# The Contract Of Sale

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LL.B. III

GħSL
Għaqda Studenti tal-Liġi

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The organisation plays a pivotal role in law students' academic and social life at the University of Malta. The organisation has also been responsible for publishing the prestigious *Id-Dritt*, and the *GħSL Online Law Journal*.

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# Advice from an Alumna

**By Dr Priscilla Mifsud Parker**

The law course is a long journey, but one that, if well-travelled, will lead to beautiful destinations. In an industry which is today attracting many young individuals looking to develop their career in law, it is important to stay ON the beaten track and remain focused. It may go without saying that it is of great importance for all students to attain good academic grades, to be dedicated to their work, as well as to be determined in this highly-competitive industry in order to fulfil their dream of becoming lawyers one day. However what is crucial is that as students and later on as professionals we are innovative by being sensitive to the changes around us. These changes might be political, economic, environmental, socio-cultural or others; what is for sure is that they all have an impact on the profession of a lawyer. We are members of a dynamic profession which is very sensitive to its surroundings. The type and 'genre' of advice which is required from us is all affected by what is being experienced by the receivers of this advice.

Work experience is considered as a vital part of the staple diet of any prospective lawyer in order to put into practice and refine the knowledge gained from the theorethical reality of the lecture halls and lawbooks into the skills required for a successful career in law. An internship will not only show future recruiters that you have a genuine interest in pursuing a career in this sector, but that you have the practical knowledge and skills to the succeed in your role.

Here are some personal suggestions that I feel helped me during my journey:

1. *Being Ambitious*

A powerful trait in any competitive industry, ambition will help you in your law course, in your career as a lawyer, as well as in your life. Whilst the law course can be quite intimidating and challenging, an ambitious individual who is dedicated to learning new things has the potential to understand and realize long-term goals. Do not view the journey as one whole insurmountable mountain but focus on the next small goal and once achieved move on to the next and goal by goal you will reach your final target point.

In this respect, gaining valuable work experience through an internship is an important step taken by an ambitious young lawyer who wants to attain certain skillsets, and remain a step ahead of his/her peers. By being inquisitive, analytical and humble enough to accept guidance and mentoring one is guaranteed a fruitful experience in a law firm. It is also not only a means to start focusing on the direction of your career and to build upon your chosen path, but will undoubtedly expose you to the international world. This is crucial, as most of the traditional legal sectors have been intertwined with new areas of legislation and all these together now present much more opportunity for intra-jurisdictional work.

2. Networking

By engaging with counterparty students abroad and in international fora one gains an insight into another reality and is exposed to different cultures, ways of communicating and is able to bridge

the differences between parties to a mundane discussion which will eventually become a transaction or a major project in professional life.

3. *Organisational Skills*

Organisation is key in any industry. Good organisation skills always stand out to a recruiter when considering potential applicants. Such skills can be obtained by gaining experience either through organising one's own work, study plan,student events or cultural/philanthropic events.

Going hand-in-hand with this, is having a study plan. By planning your studies ahead, one will have a sufficient amount of time to meet all the demands, while also being able to participate in productive outside activities. Reviewing notes or case briefs before class can also help you follow and participate in class discussions better , whilst following case-law allows you to apply them for specific situations. In view of the amount of material involved summarising and carving out the most crucial points is essential to then build your argument in papers.

4. *Taking your own class notes*

It is always important to take down your own notes as laws are always evolving and passed-down notes would provide the context but are not ideally used for the detail. Researching the particular topic and comparing Malta's law with that of other jurisdiction gives one a completely different outlook and commenting on these variances in an exam paper, dissertation or assignment would distinguish one student from another. Not to be overlooked are also the consultation papers, commentaries and other official public documents that are issued by local authorities from time to time on different areas of law and industry. Being abreast of what is happening in industry will help putting the particular law or regulation in context.

5. *Participation*

Participation is a main element of the learning process. Being actively involved during seminars and lectures and participating in legal debate sessions, mock trial competitions and moot courts are essential in order to improve your persuasive and presentation skills. If you find this very difficult (all of us have different characters and traits), then try to focus on participation in other events which will expose you to public speaking starting off in smaller groups in a more familiar environment and trying out new experiences and larger audiences as you go along.

