credits to the importer's account any balance remaining. The trust receipt is then cancelled or returned.

As Mr. Karl Frederick points out, the importer, by use of this method can make, without employing a dollar of his own money, an importation of goods, sell it to a domestic consumer, and receive his profit from the transaction, and yet at no time does he hold the title to any

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part of the goods. Nonetheless, he is not simply a broker or agent, but rather he occupies the position of a principal. He assumes the primary risk, and is entitled to the entire profit of the venture. The bank has no concern in the goods beyond the repayment of its advances and charges. The importer's credit with the bank and his business initiative make the transaction possible. Banks and financing companies, which originally employed the trust receipt in foreign trade exclusively, began using it about forty years ago in all their financing operations of manufactures and dealers in both the import and domestic fields. By the trust device, financers were able to improve their security positions and at the same time avoid the laws regarding possession or filing.

There is diversity of opinion as to the "underlying nature" of the trust receipt in the tripartite situation. It has been classified as a conditional sale, a chattel mortgage, a pledge, and also as an independent security device. The classification is important because the device will be governed by the rules of the category in which it is placed.

In the conditional sale, which is recognized in the common law and continental countries, but not in Louisiana, the vendor delivers the thing to the buyer under an agreement whereby payments are to be made from time to time on account, but with the stipulation that title shall remain in the seller until full payment has been completed, with the proviso that on default in any payment, possession may be reclaimed by the seller. There are significant differences between the vendor-vendee relationship in the conditional sale and the entruster-trustee relationship in the trust receipt. In a conditional sale, possession cannot be retaken until a default, whereas in a trust receipt it can be retaken at any time. Furthermore, the financer in a trust receipt is not interested in selling goods as a business, and if it retakes the goods and sells them, the measure of his recovery is the amount of the loan, and any excess belongs to the borrower, whereas in a conditional sale the buyer's interest is the amount paid on account of the contract. The holder of a trust receipt merely finances a transaction. Furthermore, the obligation of the borrower to repay the loan is not dependent upon the arrival of the goods, for they are sent to him at his risk.

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There are two theories of mortgages, the lien theory and the tit
theory. According to the lien theory, which prevails in many common
law jurisdictions and in Louisiana, the mortgagee simply has a "lien" o
the mortgagor's property. The lien theory of mortgages cannot be reco
squared with the trust receipt. In the orthodox trust receipt, the co
transfers title to the lender by taking and delivering a bill of ladin
in its name; title to the property is not in the buyer.

According to the title theory of mortgages, which prevails in a substantial number of common law jurisidctions, the effect of the mortgage is to transfer title to the mortgagee. Among the contentions, that the trust receipt is similar to the title theory of mortgages, the following may be noted: "The trust receipt transaction is one in which the origional vendor is like a mortgagor who has simultaneously conveyed to the lender his title as security for the debt of the buyer, and his equi of redemption to the buyer." "This creditor is a (title) mortgagee and the arrangement is a chattel mortgage, but of a peculiar type, distinguishable from the usual chattel mortgage by reason of the fact that the obligor has not prior to the arrangement had either title to or possessio of the property mortgaged." The title theory of mortgage differs from the trust receipt in that title is in the mortgagor prior to the mortgage and is transferred to the mortgagee as security for the obligation, where in the case of trust receipt, title is not in the buyer and consequently he cannot convey it to the lender. Furthermore, the mortgagee has a droit de suite whereas an entruster is generally defeated by persons who rely on the debtor's possession of the property. It has been held in many states that the trust receipt is not a mortgage or conditional sale within the meaning of the recording laws.

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Is then a trust receipt a pledge? Pledge depends upon possession in the party secured, and the title to the property is in the pledgor or someone other than the pledgee, whereas in the trust receipt, title is in the party secured while possession is entrusted to another. Professor Hanna is of the view that the root idea of the trust receipt is really one of pledge. He contends that the notion that the financing creditor is an owner and that his security is dependent upon title is wholly artificial. Concerning the requirement of possession in the pledge security

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device, or better put, explaining the lack of possession in the entruster, he finds support in the bipartite pledge situation wherein redelivery is permitted for a momentary and particular purpose. Under the modern law of pledge, possession by the pledgee is a fluid concept. Constructive possession and redelivery for a particular purpose are held not to violate the requirements for the existence of the pledge security device.

The Uniform Trust Receipts Act (UTRA), drafted by Professor Llewellyn, was promulgated in 1935 and was quickly adopted in the principal commercial states. It has now been adopted in about half of the states. The Uniform Act avoids many of the old problems (but presents new ones) by setting up, in a nominalistic way, the trust receipt as a new and independent security device. By treating the trust receipt as a distinct type of security form, the act seeks to dissociate it from other security devices. The UTRA does not simply label the trust receipt as an independent security device, but it also frames a governing body or rules.

The trust receipt under the UTRA appears to be an electic security device which seeks to combine primarily for the benefit of the financer the advantages without the disadvantages of the conditional sale (title in the creditor but without risk of loss), of the mortgage (right of pursuit, except against certain purchasers, and right of preference without the burden of possession), and of the pledge (freedom for a certain period from recordation, and right to possession at any time). The entruster has an absolute right to possession which he can exercise at any time. When the entruster retakes the property from the trustee, the Act considers that at this point he holds the property as pledgee.

It is in the sense of eclecticism that the trust receipt is a new conception. The crux of the problem is to determine which parties are to be sacrificed to the needs of business. The theory of the UTRA is to give to the financer every conceivable protection, so that the financing of sales and other transactions may be facilitated. It should be realized that the UTRA permits secret liens and is contrary to laws on pledge and mortgage. There are decisions which sanction a delivery of a pledge to the pledgor for a special and limited purpose, but no powers of dealing with the pledge as are given under the trust receipt have ever been tolerated where the rights of other creditors were involved.

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Tripartite and bipartite transactions are covered by the UTRA; it does not matter how the papers are shuffled. Under the UTRA, any transaction in which incoming stock (that is, "new value") of a dealer or manufacturer is financed by a third party who never acquires more than a security interest in the goods, qualifies as a trust receipt transaction. As before the Act, trust receipt financing is confined to the acquisition of new property, on the theory that if it was used to refinance old inventories, it would serve to defraud creditors of the trustee. In the bipartite sistuation, the entruster must obtain his interest promptly after delivery by the seller to the trustee. Only a "buyer in the ordinary course of trade" acting in good faith and without notice can under the UTRA take the goods free of the entruster's interest. A third person such as a mortgagee or pledgee does not take free of the entruster's claim. The duration of the entruster's secret lien is for thirty days. For protection beyond thirty days, the entruster must record his interest, but usually the purposes of the trust receipt are accomplished within a thirty-day period. The entruster's lien, when the trustee sells the goods, attaches to the proceeds against all classes of creditors as to whom his security interest in the goods was valid.

Louisiana has not adopted the Uniform Trust Receipts Act or other general legislation on trust receipts, but the trust receipt device is widely used in Louisiana and the term "trust receipt" appears in two statutes, one a criminal statute on the unauthorized use of collateral withdrawn on a trust receipt, and the pther a statute on collateral security for loans made by banking associations and savings banks, where it is stated that "This Section shall not prohibit the withdrawal of collateral on trust receipts. As in the bipartite situation, the Louisiana court has held in the tripartite situation that the lender is not protected against a creditor who relies on the possession of the property in the debtor. The court applies the usual rules of pledge governing special returns and does not permit the trust receipt to change the result.

Traditionally, the use of the criminal law to protect credit had been opposed by those who fear its use as a mere collection device.

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The Uniform Trust Receipts Act contains no criminal provisions, and the states which have adopted it have not provided specific criminal protection. For example, in Pennsylvania, which recognized the trust receipt as early as 1894, the conversion of the proceeds derived from the sale of goods is still not considered criminal. The complexities of modern security transactions have made common law concepts of crime inadequate for their protection. Under the traditional view of pledge, possession in the pledgee is an essential element, and therefore the crime of larceny, which protects the possessory interest, is adequate to protect this security. LCC 3173 provides that "The debtor who takes away the pledge without the creditor's consent, commits a sort of theft." In the trust receipt situation, however, the danger to the entruster is not harm to possession but rather that the borrower will convert the proceeds. It is considered in many states, and even in those which have adopted a consolidated theft statute, that where property is subject to a trust receipt arrangement contemplating a sale by the borrower, and he converts the proceeds of that sale, he is only a debtor and not a criminal. Louisiana, unlike most states, has a criminal statute which makes it an offense to repledge or to convert goods or their proceeds withdrawn on a trust receipt. It is curious to observe that less protection is afforded to the entruster against competing creditors in Louisiana than in other states, but in the realm of the public law, a greater degree of protection is afforded aginst the malfeasance of the borrower.

5. Delivery to Third Person

The element of delivery in the pledge security device is satisfied by possession in a third person who is agreed on by the parties to be the custodian for account of the pledgee (LCC 3162). The third-party custodian device is a means of protection to a debtor who does not have trust in the creditor as possessor of his property. The central idea in pledge is to have the pledgor out of possession rather than to have the pledgee in possession. The agreement between the parties and the third persons is a "deposit."

The leading case on possession by a third person is Succession of Lanaux. In this case, decided in 1894, a New Orleans commission merchant,

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by agreement with one of his creditors to secure him by a pledge, executed his promissory note in favor of the creditor, attached to it certain bonds and certificates of stock, placed the note and securities in a package with the creditor's name on it, put the package in his (the merchant's) bank box, instructed his clerk, who held the key of the box, to deliver the package on demand of the creditor whenever called upon to do so, and comunicated these instructions to the creditor. The package remained in the bank box until the pledgor's death. A divided court held that there had never been such dispossession of the pledgor, and such delivery and possession in the pledgee, as could affect competing creditors of the decedent. The clerk of the pledgor did not have possession of the securities as agent of the pledgee, but rather had held them solely as agent of the pledgor, who never lost control of the securities.

A large part of the property of manufactures and dealers consists of their inventories. Delivery of the property to a creditor to secure a loan would make it impossible for the debtor to continue his business. For reasons of business expendiency and economy, both parties to the credit transaction desire that the security remain in the hands of the debtor. The strategem of using an employee of the debtor as custodian or warehouseman was conceived, and the device has been upheld by the court in a number of decisions as a valid pledge.

Assuming the debtor's employee has actual physical possession of the thing pledged as custodian, it is still highly unlikely that he would refuse the employer's demand for return of the thing. The adoption of the chattel mortgage act in part overcomes the need for the pledge device in this situation, but at one time pledge was the only method in Louisiana of using movables as security, hence the liberality of the courts. The pledge device may still be desired today as the parties may wish to avoid the requirements surrounding a chattel mortgage.

Consider the case of Jacquet V. His Creditors, decided shortly before Succession of Lanaux. Here, the clerk of the pledgor was constituted the agent of the pledgee to hold possession of certain machinery given as security. With the consent of the pledgee the pledgor was

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permitted to use the machinery at times in their business. The common creditors of the pledgor contended that the pledgee's possession was not such as to make the pledge valid against them. The court held that it was. It said: "The possession of the property by the pledgee, as shown, was sufficient. In fact, the property pledged may be left in the possession of the debtor himself, provided his possession is precarious and clearly for account of the creditor." The court though that the pledgor was sufficiently dispossessed, although the custodian was not in an independent position nor able to hold against the pledgor. Succession of Lanaux cannot be squared with the Jacquet case. The debtor was no more dispossessed in the one case than in the other. However, it can be said that a distinction is justified on particial grounds. In the Lanaux case the property could have easily been delivered to the creditor or bona fide third person custodian, whereas, in the Jacquet case the property was bulky and essential to the debtor's business and could not have been readily taken out of his possession.

In the relatively recent case of Scott v. Corkern the court upheld the pledge of a life insurance policy which was in the physical possession of the debtor. In this case the debtor under a pledge agreement delivered his insurance policy to the creditor in return for his promise to finance the debtor's son through school. The debtor wrote the insurance company effecting a change of beneficiary to the creditor. The policy was found in the debtor's bank box, but there was no evidence as to how the policy got back to the debtor, the creditor and debtor both having died. The court found that the pledge was extant between the parties, saying that the debtor himself may be considered as trustee and be given possession of the thing by him pledged, provided his tenure be precarious and clearly for the account of the creditor. The holding of the case, strictly speaking, is not that delivery and possession in the creditor or third-party custodian is not an essential to the contract of pledge, but rather that "possession" includes constructive as well as actual physical possession. It is decisions such as Canal-Commercial Trust & Savings Bank v.New Orleans, T. & M. Ry. Co., Jacquet v. His Creditors, and Scott v. Corkern, above discussed, which are relied upon by Professor Hanna and others as evidence for the proposition that the tripartite trust receipt is fundamentally a pledge. It is said that title

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in an entruster in the tripartite transaction is a fiction, and that the entruster is really like a pledgee who momentarily gives up possession to the pledgor. The entruster, however, under the Uniform Trust Receipts Act and often at common law is given a degree of protection against competing creditors which is not awarded to the ordinary pledgee returning the thing momentarily to the pledgor.

The demand of modern business for convenient security to secure loans has given rise to the practice of "field warehousing." Field Warehousing has been used to pledge goods which are not capable as a practical matter of manual transfer because of their bulky nature. Field warehousing has been widely used, and there are sundry variations of the device. In the orthodox situation, so-called warehouse corporations, which have no warehouses, lease for a nominal sum a portion of the borrower's premises. The warehouse company isolates a quantity of goods in the leased portion of the borrower's plant, marks with large signs the segregated items and part of the building as in its possession, placed an agent, usually an employee of the borrower, and issues warehouse receipts to the borrower. The borrower then pledges the warehouse receipts to the lender to secure a loan. As the goods are left on the borrower's premises, they are readily available for processing, exhibition, or sale, when released by the pledgee. Under the fieldwarehousing device, the "warehouse" comes to the goods instead of the goods going to the warehouse. As Professor Friedman described field warehouses, "The reason for the name 'Field Warehousing' is clear: instead of the borrower taking his goods to the warehouse, the warehouseman comes to his plant and sets up a warehouse 'in the field'".

The Uniform Warehouse Receipts Act, which Louisiana has adopted, defines a "warehouseman" as a "person lawfully engaged in the business of storing goods for profit. Warehousing is usually a public calling, as that of a common carrier, storing the goods of all who offer. On the other hand, the field warehouseman, located "in the field," is physically unable and also unwilling to act for more than one party at the same field warehouse. The personel of the field warehouse consist of an employee of the borrower, covered by a fidelity bond and placed on the payroll of the warehouse company. His employment with the

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warehouse company is only for the duration of the warehousing, but during this time, he also continues to perform his regular services for the borrower. Sometimes the warehouse company itself is a corporation especially organized, or an individual especially selected, for the single operation between the particular borrower and lender. Furthermore, as it is located "in the field," the warehouse is usually not adequately protected against a determined attempt at entry by the borrower.

Often enough the field warehousing transaction is a sham. The effectiveness of field warehousing as a security device depends upon whether the warehouse corporation has actual and effective control of the goods, and whether this control is so open and notorious as to advise third persons. There are apparently no Louisiana cases involving field warehousing, although the early case of Jacquet v.His Creditors involved a variant of the device. There are two important cases from the United States Supreme Court. In one, the borrower walled off a portion of the basement of his building and leased that portion to the warehouse company. The area was padlocked and the warehouse company had the only keys. A sign was placed on the outside of the building stating in large letters that the premises were occupied by the company as a public warehouse. The Court held that a sufficient delivery had taken place to constitute a valid pledge. In the other case, the Court held that no pledge had been created, as the borrower remained in full control of the goods and as there was nothing to indicate to the public that the warehouseman had an interest in the goods. Judging from decisions throughout the country, the usual flaws in the field warehousing technique are the attempt of the debtor to act as warehouseman, either personally or through an employee, instead of hiring a bona fide independent contractor; inadequate segregation of the pledged items; an inadequate posting of indentifying signs; and a failure to tag the goods.

Field warehousing first developed on the west coast of the United States as an aid to the seasonal canning industries, where it operates under the title of "commodity loans". Today, field warehousing is accepted by bankers and loan companies everywhere as an effective security device. The Uniform Warehouse Receipts Act has been adopted throughout the United States. The field warehouse device is useful, but the

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prevalence of abuses may destroy its effectiveness even when it is honestly carried out.

Field warehousing accomplishes the same result as a trust receipt (or chattel mortgage) in furnishing a method by which inventory can be made available as collateral. The lender, however is furnished more protection by field warehousing than by the trust receipt device. By the use of the field warehousing device, the financer can control the use or sale of the goods by the borrower. The lender is able to supervise his security. It is true that often the warehouse is not padlocked but is in charge of an employee of a borrower, but an employee who is responsible is generally selected and he is bonded, and in case of doubt he can be replaced by the lender's own representative. Performed properly, the field warehousing operation can offer good protection to the lender.

Recently a number of states, approximately nineteen in number, have adopted so-called Factors' Lien Acts which further change the traditional pledge concept of possession and delivery. The definition of the term "factor" in these acts is pickwickian. This factor is not to be confused with the old-style factor who is an agent selling his principal's goods, but rather he is a financing agency whose business is lending. The factor is defined in these acts as "any person, firm bank or corporation ... which advances money... on the security of goods or merchandise."

The financer acquires a continuing general lien on the borrower's inventory or stock, without taking possession of the goods and without the use of field-warehousing. For the delivery requirement of the pledge security device, there is generally substituted a sign on the borrower's premises giving the name of the lendor or so-called factor, and the filing in the recording office of a notice of the lien containing a general description of the goods. These acts provide, however, that notwithstanding filing or actual knowledge, purchasers for value in the regular course of business of the borrower take free of the factor's lien. The lien is good, however, against creditors of the borrower.

The old-style factor is similar to a pledgee. Title remains in the principal until the goods are sold, but the factor acquires

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possession and a lien on the goods to assure the payment of his commission on goods which he has sold. The new type of factor, who lends money on the security of inventory, was created by eliminating as a prerequisite for the pledge the necessity of his taking and maintaining possession of the pledged property. The factor's lien has been described as a "field storage warehouse without segregation and possession," but this analogy is meaningless, because, like any pledge, these characteristics are of the essence of the field storage warehouse. It is erroneous to compare the new-style factor's lien as a pledge interest.

The Factors' Lien Act is considered as the answer to the need for a method of obtaining loans on the security of raw materials, goods in process and finished product. This security device exists only where provided by special legislation. Field storage warehousing, like any pledge, is inadequate where the borrower must retain continuous and unmolested possession for manufacturing purposes. The jurisdictions differ on whether or not a chattel mortgage can be used to secure a lender where the security is of a shifting nature. The reason for the failure of the after-acquired property rule in the law of mortgages in this situation is the continuous change in the character of the chattels as well as the fact that entirely new chattels are subsequently acquired. Furthermore, recording each chattel mortgage is inconvenient and expensive. The Louisiana Chattel Mortgage Act permits the mortgaging of any and every kind of movable property, either for a present debt or for future advances, and it permits the mortgaging of stock or merchandise with the provision that the mortgage will attach to future acquisitions in the stock and will automatically be extinguished as to any article sold in the normal course of business. The factor's lien, unlike the chattel mortgage and pledge, shifts to the proceeds from a sale of the security.

6. Delivery of Incorporeal Rights

LCC 3152 declares that the thing pledged be actually delivered to the pledgee, but LCC 3153 modifies the preceding article by saying that this delivery (meaning of course the actual delivery) is only necessary with respect to corporeal things, and that as to incorporeal rights, such as debts, the delivery is merely fictitious and symbolic. An incorporeal right is a personal right not reduced to possession, but

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recoverable by a suit at law.

Under LCC 3153 it is impossible to pledge an incorporeal not evidenced by a written instrument because there cannot be an actual or symbolic delivery. However, the Louisiana Legislature in 1938 (R.S. 9:4321-4323) provided that incorporeal rights not evidenced by any writing or muniment or title may be "pledged" by a written instrument, acknowledged by the borrower, of the debt and the pledge. This legislation does away with the requirement of the delivery of a thing, and remains satisfied with an act of pledge.

7. Second Pledge by Pledgor

A problem in possession arises when a thing has been pledged for a debt which is less than the value of the thing and the debtor wishes to pledge the residuary value as security for another loan. For example, A borrows $ 500 from B and gives a ring worth $1,000 in pledge. Subsequently, A borrows $250 from C and seeks to pledge as security the residuary, although B continues to hold possession. B may be considered as a third-party custodian for the second pledge. C, the second pledgee, should notify the first pledgee, who has possession of the thing, that the thing has also been pledged to him. The first pledgee would then be on notice, and may be held as a sort of third-party custodian. The first pledgee, however, may object to the responsibility of custodian. The position of custodian cannot be forced upon a person. It is true that the first pledgee will hold the property to protect his own interest, and during this time, he owes the duty to the debtor to take care of the property, but when he has been paid, it would appear that he need not continue to hold the thing for the benefit of another. He can with safety turn over the possession of the thing to the subsequent pledgee provided he was so instructed by the debtor.

It is preferable, when the same property is to serve as security for several creditors, that a custodian be selected who has no interest in the property. A third-party custodian may hold the property for the benefit of several creditors. The rank of the several pledgees is determined by the priority of acquisition of the right of pledge, by virtue of the rule prior tempore, potior jure. Generally speaking, the priority

of acquisition is determined by the dates on the contracts of pledge.