6. *Practice is the key to success*

This leads us to our next point – practice. Attaining good grades is undoubtedly an important part of the law course, however, in themselves, they are not enough to show that you have substantial material to succeed. Working within a law firm introduces you to the world of work, and allows you to gainspecific industry-related skills which one will only ever be able to learn in a workplace setting.

Work experience can provide you with valuable insight which will help you decide what your career aspirations are and in which areas you would like to further delve into.

## S A L E.

The institute was reorganized by Ordinance VI of 1853, which [illegible] sale and exchange and was subsequently amended by Ordinance IV of 1863, which related to conventional retratto. Ordinance XI of 1857 referred to legal retratto on the ground of consanguinity, neighbourhood and co-ownership. All these Ordinances now form part of Ordinance VII of 1868 under the titles of Sale and Exchange.

The contract of Sale which affects the transfer of ownership, owing to its economic importance and to its frequency, occupies a very important position in civil life, and this is why the law deals with it immediately after marriage agreements.

### Notion of Sale.

The function of sale according to its rational concept, is that of transferring ownership, but in Roman Law it was limited to the transfer and warranty of possession: this is the teaching contained in the famous fragment of Africanus (Fr. 30, par. 1, Dig. De actionibus empti et venditi, B. 19, T. 1). "Venditorem hactemus teneri ut rem emptori habere liceat non etiam ut ejus faciat".

The obligations of the seller, therefore, were merely to deliver the thing to the purchaser, i.e. to transfer the physical power of disposal ("vacuam possessionem tradere") and to maintain the purchaser in such possession, and therefore to free him from any molestations and to indemnify him in case of eviction.

From this notion of sale doctrine and jurisprudence derived the following consequences:

1. That it was not necessary for the seller to be the owner of the thing sold;

2. That he could sell a "res aliena": "rem alienam distrahere quem posse nulla dubitatio est non emptio est et venditio" (Ulpian, D: De contrahenda emptione). If he was the owner, then the purchaser would become the owner by means of the thing. "Si quidem fuit venditor facit et emptorem dominum". If the seller was not the owner of the thing he was only bound to give warranty against eviction: "si non dominus tantum evictionis nomine venditorem obligat". The sale was not null, nor did it fail to have its effects and therefore "emptori rem habere licere".

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In the present system of the law, as we shall see later on, the sale of a "res aliena" is null, because in modern codes the contract of sale has that function which reason attributes to it: it is that contract by which one of the parties (i.e. the seller), transfers or binds himself to transfer to the other the ownership of a thing, and the other party, (i.e. the purchaser), pays or binds himself to pay the price.

Section 1396 gives us a substantially similar definition: "Sale is a contract by which one of the contracting parties binds himself to transfer to the other a thing for a price which the latter binds himself to pay to the former". In this definition the words "binds himself to transfer" must be understood as in Roman Law, i.e. an obligation of transferring ownership.

It is true that according to the modern principle, introduced by the compilers of the French Civil Code, the transfer of ownership by effect of sale takes place automatically and that the obligation of transferring ownership is fulfilled as soon as it arises without the necessity of any further action the part of the seller who becomes a transferor the very moment the contract is perfect. This effect, however, though it is natural, is not essential to sale: certain sales are perfect even without an immediate transfer of ownership," -- and this in the following cases:-

1. If the parties agree to delay the transfer of ownership;

2. If the immediate transfer of ownership is made impossible because the object is not determinate.

Kinds of sale.

Sale may be of two kinds, i.e. Voluntary, when the parties enter into the contract spontaneously, and Necessary, which takes place when one of the parties is compelled by another person who has a right to do so, whether such person be the State as in the case of expropriation, or a private individual, as in the case of licitation of common property, or a judicial sale by auction demanded by the creditors.

Division of the Treatise on Sale.

We shall divide this treatise into four parts:-

1. Special Requisites of Sale.
2. Effects of Sale.
3. Dissolution of Sale.
4. Agreements frequent in Sale.

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1. Special Requisites.

The special rules on sale refer to (A) the capacity of the parties, (B) the double object of sale, and (C) the form of the contract.