8. Sub-Pledge

The pledgee in principle does not have the right to use the pledged thing. The general rule is that the creditor does not have the right to dispose of the thing given in pledge or to use it for his personal profit. The thing is confided to him for the sole purpose of security (LCC 3166). The right of retention is extinguished when the creditor abuses the thing given in pledge.

The interdiction of use and the obligation to preserve the thing (LCC 3166) would seem to entail a prohibition of a sub-pledge of the thing with or without an assignment of the claim, inasmuch as a pledge creates a real right on the thing and is an act of disposition. Between the parties to the first contract of pledge, it can be maintained that the sub-pledge constitutes a violation of the obligation of the pledge. Between the parties to the sub-pledge, it can equally be maintained that the pledge is without validity, because the one who made the pledge was not the owner of the thing. Be that as it may, these contentions do not find consecration in the prevailing law. It is generally accepted that a pledgee may subpledge the thing.

It is held that the sub-pledge of the proerty by the pledgee is not an abuse of his rights and hence does not destroy the validity of the first pledge. Though the pledgee is unable to transfer the pledgor's rights, it is considered that he has the power to transfer his own interest in the pledge. It is considered that the possession of the first pledgee is not lost on the theory that the sub-pledgee holds for and through him, as a third-party custodian. Suppose that A owes $500 to B and he pledges his ring to secure the debt. Later, B borrows $800 from C and pledges the ring to C. B discloses his interest in the property. In this sub-pledge, the subpledgee holds for the pledgee. C must return the property when B has to return it to A. The sub-pledge in this example would not be effective beyond the sum of $500.

9. Extinction of Pledge

The contract of pledge, being an accessory obligation, is extinguished by way of consequence by the extinction of the principal obligation.

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The essence of an accessory obligation is the existence of an underlying principal obligation. Independently of this mode of extinction, the contract of pledge can be extinguished in several ways without affecting the principal obligation. The pledge is extinguished independently of the principal obligation for the reasons of nullity of the pledge contract, the voluntary remission of the pledge, the abuse of the pledge, and the loss of the pledge.

I) The pledge can, independently of the principal obligation, be extinguished because of a cause of nullity in the contract of pledge. Generally, however, the pledge is an essential condition of the principal contract, and in this case, the invalidity of the pledge entails the resolution of the principal contract. This latter situation arises, for example, when the debtor opens a credit account and pledges property belonging to another.

II) The creditor, if he so desires, can voluntarily renounce the pledge and restore it to the creditor without a remission of the principal obligation. It may be contended that the principal debt is renounced to the extent of pledge.

III) Forfeiture for the abuse of the thing is a mode of extinction of the contract of pledge. The French Civil Code expressly provides that a debtor is entitled to claim back the pledge when the pledgee makes an improper use of it. Although this provision is not found in the Louisiana Civil Code, the same result is justified under the theory that the obligation to conserve the property is a resolutory condition. The forfeiture for abuse, requiring the restitution of the pledge, does not extinguish the principal obligation.

IV) The loss of the thing by a fortuitous cause deprives the creditor of security and the creditor cannot demand a new pledge. The creditor is not liable to the debtor for a fortuitous loss of the pledge. The debtor bears the consequences of the loss or depreciation of the thing. Res perit domino. When the loss does not result from the fault of the creditor, he is released from his obligation of restitution, but the debtor is not freed from his debt.

The loss of the thing due to the fault of the debtor gives rise to

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a contractual right of action, as well as to the application of the rule of forfeiture in the general law of contracts.

The loss of the thing due to the fault of the creditor is covered by LCC 3167. The creditor is answerable for the loss or decay of the pledge which happens through his fault. The creditor must take care of the pledge as a bon pere de famille. As pointed out, the pledge is subject to forfeiture for abuse of the thing, but the principal obligation is not extinguished.

CHAPTER 2. OF PAWN (LCC 3154-3175).

Pawn is the pledge of a movable thing given as security for a person's obligation (LCC 3135). Pawn is to be distinguished from the sale with the right of redemption. The right of redemption is an agreement by which the vendor reserves to himself the power of buying back the thing sold within an agreed period of time. As a rule, the three-goldball pawnbroker employs the sale device rather than pawn so that in the event of non-payment he can appropriate the article to himself without any further action. In this situation, the borrower assumes no personal liability, the property being the sole source of satisfaction. The use of an ostensible contract of sale to disguise a pledge is an old device. It is to be noted that in a pledge contract a stipulation for forfeiture of property upon default at maturity of the debt is invalid. The same prohibition is or should be applicable to an ostensible contract of sale.

1. Things subject to Pawn

Every corporeal thing susceptible of alienation may be pawned. Money may even be pawned to secure an obligation (LCC 3154). A simple illustration of the pledge of money is the deposit made with a circulating library to secure the return of books borrowed. The advantage of a money pledge is that it eliminates the necessity for the sale of property in order to obtain satisfaction upon the default of the debtor. There is obviously no no need to transform the pledge into cash because it is already of that nature; the rule of compensation operates. A money pledge is given as a security for performing or refraining to form an act (LCC 3154). Money is not given to secure a money obligation, for money is the object of such a pawn.

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The requirement of delivery of the pledge to the pledgee is considered to be the bar to the pledge of future property. Things in expectancy, or which have a mere potential existence, such as animals yet unborn, fish yet uncaught, and crops yet ungrown, are future things. They may be sold, but they cannot be pledged. An essential element of pledge is the putting of the creditor (or third-person custodian) in possession of the thing. A thing which is not in existence can only be the subject of a promise to pledge.

The young born to animals given in pledge form part of the security, although they were not in existence when the contract was entered into, but this is the result of the rule that the fruits of the thing pledged form part of the pledge. The Louisiana Supreme Court said, in a case holding that a future crop cannot be the subject of pledge: "Property in expectancy may be the object of a contract of sale, because that contract is complete by the mere consent of the parties. But it can not be the subject of a contract of pledge, because that contract is what the civilians call a real contract; one which is not performed by the consent of the parties, but which requires the delivery of the thing pledged."

However, it is considered, as the late Professor Denis wrote, that "Legislation may create certain pledges sui generis, by virtue of which future property may be pledged, such as the laws of some agricultural states which provide that the crop of a farm or plantation, even before rising into existence, may be pledged to secure loans of money or supplies used in making the crop." The State of Louisiana enacted special legislation in 1874 for the "pledge" of a crop. It has proven to be a useful provision, although it does not make good legal science. The security device afforded by this legislation resembles a privilege and a mortgage more than it does a pledge. It is like a privilege, which is dependent upon the nature of the debt, in that it is valid only for money furnished for the making of the crop and it is like a mortgage in that recordation, rather than possession, is the way notice is given to third persons. The "pledge sui generis," as Professor Denis calls it, and as its name indicates, is a departure from the old-style pledge.

The reason for the general principle that a future thing cannot be

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pledged is that it cannot be the object of a putting in possession. If this condition can be satisfied, it would be possible to pledge a future thing. The putting in possession is never possible for corporeal future things, because these things, by hypothesis, are not presently in existence. This is not the case for incorporeal property, which can be the subject of a pawn (LCC 3155). An existing debt which is not yet due can be pledged, such as the right of an inventor to future royalties or the right of a shareholder to future dividends. The requirement of putting in possession is met by turning the document over to the creditor. The incorporeal is in existence, but it represents a future thing. It is therefore not entirely precise to say, as it is often said, that future things cannot be pledged.

The Louisiana Legislature in 1938 provided for the pledge of mineral rights. It provides: "Rents, royalties, overriding royalties, bonuses, and other payments and other rights accrued, accruing, or to accrue under mineral leases and other contracts relating to minerals, whether the leases and contracts are in existence or are later executed, shall be subject to pledge." Under the theory that an incorporeal can be pledged (LCC 3155), it would be possible for a debtor to pledge the benefits accrued, accruing, or to accrue to him under his exisitng mineral contracts. Special legislation apparently was not needed for that purpose, but the legislation also provides that the "pledge shall be valid as to all persons without delivery of the rents, royalties, overriding royalties, bonuses, and other payments and other rights to the pledgee." To have effect against third persons, the "pledge" must be recorded in the mortgage records of the parish in which the land is situated. Furthermore, the legislation, as stated, provides for the "pledging" of the benefits of leases and contracts which are to be later executed. In this case, there is no existing title or right which can be pledged. Under the ordinary law of pledge, such a "pledge" would simply be a promise to pledge. Moreover, the legislative provision "other contracts relating to minerals...shall be subject to pledge" apparently does not mean that a landowner can pledge his minerals apart from the land. Under the Louisiana Civil Code, a servitude does not exist unless title to it rests in the hands of one other than the landowner. A servitude

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does not come into existence until it is servered from the land, and therefore a landowner cannot pledge his minerals apart from his land, as he would be pledging a non-existent security. The owner in this case cannot alienate without conveying title to the right.

As for the pledge of inheritance rights, it is essential to distinguish between the rights of an heir or legatee which have already accrued by the death of the relative or testator, and the mere expectant rights of a presumptive heir. In accord with the traditional rules of pledge, the expectant rights of an heir cannot be pledged. Furthermore, such a contract would probably be contrary to the public order.

The lease of movable or immovable property gives the lessee a personal right against the lessor, and not a real right in the property. The question of whether rights under a lease can be the subject of the contract of pawn was presented to the Lousiana court in Caffin V. Kirwan. At common law the validity of a "pledge" by assignment of the rights of the lessee and delivery of the act of lease to the creditor has been recognized. But the question before the court in Caffin v. Kirwan was whether it can be done in the form of a contract of pledge proper, that is, by delivery of the lease to the pledge creditor. The court decided that it could not, and suggested in the decision that the only manner in which the lessee can "pledge" his rights under the lease is by making a transfer or sale of the lease to the creditor and notifying the lessor. The reason for the decision is that rights under a lease (and also under a mortgage) are not susceptible of delivery and hence an additional agreement in the form of a sale or transfer is necessary. This sale or transfer will be treated as a pledge when it appears to the court that the intention of the parties was to secure an existing debt and not the outright transfer of property. In France, a lease may be pledged by the lessee by an act of pledge proper: the lessee's right of use is an incorporeal right susceptible of being pledged by the symbolic delivery of the title or evidence of that right. In the event that the lease stipulates against either subleasing the property or transferring the lease, the lessee cannot pledge it for, if foreclosed, the pledge would lead to the sale of the lease and the lessee would have done indirectly what he could not have done directly.

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Property which is exempt from ordinary seizure to satisfy a judgment may be pledged. In the case of Kyle v. Sigure, a lawyer pledged his law books to secure a debt, and when the pledge was sought to be foreclosed, he claimed that they were exempt from seizure as they were the tools of his trade. The court held that the pledge was a waiver of the exemption. The owner of exempt property can sell it, and so it follows that he can also pledge it, since pledge is nothing more than a qualified alienation of the thing. The pledge or assignment of future benefits under provisions of the Social Security Act is prohibited. This type of property cannot be alienated.

LCC 3155 provides what already has been stated, namely, that incorporeals as well as corporeals may be pledged. The delivery of incorporeal things, such as credits, bills of lading and warehouse receipts, is symbolic or constructive (LCC 3153). Incorporeals not represented by a writing or indispensable instrument were considered not capable of being pledged as there could be neither actual nor fictitious delivery, but the Louisiana Legislature provided in 1938 that an incorporeal not in writing can be "pledged" without delivery. In a number of American jurisdictions, intangibles in the nature of a chose in action not represented by an indispensable document cannot be the subject of pledge for lack of ability to deliver possession. The Louisiana law provides that in pledging incorporeals which are not represented by a written document, all requirements except delivery must be met. To bind the debtor to pay such pledges, it is necessary that he be given written notice of the pledge. The requirements for the pledge of incorporeals will be taken up in detail.

2. Privilege of Pledge Creditor

The perfected pawn invests the pledge creditor with a preference in payment to the other creditors of the debtor, out of the proceeds of the sale of the thing pledged. Various articles of the Civil Code (LCC 3157, 3158, 3162, 3217(4), 3220, 3221) speak of the pledgee's right of preference as a "privilege." It should be noted that the language is not entirely precise. Privileges are the result of the law, and not of contract. Pledge, on the other hand, is a contract. Unlike all privileges, the pledge is not the work of the law, but exclusively that

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of the parties. Pledge is a security sui generis which, because it is contractual, has nothing in common with the true privilege, which proceeds only from the law. Pledge does not depend on the nature of the debt, which is the case for all privileges (LCC 3186). A pledge as a mortgage, can be accessory for any valid obligation. Pledge involves the dispossession of the debtor, which is not the case for any privilege. Pledge is a real right founded upon possession. The privilege of the pledge creditor as a rule primes the privileges established by the nature of the debt. The privilege of the pledge creditor, being a special privilege on a particular thing, primes all the general privileges on movables, except possibly the privilege for taxes and for taxed costs of court necessary to sell the property.

3. Formalities and Contents of contract of pledge

a. Requirements for the pledge of a corporeal thing

The requirements for the pledge of a corporeal thing to be effective against third persons are 1. the thing pledged must be delivered to the pledgee or custodian, 2. the act of pledge must be in writing, 3. it must state the amount of the debt secured, and 4. it must describe the thing pledged. The first formality, which has already been examined, is required between the parties as well as with regard to third persons.

The pledge, to affect third persons, must be in a written instrument which states the amount of the debt secured and describes the thing pledged (LCC 3158). The writing is required only with reference to theird per ons. An oral contract of pledge is valid between the pledgor and the pledgee, although the reduction of the contract to writing is advisable to facilitate proof. The general rule in the law of contracts is that contracts affecting movable property as between the parties need not be reduced to writing.

The early civil code of Louisiana provided the act of pledge may be either in the form of a public act or an act under private signature, but in the latter case, the act had to be registered. Article 3158, as amended in 1900, requires simply "some written instrument." Pledge by private signature, without recordation, is now sufficient.

The description of the thing pledged in the act of pledge prevents

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the fraudulent subsequent substitution of other property for that originally pledged. Without a description of the thing pledged, the parties could fraudulently substitute property to the prejudic of other creditors of the pledgor.

The requirements of a statement in the act of pledge of the amount of the debt which is secured by the pledge serves to protect other creditors by informing them of the extent that the debtor's property is encumbered. When a pledgee turns up with pledged property in his possession and claims a preference over other creditors of the debtor, this provision limits him to what he can prove by his written agreement. The date of the act of pledge shows whether at the time the pledge was granted the pledgor could properly give a right of preference to the pledgee. Property may be pledged for a specified debt and also for debts which may later arise, provided the amount is specified. If property is pledged for a specific debt, the pledgee cannot hold it for other debts owed him by the pledgor. A general clause that the pledge is given to secure "any other debt which the debtor may owe to the creditor" is not adequate against third parties, but such a clause would presumably allow the pledgee to hold the property against the pledgor. Recently the Louisiana Legislature expressly authorized the use of the "open-end" pledge.

b. Requirements for the pledge of incorporeals

The requirements for the pledge of incorporeals to be effective against third persons differ somewhat from those concerning corporeal movables due to their nature.

The delivery of incorporeals is fictitious or symbolic (LCC 3153) The procedure for the pledge of an incorporeal is to convey the document representing the debt to the pledgee (LCC 3156). By special legislation, as already pointed out, an incorporeal not evidenced by a written instrument may be pledged. As it is impossible in this situation to have either an actual or a fictitious delivery of the thing pledged, the statute abandons the requirement of delivery. The other requirements for the pledge of an incorporeal not evidenced by a writing are the same as for the pledge of a corporeal. It is necessary for the pledge of an unwritten instrument to have a written act of pledge in

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which shall be stated the amount of the debt as well as the nature of the right given in pledge.

LCC 3156 deals with the pledge of written claims against third persons. It declared: "When a debtor wishes to pawn a claim on another person, he must make a transfer of it in the act of pledge, and deliver to the creditor to whom it is transferred the note or instrument which proves its existence, if it be under private signature, and must indorse it if be negotiable." The meaning of the term "transfer" in LCC 3156 is not one of ownership, for pledge does not constitute a total alienation of the thing, but a transfer of the thing only for the purpose of security. As for the requirement of indorsement of a negotiable document, the present law throughout the United States is that the delivery of a negotiable bill of exchange or promissory note, with or without indorsement, constitutes an effective pledge of the debts they represent. LCC 3161 required that notes payable to bearer or converted to bearer paper by blank indorsement had to be indorsed by the pledgor, but this article was repealed in 1900. The court has held that since the intent of the legislature was to remove this requirement from bearer paper LCC 3156 no longer controls with regard to it. Furthermore, LCC 3158 as amended in 1900, states that the pledge of negotiable instruments can be made, "without further formalities" than delivery. It can be assumed that the requirement of indorsement in LCC 3156 with respect to any negotiable instrument is no longer applicable.

It is important to determine whether or not the credit is represented by a negotiable instrument. The pledge of a non-negotiable note is somewhat more detailed than the pledge of a negotiable note. A negotiable note need only be turned over to the pledgee or third-party custodian. On the other hand, if the instrument is non-negotiable, an act of pledge is required and the obligor must be notified of the pledge, the pledge not being perfected until the obligor is notified (LCC 3158, 3160). For example, A owes B $100 and gives him a non-negotiable note. B delivers the note to C as security for a loan. To bind A, the obligor on the note, he must be given notice that C, and note B, is to be paid. Notice is not necessary for negotiable instruments because the debtor owes the holder of the instrument. The note itself is the embodiment of the

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maker's obligation. In non-negotiable obligations, on the other hand, the obligor owes the obligee-pledgor and no one else, and unless he is given notice of the pledge by either the pledgor or the pledgee, he obtains a full discharge by payment to the obligeeépledgor.

It has been maintained that LCC 3158 (par.2) dispenses with the requirement of a written act of pledge for written incorporeals. LCC 3158 provides that, in the pledging of promissory notes, bills of exchange, bills of lading, stocks, bonds, or other written obligations, the debtor must deliver the document to the creditor, and such pledge shall "... without further formalities, be valid as well against third persons as against the pledgor there of..." (Emphasis added). The article in the same paragraph also provides that "...the delivery of property or deposit in a warehouse, cotton press, or on storage with a third person, or represented by a bill of lading, shall pass to the pledgee by the mere delivery of the warehouse receipt, cotton press receipt, bill of lading, or storage receipt, showing the number, quantity or weight of the thing pledged" (Emphasis added). It is considered that the phrases "without further formalities" and "the mere delivery" in LCC 3158 eliminate the necessity of a written act. The counter-argument that a written act of pledge is required is based on the theory that these phrases do not eliminate the requirement of a written act of pledge, for in the same paragraph of LCC 3158 it is stated that, "All pledges may be made by private writing of any kind if only the intention to pledge be shown in writing ..." The terms "without further formalities" and "the mere delivery" may have reference to the formalities of an authentic act, recordation, and notice to the obligor. The requirement of a written act does, however, serve the useful purpose of informing other creditors of the pledgor that the pledgee holds property belonging to the pledgor. This requirement does not deprive the holder for value from the pledge creditor of protection under the Negotiable Instruments Law. In France, the Code of Commerce relieves the pledge in commercial transactions, of any property susceptible of being pledged, of the necessity of the written act demanded by the Civil Code, but in Louisiana, all pledges are governed by the Civil Code.

LCC 3158, as amended by Act 290 of 1952, spells out the procedure for the pledge of life insurance policies. Because of their unfluctuating

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and liquid value, life insurance policies have been considered desirable collateral. The death benefit, cash surrender and loan privileges of life policies are accessible to the pledgee. The pledgee has the right to pay premiums to keep the policy alive, and to be reimbursed for that but the payment of premiums is risky in that it may result in the pledgee advancing a sum which, with the amount of the origional debt, will exceed the proceeds of the policy.

In addition to delivery, the pledge of a life insurance policy must be "evidenced by a written assignment there of as security to the pledgee and by delivery of the pledge or assignment to the insurer and unless the beneficiary thereof may be changed upon the sole request of the insured, or unless pledge or assignment without the consent of the beneficiary be specifically provided for in the policy, must be accompanied by the consent of any named beneficiary who is not the insured or his estate." There is no need for actual delivery in a pledge of the policy to the insurer.

LCC 3158, as amended in 1952, provides that no notification to the obligor is required in the case of the pledge of certificates of corporation stock. The article, as amended, excepts stock shares from the rule that the obligor of non-negotiable instruments must be notified of a pledge. Manual delivery of the document is sufficient to create a pledge interest in the recipient. The provision in statutes and corporation by-laws that a transfer of stock shall not take effect until it is registered on the books of the corporation is generally considered as affecting the relationship between the corporation and its stockholders and not as regulating the rights between the transferor and the transferee. However, registration is desirable as it affords evidence to creditors on the ownership of the stock.