A. Rules which refer to capacity.

Besides those persons who are incapable according to the general rules governing all contracts, the following are incapable of contracting sale within the limits we shall lay down:-

1) The spouses between themselves;
2) The tutors, curators, and attorneys with regard to property belonging to those whom they represent;
3) The Judges and Magistrates with regard to sales or assignments of lawsuits or rights or actions which are being disputed ("litigiose").

(1) The spouses, between themselves, are incapable of contracting sale. The reason for this prohibition is partly the danger that the sale instead of being the effect of the free will of the parties, may be the result of undue pressure on the part of one of the spouses; and partly the danger that the spouses may enter into this contract in order to simulate a donation, against the prohibition of Section 1906, in order to defraud the rights of the persons entitled to the legitim and of the creditors.

This rule has the following exceptions:

i) When the wife sells property to the husband in order to pay her debt for the dowry (Section 1416-(a)): it is supposed that the wife has not paid the dowry promised by her to the husband, and in this case there is therefore a lawful reason, i.e. the payment of a debt, to justify the sale.

ii) When the sale has for its cause the investment of money belonging to the party acquiring. In order to prevent any possible abuse, even in these cases, Section 1416, 1 p., lays down that in case any indirect advantage accrues to either of the parties, the heirs of the other party, or other persons concerned, can demand the rescission of the contract.

iii) Similarly, and in general, in all those cases in which the sale or assignment is made by one of the parties to the other with the object of paying a debt towards the party acquiring.

iv) In case of a sale by auction of the property belonging to one of the spouses, on a demand made by his creditors. In this case there is no danger of any undue pressure because the proceedings of a sale by auction are such as to guarantee the liberty of the offerers and to prevent the possibility of any abuse (Section 1417).

(2) The incapacity of tutors, curators, attorneys, etc. (Section 1418). The tutor cannot become the buyer of property belonging to the ward, nor can the curator and the attorney become buyers of property belonging to the interdicted person or the principal respectively, because they will naturally prefer their own interests to those of the person represented by them, whilst it is their duty to look after the interests of those whom they represent, i.e. to sell the property at the highest price: his interest on the contrary would be that of selling it at the lowest price. This prohibition extends also to judicial sales, i.e. these persons cannot become offerers in judicial sales of property belonging to those whom they represent, because this may incite them not to fulfil their duties. The sanction to this prohibition is the nullity of the sale (Section 1418). Properly speaking, also in this case, the contract is voidable, and such voidability can only be availed of by the persons in whose favour it is established, and it can therefore be ratified.

(3) The incapacity of Judges or Magistrates with regard to the sale or assignment of lawsuits or of litigious rights and actions. The Judges and Magistrates are forbidden from becoming purchasers or assignees of litigious rights or actions, whether directly or indirectly (Section 1419), because this sort of trade is not an honourable one, and especially to Judges, and there is moreover the danger of abuse of influence which would render these persons too dangerous to the other party to the suit. The sanction to this prohibition is the voidability of the sale in favour of the vendor of the lawsuit and of the other party to the suit ("avversario").

B. Rules relating to the double object of Sale, i.e. the Thing and the Price.

a) The Thing. All things, according to the general principles, may be the object of sale (Section 1420), whether they be corporeal or incorporeal, movables or immovables, present or future. When the object of sale is an incorporeal thing, i.e. a right which does not

fall immediately on a corporeal thing, then the proper name of this kind of sale is "assignment".

As to future things, we have already said when dealing with obligations in general that we must distinguish according to whether the contract refers to the future thing itself or merely to the hope in the future existence of the thing, i.e. "pactum de re sperata" and "pactum de spe vel alea". Section 1421 applies this distinction to sales in particular: when the object of the sale is the future thing itself, if this does not come into existence the contract remains without an object, it becomes inexistent and therefore the purchaser is not bound to pay the price; if, on the contrary, the object of the sale is an expectancy of a future thing -- and the risk is that the thing may not exist at all -- still the sale is absolute and unconditional, and the purchaser will have to pay the price even though the thing in question never comes into existence. Whether it is a "venditio rei speratae" or a "venditio spei" is a question of fact. When there is doubt as to the intention of the parties, Section 1421 (3) lays down the presumption that the sale is conditional, i.e. "de re sperata", and, therefore, it includes the condition "if the thing comes into existence". Properly speaking, in case the thing fails to acquire existence, it is not the case of a condition which has not taken place, which is an extrinsic and accidental element of the contract, but it is a case of a lack of object, which is an essential element of every obligation.