A merchant who needs credit for his business operations may have no unencumbered asset that can be used as security except his accounts receivable, that is, debts owed to him for goods sold to customers. This asset is of a liquid nature and has a fairly constant value in a business where new accounts are created as existing ones are paid. The Louisiana Legislature in 1952 adopted the so-called "Assignment of Accounts Receivable Law," which makes it possible to "pledge" accounts receivable

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without delivery of a thing and without notification to the individual debtors. "Assignment" under the Act "means and includes any sale, pledge, conveyance or transfer of an account, or of any right, title or interest therein." It was possible under the Civil Code to assign accounts receivable, but it was seldom done because it was necessary to assign each account individually and each debtor had to be notified that the account was assigned in order for the assignment to be effective (LCC 3160). Under the "Assignment of Accounts Receivable Law," the borrower executes a generals statement of assignments of accounts receivable which must be recorded in the public records. After the statement has been filed, the assigned accounts are marked in the account book either by a written instrument affixed to the accounts receivable ledger or by stamping a notice of the assignment on each ledger page of an assigned account. No other notice to the account debtor is necessary to perfect the assignment, but the debtor is not required to search the records and he is protected if he pays the original creditor without actual notice of the assignment. Even though the assignment of accounts is perfected in accordance with the statute, the assignment might be attacked by a trustee in bankruptcy or other creditors if the borrower has "unfettered use" of the accounts. This risk can be avoided by denying to the borrower the right to use the proceeds collected and to have them remitted to the lender or deposited in a special account in the name of the lender.

As already pointed out, legislation in 1938 provided for the pledge of incorporeal mineral rights. These rights need not be delivered to the pledgee. There must be a written act of pledge, and to be valid and to have effect other than between the immediate parties, the act must be recorded in the mortgage records of the parish in which the land is situated. Furthermore, a copy of the act of pledge must be sent to the obligor, unless he has already acknowledged notice of the pledge.

As has been pointed out, in keeping with other agricultural states, it was found necessary in Louisiana to furnish a method for employing as collateral crops not yet grown. Here, as in the contemporary Louisiana law concerning the "pledge" of unwritten claims and mineral rights, the requirement of delivery is wiped out. At common law the device

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usually employed for crop security is the chattel mortgage with an after-acquired clause or a crop mortgage. In fact, as stated, the Louisiana security device, although it is called a pledge, resembles a mortgage more closely than it does a pledge. The act of "crop pledge" must be in writing and must be recorded in order to affect third parties. It is made a crime to sell or buy "pledged" crops with the intent of depriving the creditor of his pledge.

4. Acts of Pledge in Favour of Banks

LCC 3159 is for all practical purposes now obsolete. It provides that a bank cashier has the power of notarial act. The article is a holdover from the time when acts of pledge had to be by authentic act. Perhaps the only effect today of the provision is that an act of pledge so witnessed would be more easily proved and admitted as evidence.

5. Partial Payment of Debt Secured by Pledge of Several Things

The debtor is not entitled to claim back the pledge until he has rapaid the whole debt, both principal and interest, for securing which the pledge was given, unless the pledgee makes an improper use of the security. If several things have been pledged for the debt, unless the parties have agreed otherwise all the objects secure the whole debt and the debtor cannot get back any one of them until he has paid the entire amount due. Articles 3163 and 3164 provide for the indivisibility of the pledge. Thus, if five United States bonds are put in pledge, all are pledged for the whole debt, and not each for one-fifth of the debt. Each and every part of the pledge secures the debt down to the last dollar. The indivisibility of the pledge is a consequence of the right of retention which the pledgee enjoys.

The pledged property may be of such a nature that it is a burden for the pledgee to take care of it. The pledgee may be willing to return part of the pledged property if the remaining security is ample for the unpaid balance, but he is under no obligation to do so unless the parties have made such a provision in the contract. It would be an act of grace by the pledgee. The pledgee has the right to keep the pledged property until the entire debt is paid.

The pledge is indivisible although the debt becomes divided among the heirs of the debtor or among those of the creditor. An heir of the

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debtor who has paid his share of the debt cannot require the creditor to return him his share in the pledge so long as the debt has not been entirely paid off. In the same way, the heir of the creditor who has received his share of the debt cannot return the pledge to the prejudice of those of his coheirs who are not satisifed (LCC 3171). The principal of indivisibility is of the nature but not of the essence of the contract of pledge. The parties may provide differently by agreement.

The right of retention is not absolute. The pledge creditor does not have the right to retain the pledge as against third parties. It is to be remembered that the pledge confers upon the pledgee a right of preference as well as a right of retention. The right of retention exists against the debtor, and not against other creditors of the debtor. The right of retention of the pledge creditor does not prevent the seizure of the property by other creditors of the debtor because the object given in pledge, belonging to the pledgor, is the common right of the creditors, but subject to the lawful causes of preference. The pledge creditor has a privilege or preference against the other creditors. It is the privilege of the pledge creditor and that alone, which protects him against other creditors.

As French author Laurent puts it, "The right of retention is foreign to the creditors...They may seize the property of their debtor; they may therefore, seize also the thing which he has pledged because he remain the owner of it. This right of seizure, and the forced sale which is the consequence of it, can not be impeded by the right of retention of the pledgee; all that the pledgee can demand when there is a conflict between him and other creditors, is to be paid by preference; but the privilege does not prevent the creditors from seizing the pledge, because the seizure does not impair the rights of the pledgee.; Similarly, the French author Troplong states: "From the principle that the right of retention can be opposed only to be pledgor and not to third parties, it follows that though the pledgee is in possession of the pledge, the other creditors with executory rights can size the thing pledged in his hands, cause it to be sold against his will and convert it into money, reserving his right of preference over the proceeds."

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The principle that the right of retention is personal to the pledgee against the pledgor is well established in Louisiana. As the court said on one occasion: "It is now well established in our jurisprudence that the property of any nature held in pledge by a creditor may be seized from his possession by another creditor of the common debtor and sold subject to the pledgee's claims. The only right which the law secures to the pledgee is to satisfy his debt 'by privilege and in preference to other creditors of his debtor out of the product of the movable, corporeal or incorporeal, which has thus been burdened.' Nothing in the nature of the contract can authorize the pledgee to hold indefinitely the property pledged, which is usually far in excess of the amount thereby secured, and to thus deprive other creditors of their recourse on the debtor's property."

The right of the other creditors to the property, however, can only be exercised when the seizure and sale demanded by the creditors cannot impair or destroy the rights of the pledgee and this will depend upon the nature of the thing pledged, its value and the amount of the debt secured. Thus, if the value of the pledge is less than the debt, or the offer of the pledge at public sale would diminish its value below the amount of the debt the other creditors cannot demand the seizure and sale. No adjudication can be made if the amount bid at the sale of the pledge does not cover the debt of the pledgee. The pledgee, as anyone else, may purchase the thing pledged at a foreclosure sale provoked by another creditor of the pledgor. By so doing, the pledgee has the qualities of both purchaser and creditor. As purchaser, he becomes owner of the property by virtue of the sale; as the pledge creditor, he has a preference to the proceeds of the sale in the amount of his claim to secure the debtor's obligation to him.

At common law the right of retention is absolute. The thing pledged is beyond the reach of other creditors of the pledgor. A number of the common-law states, however, have provided by stateute that creditors of the pledgor may seize or attach the pledge subject to the lien of the pledgee.

Rights of pledgee on default of debtor

The debtor remains owner of the pledged property until he has

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been expropriated of the thing, which remains in the pledge creditor's hands only as a deposit for the purpose of security. The contract of pledge does not pass the ownership of the thing to the pledgee. By receiving a pledge, the creditor simply acquires a right to be paid out of the thing pledged in priority to other creditors (LCC 3157, 3166).

LCC 3165 provides the procedure for extracting payment from the pledged property. If the debt is paid, of course, there is no sale under the hammer, and the security is returned to the pledgor. If the debtor does not pay at maturity, the pledgee can demand that the pledged property be used to discharge the debt. He must, unless the parties have agreed otherwise, get a judgment and have the pledged property sold at a public sale by the sheriff, and he receives the amount due as a preferred creditor under the pledge.

Until 1872, the rule was that foreclosure had to be exclusively by judicial proceedings. Article 3165 of the Louisiana Civil Code of 1870 provided that "Any clause which should authorize the creditor to appropriate the pledge to himself, or dispose thereof without the aforesaid formalities, shall be null." The French author Troplong says of the prohibition, which still prevails in the French Civil Code. "This pact is marked by excessive harshness. Almost always the thing given in pledge is of superior value to the debt, and it is only in yielding to the moral constraint necessity that the debtor consents to submit to the regorous obligation of abandoning to the creditor that thing which is worth more than he owes. Such a clause is immoral: contra bonos mores. It is oppressive; it is the abuse of the strong party over the weak one; it is an odious speculation by the person who has money over the one who needs it."

In 1872, a statute was passed in Louisiana, amending LCC 3165. It reads:"... But in all pledges of movable property, or rights, or credits, stocks, bonds, or other movable property, it shall be lawful for the pledgor to authorize the sale or other disposition of the property pledged in such manner as may be agreed upon by the parties, without the intervention of the courts of justice; provided, that all existing pledges shall remain in force and be subject to the provisions of this act".

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By virtue of this provision, the parties can agree that the pledgee, in case of non-payment, shall have the right to sell the pledge at private as well as at public sale, with or without notice to the pledgor. The validity of a private sale under the amendment is not questioned, but does it authorize a stipulation allowing the pledgee to take the property without sale in satisfaction of the debt? What is the meaning of the phrase "sale or other disposition" of the property in LCC 3165? The question was presented in Alcolea v. Smith. In this case, a refugee from the political wars in Mexico came to New Orleans, and he pledged his jewels. In the agreement there was a clause that at the option of the pledgee the property belonged to him upon non-payment of the debt at maturity. The court held that the stipulation was contra bonos mores. The court rule that the clause in LCC 3165 of "sale or other disposition" means sale only, either public or private, and the pledgee cannot simply take over the property in satisfaction of the debt. To paraphrase the court: Since the edict of Constantine it has been prohibited at Civil law that the pledgee may keep the property at maturity of debt if the debtor defaults. Until an amendment in 1872, Article 3165 contained a provision making such an agreement null, then an 1872 amendment left this paragraph out in re-enacting the article. However, this omission cannot be interpreted as overruling civil law doctrine of 1400 years when there is no evidence that the legislature intended to do this." The effect of the dicision is to read the words "or other disposition" out of the statute. The pledgee of course cannot destroy or give away the property and if he cannot keep the property in payment of the debt, there is no other meaning which can be given to the words "others disposition." Hence, even though the old paragraph prohibiting the pledgee from keeping the property as his own has been removed, the court still given effect to it by holding that the pledgee must sell the property, except that now the sale may be at either private or public sale. The common law likewise gives no effect to a stipulation in the contract of pledge wherein the thing pledged upon default of payment becomes ipso facto the property of the pledgee.

However, the civil law and the common law both allow an agreement postorior to the maturity of the debt that the pledgee may keep the property as his own in payment of the debt. After the debt has become

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due, the parties can validly agree on a dation en paiement. The dation en paiement made at the maturity of the debt is valid; the promise of a dation en paiement is null. At the time of maturity, the debtor sis not under the stress of necessity and constrained to accept the conditions of the creditor in applying for a loan. When making a dation in paiement, he is presumed to be making no sacrifice of his property.