In order that a thing may become the object of sale, it must, in the first place, contain all the conditions which the object of contracts in general requires, i.e. it must be possible, lawful, in commercio specified, or which may be specified and useful to the creditor: moreover, the object of sale must be the property of the vendor.

With regard to the lawfulness of the thing, Sections 1423 and 1424 lay down the following rules:-

1) The sale or assignment of any right to the succession of a living person is void, although such person shall have given his consent thereto.

2) The rights relating to sums granted judicially, or donated or bequeathed expressly for maintenance, cannot form the object of sale or assignment (Section 1424). The law forbids such assignments in order to

prevent the person to whom such sums are given from depriving himself of means of subsistence. It is important to note that the prohibition refers to the assignment of the right itself and not to the sums which may have already fallen due at the time of the assignment.

3) The right to a pension granted by the Government cannot be sold or assigned, because these pensions are also destined to ensure the future maintenance of the person who receives them.

The condition particular to the object of sale is that the thing must belong to the vendor; the sanction to this condition is that the sale of a "res aliena" is null (Section 1422). This nullity is relative to the purchaser, because he has a right to and an interest in acquiring the ownership of the thing. It cannot, on the other hand, avail the seller, who has the obligation of warranting to the buyer the peaceful possession of the thing and can never impugn the sale. The third party who is the owner of the thing does not need this subsidiary means, because with regard to him the sale is a "res inter alios acta" which does not prevent him from exercising the "rivendicatio".

The sale is null if this requisite does not concur, and the purchaser, even though he has not been molested by the owner, may, as soon as he wants, impugn it by means of an action if the contract has been executed, or plead the exception of nullity if he is called to execute the contract.

When the sale is annulled on this ground the effects are those common to all rescissions, i.e. the parties return to their former position. There is also room for reimbursement of damages sustained by the purchaser according to the rules of warranty against eviction, because the action for nullity may be considered as an anticipated action for warranty.

In order that the purchaser may have the right to such reimbursement he must have been in good faith, i.e. he must have been unaware that the thing did not belong to the seller. But it does not matter that such ignorance was due to want of attention or even to "culpa gravis" on his part.

The action for nullity cannot be exercised when the object of sale are movables by nature or titles to bearer, because according to Section 595 the possession

of these things obtained in good faith amounts to title in favour of the possessor, who therefore cannot be evicted by the owner: so that the ground for the rescission of the sale of a "res aliena" is wanting.

The same thing may be said with regard to the sale of pledges given to the Monte di Pieta', (Secti 1422) because the pledge of a "res aliena", made wit such institution is always and invariably valid, and it therefore transfers to the Monte di Pieta' all th rights arising from pledge, including the "jus dis- trahendi". Consequently, the sale of the pledges ma with it are always valid, and the owner, as he canno impugn the constitution of pledge, so he can neither impugn its sale, and the purchaser of the pledge can have no interest, and therefore no right, to impugn the sale, because he has no fear of eviction.

Sections 1425 et seq. lay down the consequences which take place in certain cases in which the thing is inexistent or cannot form the object of sale. Th cases foreseen by these Sections are:-

1) If at the time of the contract the thing has already been totally or partially destroyed.

2) If it is extra-commercium.

3) If it already belongs to the purchaser.

(1) If the thing has already been totally destroy the sale is null, nay inexistent, through lack of object (Section 1425). It may, however, give rise to certain juridical effects which, however, do not result from the sale but from the "dolus" or "culpa" on the part of either party. In fact, if the vendor was aware of the fact and the purchaser was unaware, the seller is bound to make good the damages (Section 1426); if the purchaser knew that the thing had perished and the vendor was unaware of the fact, the purchaser, under Roman Law, remained bound to pay the price, and if he had already paid it he could not claim it back (Fr. 57, par. 2, D. De contrahenda et emptione). Section 1426, on the contrary distinguish according to whether the price has or has not been paid: if it has not been paid, the purchaser is not bound to pay because the sale is null, and one cannot therefore talk of an obligation on the part of the purchaser, arising from the sale: but he is bound to make good the damages resulting from fraud. If, on

the other hand, he has already paid the price, he cannot claim it back because an "indebitum" paid knowingly cannot be claimed back. If both were aware that the thing was entirely destroyed, the sale is null, and there can be no reimbursement of damages because both were in "dolus".

If the thing has been partially destroyed, the purchaser may choose: he may either rescind the contract or demand the part which remains, in which latter case the price is reduced proportionately (Section 1425 (2)). He has the right to rescind the contract because he wants to buy the whole thing, and such intention does not necessarily and always imply the intention of buying a part.

(2) and (3) The same rules laid down with regard to total destruction apply in case the thing was extra-commercium or already belonged to the purchaser, both with regard to the nullity of the sale and with regard to the reimbursement of damages.

b) The Price. The price is a quantity of money which the purchaser pays or promises to pay to the vendor. If the consideration which the acquirer gives does not consist in a sum of money but in a thing in kind, it is not a price, and the contract is not sale but exchange. If, besides the price, the purchaser gives or binds himself to give some other thing in kind the contract is one, and it may be either sale or exchange according to its principal element: if the sum of money exceeds the value of the thing given together with the money, the contract is that of sale entirely, and the things given are considered as a supplement to the price (Sections 1402 and 1568). If, on the contrary, the value of the thing exceeds that of the sum of money, the contract is exchange, and the sum of money is considered as a supplement to the thing given in kind.

Requisites of the Price.

1. The price must be true and serious: "true" means, not simulated, i.e. there must be the intention of paying it; "serious" means that it must be more or less proportionate to the value of the thing.

2. It must be determinate and expressed by the parties.

1. Two elements must occur in order to give this character to the price:-

a) Equality, i.e. it must correspond to the thing in the mind of the parties. The equality need not be objective, but subjective. It is not necessary that the price be equal to the value of the thing itself, but it is sufficient if it is considered as such by the parties, and therefore the price does not cease to be serious because it is more or less inferior to the value of the thing. The opposite of a serious price, taken in this sense, is not a low price but an illusory price, viz: that which is completely out of proportion with the value of the thing, so that it could not even be considered as an equivalent to the thing by the parties themselves.

b) The intention of the parties of claiming and of paying it. It must not have been agreed upon fictitiously, but the seller must have had the intention of claiming it, and the purchaser of paying it. The opposite of a true price, taken in this sense, is simulation.

2. The price must be determinate and expressed by the parties. As the price is an essential element of sale the parties must agree with regard to it and they must express such agreement: there must be both the internal and external consent.

The parties may determine the price in two ways: in a direct manner when they fix the sum (this is the more regular way, because in this way the consent of the parties necessarily refers to the price: they are aware of the price to which they give their consent); and in an indirect manner by means of a reference to something which is certain and determinate, i.e. to the price current at a given time and in a given place. The possibility of determining the price in this way is admitted by traditional law, and it is also conformable to the general principles, because, for the validity of an obligation, it is sufficient that the object be such that it may be specified.

Moreover in this way the parties may obtain the objective certainty of the amount of the price, and up to a certain extent the subjective certainty as well: because by referring themselves to something which is certain they may always have an approximate idea of the amount of the price.

Section 1406 has confirmed this traditional doctrine in so far as it considers the case of a sale made at the current price: the Section lays down that if the parties

have made reference to the current price without specifying the time and the place, it is presumed that they wanted to refer to the time and place of the execution of the contract.

"A fortiori" the price may be fixed with reference to something which has already taken place ("un dato passato") because in this case, besides the objective certainty, the parties may also be subjectively certain, whilst such certainty, in case the thing referred to is a future thing, cannot but be approximate.

Whatever be the way in which the price is determined, i.e. directly or indirectly, it is always established by the parties, who may, however, remit themselves to the judgement of a third party. On this question the two Roman schools of thought, the Sabinians and the Proculeans, disagreed. Sabinus and Cassio held that this could not be done, Whilst Ophilius and Proculeus held that it could. Justinian decided the question in favour of the Proculeans by means of the Constitutio Unica "De Contrahenda Emptione" and our law confirms this view, saving the conditions and rules with which we shall deal later on. This faculty of leaving the determination of the price in the hands of a third party is very useful to the parties: there may be two persons who seriously intend to contract sale and have an interest in concluding it immediately, but who may not have come to an agreement on the price, either because they ignore the value of the thing or because they disagree as to certain elements which may have an influence upon the determination of the price. If this faculty were not given to them they would have to wait until each of them is in a condition to determine the price ("con cognizione di causa").