In the absence of an agreement for non-judicial sale of pledged property in the pledge agreement, the creditor must observe the same formalities as in ordinary judicial foreclosure sales in order to dispose of the thing pledged. The requirements for an ordinary judicial sale are 1) an appraisement of the property to be sold 2) advertisement of the sale, and 3) notice to the debtor of the time and place of sale. However, in the ordinary judicial sale, the requirement of appraisal may be waived by the debtor, but the creditor in such a case loses his right to collect a deficiency from the debtor.

There are a number of non-judicial foreclosure sale agreement cases in the jurisprudence. The non-judicial sale must follow the terms and conditions which the parties agree upon in the contract of pledge, but the pledgor who authorizes a non-judicial sale in the pledge agreement must specifically waive those reqirements for judicial sale which are not to apply to the pledge foreclosure sale. The parties under a pledge agreement may waive any rights except the right against an express forfeiture. The non-judicial sale must follow any special terms or conditions which the parties may include in the contract.

In the agreement for a non-judicial sale, the pledgor may waive the requirement of notice before sale. However, unless it is waived, it is essential that notice be given the pledgor in selling the property under the private-sale stipulation. Authority to sell at private sale does not entail a waiver of notice. The pledgor, barring agreement to the contrary, must be informed of the time and place of the projected sale. Although notice may be waived, it is safer and better procedure to furnish it.

Unless the private-sale agreement provides otherwise, the pledgee cannot validly purchase the property at the sale. On the other hand, at a public sale, the pledgee has the same right as an ordinary judgment

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creditor to bid and buy in the foreclosed property. In a judicial sale, the court is the vendor, whereas in a private sale the pledgor is the vendor and the pledgee sells as his agent. An agent appointed to sell cannot purchase the property of his principal without the latter's consent. The court has held that if at a private sale the pledgee somehow gets the property through a nominee and then resells it at a profit, the pledgor receives the benefit of the profit. At a private or semi-sheriff's sale, the pledged property is not likely to bring its full value. As the bidding will not be much if the pledgee cannot bid, it is suggested that the pledgee obtain permission from the pledgor to permit him to purchase the property. Private sales of property, other than securities or commodities selling in the open market for which the price is established with certainty, are often risky. The pledgee, to protect himself, should invoke a public sale when the prohibition against his purchase at a private sale has not been waived.

Notwithstanding the waiver of appraisal, the proceeds from a sale of pledged property which exceeded the debt are returned to the owner. On the other hand, as shall be pointed out, the balance of the pledgor's debt not satisfied by the proceeds of a sale cannot be recovered as a personal obligation of the pledgor as a result of the waiver of appraisal.

7. Ownership of Thing Pledged

As has been pointed out, a pledge does not transfer the ownership of the property to the pledgee (LCC 3166). The creditor holds only by way of security. Hence, the pledgor has a residuary interest or equity in the property namely, the value of the object less the amount of the debt. He may pledge this residuary interest to another person, or he may sell the residuary interest. General creditors may seize this residuary interest by levying on the property and having it sold subject to the rights of the pledgee. As the pledgor remains the owner until title is divested by authroized foreclosure sale, a sale of the property by the pledgee would constitute a wrongful sale of the property of another and would entitle the pledgor to bring suit for damages. The pledgor may, if he wishes, subsequently ratify the sale and claim any proceeds in excess of the debt. If he does not agree to the unauthorized sale and is not estopped, the pledgor may recover the object from

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the third party purchaser, subject to credit for amount owed on the debt secured by the pledge. This rule, of course, does not apply to the holder inddue course of a negotiable instrument.

As the ownership of the pledged property remains in the pledgor and is in the hands of the pledgee only as a deposit to secure his privilege on it, the court has held that the pledgee of stock does not have the right to have the stock transferred to him on the corporation's books over the objection of the pledgor before maturity of the debt for which the stock was given in pledge. It is possible that a different result might obtain under the Louisiana Corporation Act adopted in 1928. The act states: "A person whose shares are pledged shall be entitled to vote thereon until said shares have been transferred on the books of the corporation to the pledgee, and thereafter the pledgee shall be entitled to vote thereon." By implication the Act provides for the transfer to the pledgee on the books of the corporation. The Uniform Stock Transfer Act is silent on the right to transfer in this case, but requires that local law be applied. The common law as a rule allows the pledgee to have the stock transferred to himself before maturity, which places him the position of a simulated owner.

8. Pledgee's Liability for Loss or Decay of Thing Pledged

The pledgee is liable under the rules laid down in the part of the Civil Code on Conventional Obligations for any loss or damage to the pledge resulting from his negligence (LCC 3167). The duty of taking care of a thing obliges the person who has to use such care as that of a good father of a family, and this duty is the same whether the contract has been entered into for the benefit of one of the parties to the contract, or is for their common benefit (LCC 1908, 2298). The pledgee is liable for decay or loss of the thing due to his fault. The test is "fault". The pledgee must exercise "due care" of the pledge, according to the nature of the thing pledged. The duty of care points out the undersirability of some types of pledge. It is a reason for the refusal of some persons to act as third-party custodian.

The duty of care, however, carries with it compensating rights. The debtor is liable to the creditor for expenses incurred by him for the purpose of preserving the pledge. The duty of care makes the pledgor

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liable for all the "useful and necessary" expenses which the pledgee has made for the preservation of the pledge (LCC 3167, par.2). The pledgee is given a privilege or lien for these useful and necessary expenses (LCC 3217(6)). The pledgee may keep the object not until the debt is paid but untill these expenses are paid also (LCC 3225).

The terminology of "useful and nedessary expenses" of LCC 3167 (par.2) has been criticized. It is contended that so far as "necessary" expenses incurred by the pledgee are concerned, they must be refunded to him in full, but for expenses which are merely "useful," it must be determined whether they were indispensable. For expenses incurred which were merely useful, but not indispensable, it would appear that the pledgor is indebted to the pledgee, but that this obligation is not secured by the pledge.

The duty of care does not result in liability for the pledgee for loss caused by the decline in the market value of the pledged thing after the debt has become due. The responsibility of the pledgee for loss or decay of the property exists only where it is due to his fault. It is the responsibility of the pledgor, if he wishes to protect himself against a decline in the market, to pay the debt and sell the property himself. Indeed, the pledgor would be liable in damages for a sale of the goods.

The general gule is that, although the security dwindless in value, the pledgee can still enforce the personal liability of the pledgor debtor. A decline in value of the pledged property is the pledgor's loss. It has been contended that the decline in market value should be a good defense to a suit by the pledgee for a deficiency judgment if the pledgor had prevailed upon the pledgee to sell the pledged property The defense has not been successful. For example, in a New Jersey case, the court held that the pledgee was not liable for the market depreciation of the pledged property (corporate stock) because the pledgor had not made an offer to pay the pledgee the amount as would together with the price for which the stock could have been sold satisfy the note. The holding of this case is reasonable. The pledgee is entitled to the protection of the security as long as the debt remains unpaid. Property, such as stocks, which are of little value as security today

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may be more than adequate in the near future. A pledgee is not negligent because his judgment turned out to be wrong.

It is generally agreed that the pledgee owes no duty (but has the right) to pay premiums on pledged policies of life insurance, or to remove paramount rights on the subject matter of the pledge. However, in the case of promissory notes, bills of exchanges, and other evidences of indebtedness pledged as security, a duty exists on the part of the pledgee to preserve the rights of the pledgor against the obligors in the deposited documents. The pledgee is held responsible if he neglects to have a promissory note, the subject of the pledge, protested for non-payment, and the endorser is discharged in consequence; or, if he neglects to have a mortgage which is pledged to him reinscribed or reregistered in proper time, and it loses its rank or effect. In the case of Meyer Bros.Ltc.v. Colvin, the pledgee allowed a pledged note to prescribe. The pledgee was held liable for actual damages, that is, the amount which could have been collected from the obligor or peroper diligence. The decision is based on a theory of fault, and it can be argued that the decision is justified by LCC 3170, which expressly gives to the pledgee the right to enforce collection of notes pledged when they become due.

The counter-argument that the pledgee is under no obligation to keep a pledged note from prescribing has merit. Prescription can be interrupted by an acknowledgement by the obligor or suit by the obligee to interrupt; a pledgee, as obligee of the collaterally pledged note, has a sufficient interest to interrupt the running of prescription on it. Furthermore, LCC 3170 does not require the pledge creditor to enforce the pledged note at its maturity, but merely gives him the right to do so. These contentions have not borne decisional fruit. In general, the courts hold that the primary responsibility of avoiding the accrual of prescription is on the pledgee.

Although a collaterally pledged note has prescribed, the court has held that the continued detention of it by the pledge creditor operates as a suspension of the prescription of the principal obligation. The pledge of security, although it is valueless, is said to be a continuing acknowledgement of the debt it secures, and prescription is "interrupted

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and suspended" during the existence of the pledge. The obligee (the pledgor) cannot plead prescription against his own right of action on the collateral note which he has given in pledge.

When the note of a third person is given in pledge, the time for foreclosure is the date of the pledged note, irrespective of the date of maturity of the principal obligation of the pledgor. When the pledged credit becomes due, the pledgee may take steps to enforce it against the maker, and when collected the proceeds are applied to the payment of the debt, the surplus being returned to the pledgor (LCC 3170). When received, he must apply it to the payment of the debt due to himself, and restore the surplus, should there be any, to the person from whom he held it in pledge. A collateral mortgage is frequently used over and over again as pledge security. Is suing on a pledged mortgage note and foreclosing on the property, the pledgee acts as a fiduciary of the pledgor, up to the value of the pledgor's claim, and hence he cannot bid in the property at a collusive sale and he must turn over the profits. If the pledgee finds it troublesome to collect on the note from the maker, he has the alternative right of treating the note as corporeal property. That is to say, upon default of the pledgor, he may sell the note of the third person at judicial sale, or, if agreed upon, at a non-judicial sale.

The debtor may pledge his own note and mortgage for the debt. If the pledged note is that of the pledgor, the pledgee cannot sue on the pledged note prior to maturity of the note representing the debt. The pledgee can enforce the note only to the extent of the debt, and not to the full amount of the note, if the note was given for the security of the debt. An accessory cannot be contracted under conditions more onerous than that of the principal obligation.

A pledgee must take care of the thing pledged, just as a depositary must do of the thing deposited. Likewise, the pledgee has no right to take use of the thing pledged, just as the depositary has no right to take use of the thing deposited. Article 2079 of the French Civil Code provides: "The debtor remains owner of the pledge until he has been expropriated of the thing, which remains in the creditor's hands only as a deposit for the purpose of securing him a privilege" (Emphasis added). Article 3166 of the Louisiana Civil Code is similar.

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According to the strict rule of the civilians, any use of the pledge, if unauthorized expressly or tacitly by the pledgor, is an abuse of the pledgee's possession, and entitles the pledgor to the restitution of the thing pledged. The French author Laurent states: "If the law says that the pledgee only has the thing on deposit, it is to show that he can not make use of it though it is in his possession. In this respect, the right of the pledgee differs from the other real rights which are accompanied by possession; usufruct and servitude give a right in the thing which implies the faculty to use and enjoy it. If it is other wise with the pledgee, it is because his possession has only one object, and that is to guarantee the payment of the debt." Inasmuch as the pledgee is holding possession of the property merely as security, the pledgee's use ought not to extend beyond that point necessary for the preservation of the pledge. For example, if a horse is pledged, the pledgee might ride it as often as would be necessary to exercise the horse properly. Indeed, the pledgee's duty of care compels him to use the horse for exercise. But to lease the horse would be an abuse of the pledge. The permissible use of a thing is determined by its nature. Thus, if jewels are pledged, the pledgee's waring of them as a personal adornment would be an abuse of the pledge.

The French author Troplong is of the opinion that the pledgee may transfer or sub-pledge the security for commercial purposes. On the contemporary scene, as already pointed out, it appears that a pledgee can sub-pledg the property to his own creditor or sell out entirely his status as creditor of the pledgor. As the pledge is anoillary to the debt, an assignment of the collateral security. The pledgee has the right to sell out without any specific permission in the act of pledge. However, as the pledgee has the duty of safe-keeping of the pledgor's property, unless excused by a stipulation in the contract of pledge, the pledgee would be liable for his transferee's acts which injure the debtor-pledgor. Furthermore, the transferee from the pledgee is liable for any tortious use of the pledge. Consequently, the pledgor has a claim against the pledgee or transferee for damages to the pledged property.

9. Fruits of the Thing Pledged

The fruits or interest of the pledge form part of it, and therefore they remain, like the pledge, in the hands of the creditor, but the pledgee

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must return them or deduct them from the claim (LCC 3168). The fruits of the thing pledged are applied first to the interest on the obligation secured by the pledge and then on the principal (LCC 3169). The theory of LCC 3168-3169 is a variation of the general principle which denies the usus and fructus of the thing to the pledge creditor. The The fruits do not belong to the creditor for his personal appropriation. He must account for them either by returning them or deducting them from the debt. Property which is pawned is frequently property which is stored, and this has no fruits, but a pledge consisting of a third person's note or other credit, or of an immovable, usually has "fruits." In the pledge of corporate stock, the pledge creditor apparently need not have a transfer noted on the corporate books in order to have the dividends sent to him.

10. Surplus or Deficiency After Sale

LCC 3172 has already been noted: "If the proceeds of the sale exceed the debt, the surplus shall be restored to the owner; if, on the contrary, they are not sufficient to satisfy it, the creditor is entitled to claim the balance out of the debtor's other property." LCC 3172 is the counterpart of LCC 3166, which provides that the contract of pledge does not transfer ownership of the property. Thus, if the sale of the pledged property brings more than the amount due (debt , interest, and cost of preservation), the surplus belongs to the pledgor, as he is the owner of the property. On the other hand, if the sale does not bring enough to pay the amount due, the pledgor must pay the deficiency, since the pledge is simply a security, and not a payment in advance.

The Deficiency Judgment Act, adopted in the depression year 1934, provides that a creditor who takes advantage of a pledgor's waiver of appraisement of encumbered property subject to judicial sale loses his right to collect from the debtor any deficiency resulting from the sale. The language of the Act, which speaks of "provoking a judicial sale," might indicate that the scope of the Act is limited to judicial sales which do not involve appraisement of the property, and does not apply to a non-judicial sale in which there is no appraisement. The Act's statement of policy has been construed to include non-judicial

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sales of unappraised encumbered property.

The coverage of the Deficiency Judgment Act is of "mortgagee or other creditor" and "debts or other obligations." This is broad enough to include a contract of pledge, inasmuch as under the Civil Code the pledgee and pledge are respectively a "creditor" and "obligation." Thus far, however, all the cases arising under the Act have involved mortgages.

The rule apparently is that either a judicial or a non-judicial sale of pledged property which does not follow the appraisement procedur extingushes the pledgor's indebtedness. In short, a pledgee cannot have both a deficiency judgment and a waiver of appraisement. As a result, LCC 3172, which establishes the pledgor's personnal liability for the amount of the indebtedness in excess of the sale proceeds, is limited in operation to pledge sales with the benefit of appraisement.

11. Debtor Taking Pledge Without Creditor's Consent

The contract to pledge contemplates not only that the pledgor will deliver the security but also that he will not jeopardize the pledge. The pledgor cannot take back the pledged property without the consent of the pledgee. LCC 3173 provides that the debtor who takes away a pledge without the creditor's consent is "a sort of thief." This is not a criminal statute, and therefore no criminal penalty can be assessed under the article. However, the Criminal Code now makes such an act a theft. On the civil side, the pledgee may obtain a writ of sequestration. The pledge creditor has legal possession and hence has the benefits of the usual real actions for retaining and recovering possession. When the pledgor wrongfully retakes the pledged thing, he thereby breaches his contract, and the pledgee may sue on the breach and effect an acceleration of the debt.

12. Deceitful Pledge

The fraudulent or unauthorized pledge of another's property other than negotiable paper, does not affect the owner. He can recover his property from the pledgee, even though the latter is in good faith and has given value for the pledge. The rule of the French Civil Code that possession of movable property is equivalent to title ("En fait de

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meubles, possession vaut titre") is not followed in Louisiana. The French rule applies only to corporeal movables, and to choses in action transferable by delivery, but it is provided that in case the property was lost or stolen, the true owner can claim it from the vendee or pledgee in good faith during three years from the time of the loss or theft. However, in Louisiana, so long as the owner refrains from claiming it, the pledge creditor is protected, in that the debtor who has given it in pledge cannot have it restored until his debt has been entirely discharged (LCC 3147).

When the creditor gets a "gold brick" in pledge, but it turns out to be only "gilt," the creditor who has been deceived may claim another thing. LCC 3174 allows the pledgee who has been deceived as to the substance or quality of the thing pledged to demand another thing in its place or demand the payment of the debt secured, even though it is not yet due. At common law the pledgee who is deceived in the nature or quality of the pledge apparently cannot demand another pledge in its place or the immediate payment of his debt, but is relegated to an action for damages.

There is a provision in many pledges, and in all bank pledges, that if the pledged thing declines in value, the pledgor on demand must furnish more security. This provision has been upheld. The result is analogous to LCC 3174, but the contractual provision does not depend on dishonesty of the pledgor.

3. Acquisitive and Liberative Prescription

Acquisitive Prescription. "The creditor can not acquire the pledge by prescription, whatever may be the time of his possession" (LCC 3175). Since the pledge creditor has the right of retention, and hence the pledgor cannot help himself, it follows that the property is not subject to acquisitive prescription. Prescription does not run in favor of a pledgee and against a pledgor, as to the thing pledged, as long as the pledge exists and the debt remains unpaid. During the period of the pledge, the pledgee possesses as a contractual detainer of another person's property.

However, when the debt has been paid, prescription may run on the action in restitution. The pledgor, when the debt has been paid, is not

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legally helpless and can demand the return of the property. In accordance with the general rule on acquisition by usucapio, the pledgee must claim possession as owner.

Liberative Prescription. It is generally said that the retention of the pledge has the effect of preventing the prescription of the principal obligation. The thing pledged, remaining in the hands of the creditor, is said to be a continuous acknowledgement of the debt by the pledgor, and thereby continually interrupts the operation of prescription. The debtor, by placing the pledge in the hands of the creditor (or third-party custodian), recognizes the existence of the debt, and this recognition "constantly" interrupts prescription. As a consequence, the principal debt is imprescriptible, provided the pledged thing its not returned to the debtor, That is to say, the debt exists as long as the pledge exists. Strange as it may seem, it is a way of saying that the principal obligation depends upon the accessory obligation for its existence.

There is, however, no statute which provides that liberative prescription does not operate as long as the creditor retains the property. The rule may be unwarranted. For one thing, it does not allow the use of the general principal that the prescription of the principal debt destroys with it the accessory obligation. As long as the pledge exists, the principal obligation can never be prescribed, and the rule that the prescription of the principal debt destroys the accessory will never find application. Furthermore, the acknowledgement of a dent must be by a positive act, whereas the silence of the debtor, simply allowing the creditor to retain possession, is a negative act. Moreover, it is debatable whether prescription can be "constantly" interrupted. An interruption of prescription always leaves the door open in the future to a new prescription. Accordingly, the pledge, if anything, is a suspension of prescription, but the causes of suspension are spelled out in the law, and the pledge does not figure among them.

14. Bankruptcy

The discharge of the pledgee's claim in bankruptcy does not extinguish the pledgee's right to retain the security (if its value does not

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exceed the debt) and enforce his claim against the security. The pledgee, of course, cannot convert the pledge from a security of a particular obligation into a security of all indebtedness due from the insolvent. A pledgee cannot apply property pledged for one debt to the payment of other debts, but a clear agreement that collateral shall secure a present or future indebtedness of the pledgor to the pledgee will suffice.

A debtor, on the verge of insolvency, is not permitted under the Bankruptcy Act to prefer one creditor over others by surrendering possession of property. Under the Bankruptcy Act, as amended, the trustee in bankruptcy prevails over those creditors who attempt to establish their preferred claims in this manner within four months of filing the debtor into bankruptcy.

CHAPTER 3. OF ANTICHRESIS (LCC 3176-3181)

It has been pointed out that in current language the pledge is generally thought of as connected exclusively with movables. However, the term "pledge" in the Civil Code refers to immovables as well as to movables. The pledge of immovables is called antichresis.

Antichresis is a contract by which a debtor transfers to a creditor the possession of his immovable for the purpose of allowing the creditor to take the fruits or revenues, on condition of deducting them from what is due (LCC 3176). Antichresis is a contract of Greek origin. In old French law, the antichresis functioned under the name of mort-gage (dead pledge). It was condemned as usurious by the canonists, because it permitted the lender of money to obtain interest under the form of fruits. Creditors, fearful of church censure, did not dare to practice it, and when they obtained land in pledge, it was agreed that the fruits would be imputed to the principal of the debt. This was the permissible vif-gage (live-pledge). The vif-gage device was not particularly attractive to the creditor. By the seventeenth centrury, antichresis had completely fallen into disuse.

The French Civil Code allows the loan on interest. Nonetheless, the projet of the French Civil Code is silent on the contract of antichresis, probably because it was the subject of infrequent practical application, but as the omission caused complaint, the final version of the

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French Civil Code treats antichresis with a luxury of great detail. The articles in the Louisiana Civl Code of 1870 on the contract of antichresis (LCC 3176-3181) are substantially the same as those in the French Civil Code and the Louisiana Civil Code of 1808.