The parties may remit themselves to the judgement of a third party in two ways:-

a) by remitting themselves to one or more specified persons;

b) by remitting themselves to one or more unspecified persons.

(a) When the parties entrust the determination of the price to one or more specified persons, if one of them does not want to undertake the charge, one of the parties cannot demand against the other that another person be substituted (Section 1403). The sale remains without an object and therefore without effects, because

it is presumed that the parties wanted to remit themselves to the individual judgement of that specified person and not to that of a "bonus vir" in the abstract.

(b) When the parties remit themselves to the judgement of one or more unspecified persons it is necessary to determine them in order that the sale may have its effects. If the parties do not agree in the choice, it is made by the Court on the demand of one of the parties against the other, because the parties do not in this way leave the question in the hands of this or that person in particular but in the hands of a "bonus vir" in the abstract.

In either case, if the decision is left to more than one person, if these disagree, the price is determined according to the opinion of the majority; if there is no majority, the price is determined according to the average of the sums proposed by each of them.

As to the binding effect of the valuations made by a third party, according to the doctrine prevailing among the interpreters of Roman Law, it was admitted, on grounds of equity, that the price could be altered in case it was evidently unjust either through gross error or through fraud.

The same doctrine generally prevails among modern writers, who teach that the third party must be considered as an attorney of the parties who cannot impugn the determination of the price except in case he is guilty of evident fraud or mistake, and has not acted within the limits of the mandate, especially those established by the parties (vide Planiol et Ripert, Vol. X, para. 38).

O. Rules relating to the Formalities of Sale.

In case of immovables the law requires "ad validitatem" the solemn form, and the sale is subject to publicity with regard to third parties. In case of a judicial sale the deed of adjudication made by the Registrar takes the place of the notarial deed of sale, and it must be similarly registered in order to have effect vis-a-vis third parties. In case of other property the form of sale is free saving the rule proper to assignment. Vis-a-vis third parties the seller remains the owner, doctrine holds, until delivery is made -- a theory which is absurd -- because in case of immovables the important thing is the public deed.

2. Effects of sale.

The effects of sale are the following:-

A. The transfer of the ownership of the thing sold.

B. The transfer of the "periculum" and of the "commodum rei".

C. The obligations of the vendor.

D. The obligations of the purchaser.

A. The transfer of ownership.

We have already pointed out that the transfer of ownership is effected, as a rule, according to the rules governing the contracts which transfer ownership and other real rights, by effect of the contract alone, and that this takes place not only in the relations between the parties but also with regard to third parties, saving the causes of preference between successive acquirers.

Section 1397 here adds that ownership passes, by effect of the contract, from the vendor to the purchaser even though the thing is not delivered nor the price paid. This phrase shows that modern law has completely abandoned the Roman principle according to which "traditionibus (et usucapionibus), non nudis pactis, dominia rerum transferuntur", and moreover in Roman Law, as a protection to the vendor, he remained the owner of the thing, even after delivery, until he was paid, unless he had granted a delay to the purchaser.

Among the exceptions to this principle, we have mentioned the impossibility of such immediate transfer of the ownership of the thing sold through defect of determination. Section 1398 lays down the following two notable applications:-

(i) With regard to movables in case they are sold not in bulk ("massa"), but by weight, number or measure.

(ii) With regard to the sale of an immovable, when it cannot be determined with certainty before it is measured.

(1) The case of a sale of movables by weight, number or measure, and not in bulk. The sale is said to be made "en masse" when all the things in question are sold for one price, without any regard to their weight,

number or measure. It is said to be made by number, weight or measure in the following cases:-

a) If the price is agreed upon with reference to the number, weight or measure, whether the sale is in respect of the whole quantity existing in a given place, or only a part thereof;

b) In case a certain number, or a certain weight or measure of a specified thing has been sold, even though for one price, e.g. 30 rotoli of sugar for £3.