As at the time of the adoption of the Civil Code in the beginning of the nineteenth century, the contract of antichresis remains today an anachronism. It has been used infrequently and has been referred to by the court as an "antiquated contract." There are several reasons for the unpopularity of the antichresis. The creditor must keep the immovable in good repair, making all useful and necessary repairs, which is a burdensome task, unlike the task of the pledgee of incorporeal property, and he must pay the taxes and other expenses of operating the property, saving the right to deduct from the fruits all the expense relative to such charges (LCC 3177). The creditor must render an account of revenues recived from the property, otherwise it is presumed that the revenues received were sufficient to pay the debts and the property is returned to the debtor free of any claim. A creditor, when he seeks security, generally does not want responsibility with it. A mortgage is usually all the security the creditor wants. What the creditor obtains as to immovable property under the antichresis, that he could not get under a mortgage, are the revenues of the property.

The classification of antichresis in the Civil Code as a pledge of an immovable is not entirely accurate (LCC 3135). The antichresis does not confer a privilege, but a simple right of retention to acquire the fruits of the property (LCC 3176). It is a pledge of the revenues, and not of the property. As Planiol put it, "The method in which the law presents the antichresis as a security similar to the pawn and differing only by the immovable nature of its object is not precise." The immovable is placed in the possession of the creditor only for the purpose of allowing him to exercise his right of pledge on the revenues.

The antichresis creditor has no preferred right in the immovable itself. Of course, as any creditor, the antichresis creditor can cause the compulsory sale of the immovable and other property of the debtor upon his default at maturity of the debt, but, in doing so, the

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antichresist loses all the advantages given him by his contract of antichresis, because the seizure of the property leads necessarily to the sale of the property and to the putting in possession of the purchaser. He renounces implicitly his right of retention. The price of the immovable is distributed pro rata between him and the ordinary creditors. LCC 3181 (par.2) provides: " The creditor, who is in possession by way of antichresis cannot have any right of preference on the other creditors; but if he has by any other title, some privilege or mortgage lawfully established or preserved thereon, he will come in his rank as any other creditor."

The antichresis creditor cannot prejudice the rights which other creditors have by way of privilege or mortgage (LCC 3181, par.1). As to creditors who obtain rights against the debtor subsequent to the accordation of an antichresis, it appears that the result might be different when the sale of the property is made at their instance. These creditors may not be able to dispossess the antichresis creditor without first satisfying his claim. In this situation, the antichresis creditor is apparently in the same position as if he were a privileged creditor. As a matter of precaution, it is advisable that the antichresis creditor also take a mortgage on the property.

The contract of antichresis is devoid of practical interest. The Civil Code did not resuscitate the corpse. The device belongs to the ages.

ADDIS ABABA UNIVERSITY
FACULTY OF LAW

Civil Case No. 1460/60
Senie 24, 1962

Judges: Ato Negussie Fetawek
" Mohammed Berhan Nurhusien
" Tebebu Abraham

Plaintiff: Ato Teckle Kassaye

Defendant: Yesrawotch Industry Company

JUDGMENT

The plaintiff, in his statement of claim dated Guenbot 18, 1960, stated that he bought a loader model transcapter F.L. designed for the loading of sand, gravel, etc. on the basis of a document dated Meskerem 29, 1960 at a price of 15,300 (fifteen thousand three hundred) birr, paid 5,338 (five thousand three hundred and thirty eight) birr and took delivery of the loader. He examined the loader on the second day after delivery and found out that it does not work because it was defective. He wrote to the defendant a letter on Tekemt 2, 1960 stating that the loader it sold to him does not work. The defendant sent its employees who, after finding out that the loader was defective, left without repairing it. The plaintiff waited until Tekemt 17, 1960. However, since the defendant did not repair the defect, plaintiff warned the defendant by a letter written on Tekemt 17, 1960 that if the defendant does not correct the defect until Tekemt 22,1960 plaintiff will have the defect corrected at FIAT garage and will be compelled to deduct whatever the repair cost will be from the remaining price of the loader. But the defendant failed to respond. Therefore, palintiff handed over the loader to FIAT garage for repair.

After it was repaired and when the plaintiff was about to take it from the garage, the defendant wrote a letter to the plaintiff stating that since it has decided to take the loader back the plaintiff can take his money back. The plaintiff in reply explained to the defendant that since the plaintiff has already incurred expenses for the repair of the loader defendant can take the loader only if it pays the expense incurred by the plaintiff for its repair. However, since defendant was not willing to pay the expense, plaintiff had to pay birr 5,752.73 (five thousand seven hundred and fifty two birr and seventy three cents) as repair cost and take delivery of the loader.

Plaintiff further alleged that if he had known that the loader was defective, he would not have paid birr fifteen thousand and three hundred. He bought it with the belief that it would pay its price and enable him to make profit. He did not know that the defendant wanted to profit illegally by selling a defective loader. He further stated that he had, as soon as he knew of the defect, notified the defendant.

The plaintiff therefore requested that since the defendant has liability in accordance with Art. 2297,2273 and 2287 of the civil code, defendant be ordered to pay the plaintiff birr 5,752.73 being expense the plaintiff paid for the repair of the truck, and four thousand one hundred and sixty (4,160) birr being expected profit plaintiff would have been entitled to at the rate of twenty (20) birr per day for twenty six (26) days had the loader been without defect. Thus, the claim is birr nine thousand nine hundred and twelve and seventy three cents (9,912.73).

The defendant, in its statement of defence dated Hamle 12, 1966, submitted the following two grounds of defence:

I The defendant had sued the plaintiff in civil case No. 704/60 because he failed to pay the remaining price of the loader. As a defence, the plaintiff argued in civil case No. 704/60 that since he had paid Birr 4652.73 to repair the defect in the loader, this amount be deducted from the price of the loader. To support his defence, he had introduced all the evidence he submitted in this case as plaintiff. However, the court rejected his defence and passed a judgment in favour of the present defendant. Therefore, plaintiff is barred from bringing a suit against the defendant because he must be barred by Art. 5 of the civil procedure code.

II. The defendant sold the truck to the plaintiff in the condition it was at the time of sale and with warranty that it is new and without defect. Therefore, the claim should be rejected.

This court had previously ruled that the defendant's first ground of defence is not tenable and ordered that it give a full reply to the claim. The defendant's lawyer's reply was that plaintiff does not have any legal right to refuse to return the thing he bought or to pay its price. If the loader were defective the plaintiff would have returned it to the defendant as soon as he knew of the defect. However, since the plaintiff raised the question of defect of the loader after his obligation to pay the remaining price became due, it must only be seen as a design by the plaintiff to avoid payment of the price.

The defendant has no contractual obligation to repair any defect in the loader after the plaintiff took delivery of it. Therefore, plaintiff's suit must be rejected since it does not disclose a cause of action.

The plaintiff, in his counter-reply dated Ter 19, 1962, stated that the defendant sold the loader to the plaintiff with the awareness of the particular use the plaintiff had of the loader and with the defendant's statement that it is fit for the particular purpose the palintiff wanted it.

The loader was, after examination, found defective. For this defect, the defendant has legal liability. Defendant would have been relieved of this liability if he had informed the plaintiff of the defect at the time of sale. As it is, however, defendant will not be relieved of his legal liability since he concealed from the plaintiff the fact that the loader was defective. Two days after the defendant sold the loader to the plaintiff stating that it is not defective plaintiff found out that it was defective and promptly notified defendant of the defect and the defendant sent its employees and ascertained the defect.

If plaintiff had known that the loader was defective, he would not have bought it for birr 15,300.

Although the loader had been in use before plaintiff bought it, plaintiff bought it on the basis of the defendant's declaration that it was free from defects and was fit for the particular purpose the plaintiff wanted it. Hence, defendant has liability under Art. 2287, 2289, 2291(3), 2292, 2293(2) 2299(2) and 2300 of the civil code.

The court ordered the plaintiff to prove his allegation that the defendant had sent its employees to ascertain whether or not the loader was defective. Three witnesses testified the that the above stated allegation is true.

The three witnesses testified in a similar manner that one European and two Ethiopians came to the plaintiff's place of work, undid certain parts of it and left it unattended after that.

1. The defendant did not deny selling the tractor to the plaintiff.

2. The defendant confirmed that when the plaintiff wrote it a letter explaining that the loader does not work, it wrote a reply to the plaintiff asking him to return it and to take his money back.

The defendant did not take any action when the plaintiff wrote explaining that since he had incurred expenses to rectify the defect in the loader, the defendant can take it after reimbursing the plaintiff his expenses. This shows that the defendant knew that the loader was defective.

Defendant admitted that he sold the loader to the plaintiff. However, defendant did not produce evidence to prove that he notified the plaintiff that the loader was defective and that the plaintiff bought it knowing its defect.

It is provided in Art. 2287 of the civil code that a seller has to guarantee that the thing sold confirms to the contract and is not defective.

Art. 2289 of the civil code provides that the warranty a seller undertakes becomes effective when the thing he sold does not possess the quality required for its normal use or commercial exploitation or the thing he sold does not possess the quality required for its particular use as provided expressly or impliedly in the contract or the thing he sold does not possess the quality or specifications provided expressly or impliedly in the contract.

No defence was produced to prove that at the time the buyer bought the loader, it had an obvious defect or that it was tried at the time of delivery.

The fact that the defendant asked the plaintiff to return the loader and take his money back and did not state that the plaintiff bought it with full knowledge of its defects when the plaintiff notified it of the defect shows that defendant accepted the existence of the defect.

After the plaintiff found out that the loader does not work, he asked the defendant to repair it. The defendant sent his employees to repair it. However, they left it unattended. Because of this plaintiff took it to a garage, after which defendant asked plaintiff to return the machine. But, the plaintiff informed the defendant that since it is in a garage and since he has incurred expenses for its repair, the defendant can take it after it paid the expenses already incurred by the plaintiff. However, since the defendant did not pay the expenses, the plaintiff has produced evidence that proves that he paid the expenses. The defendant did not produce any evidence to rebut that the plaintiff did not pay the expenses. Therefore, on the basis of the above and the law, the defendant is liable to pay the expenses plaintiff incurred to repair the defect.

The plaintiff's claim for damages of Birr 4,160 is rejected since plaintiff did not produce evidence to show that if he worked with the machine for 26 days he would have made a profit of birr 20 a day.

Therefore defendant must pay the plaintiff birr 5,752.73, court fees on this amount and costs of the case.

Questions:-

1. Is the holding of the court in accordance with the law?

2. What other measures, if any, could the buyer have taken under the law?

3. Assume the plaintiff had produced evidence that proves that he would have made a profit of birr 4,160 by working with the loader for 26 days at the rate of birr 20 per day. Would he have been entitled to this amount under the law?