This distinction with regard to the transfer of ownership is due to the fact that in case the things are sold "en masse" the object is determinate and it is not necessary that they be measured (Lex 36, p. 5, Dig. De Contrahenda Emptione: and Section 1399); if, on the contrary, the sale is made by number, weight or measure, ownership does not pass to the purchaser before the goods are numbered, weighed or measured, because these are necessary in order that the object of the sale be specified, and in order that the price be fixed. In fact the determination of the price is the purpose of such numbering, weighing or measuring, in case the entire goods existing in a given place are sold.

More logical than our own is the Italian Civil Code, which considers the sale to be in this case "en masse" (Art. 1451, It. Civil Code) which therefore transfers ownership and the "periculum" to the purchaser from the very moment of the contract.

When the sale is by weight, number or measure, it is not complete until the things are numbered, weighed or measured: ownership and the "periculum rei" do not pass to the purchaser, but remain with the vendor, because with regard to all other effects (i.e. as a cause of obligations), it is complete, and it binds the parties under the sanction of having to make good the damages plus interest in case of non-fulfilment. It therefore binds the seller to number, weigh or measure and then to deliver the things, and the purchaser may compel him to do so. Similarly it binds the purchaser to receive the goods and to pay the price (Section 1398).

(2) The same rules apply in case of a sale of an immovable which cannot be determined with certainty before it is measured. The right of ownership is not acquired by the purchaser before the immovable is

measured, but he may compel the vendor to have it measured, and, on the other hand, the vendor may compel the purchaser, as soon as it is measured, to pay the price.

B. Transfer of the "Periculum Rei".

This effect of sale follows the transfer of ownership, saving the effects of an agreement to the contrary. In other words, the "periculum rei" and the "commodum rei" pass to the purchaser the very moment the ownership of the thing is transferred to him.

C. Obligations of the Seller.

The seller has two principal obligations:-

1. Delivery.

2. Warranty, which is subdivided into warranties of peaceful possession, i.e. against molestations and evictions, and warranty against hidden defects.

(1) Delivery.

Delivery is defined, in modern law, as the transfer of possession of the thing sold, from the seller to the purchaser. The function of delivery has, in fact, been reduced to this, owing to the principle of modern law according to which ownership is transferred by effect of the contract.

The old forms of delivery, i.e. real and symbolic, "brevi manu" and "longa manu", and "constituto possessorio" have remained in use. With regard to the way in which delivery is effected we must distinguish between movables and immovables.

a) In case of immovables delivery is effected "ipso jure" by the publication of the contract. It is supposed that the sale has been made by means of a contract which is published by reading it before the witnesses. With regard to property judicially sold by auction, in order to effect delivery it is necessary to deposit the price or to have the compensation approved in case the immovable is adjudicated to a creditor of the owner of the immovable, "cum animo compensandi"(Laws of Procedure).

b) The delivery of movables may be effected in various ways:-

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(i) by the physical delivery of the thing made from hand to hand;

(ii) by symbolic delivery, i.e. by the delivery of the keys of the place where the thing is found, or by the delivery of the titles which represent the goods themselves (Bill of Lading), the delivery of which, according to law, amounts to the delivery of the goods.

(iii) by having the purchaser acknowledged by the persons with whom the thing is; e.g. A sells to B jewels deposited with a bank and effects delivery by means of verbal or written instructions to the bank directing it to acknowledge B as the owner of those jewels.

These modes of delivery of movables, which are enumerated by Section 1430, are not the only possible ways: other ways may be devised which have the same effect, i.e. which are equally suitable to show to third parties that the thing is no longer in the possession of the vendor but it has passed to the purchaser. Whether such other means are equivalent or not to those declared by law is a question of fact which is left to the Judge, who will take into consideration whether they are suitable or not to show to third parties that ownership has been transferred.

(iv) Finally, the delivery of movables may be also effected by consent alone in the cases foreseen by Section 1431, i.e. when delivery cannot be otherwise effected:-

a) when the thing is already in possession of the purchaser on another title, e.g. usufruct, deposit or "commodatum". There may be sometimes an "interversio" of the title - a "traditio brevi manu" - in which case the purchaser is not bound to deliver the thing to the vendor in order that the latter may give it back. The consent which changes the title of the holder is enough to effect "traditio".

b) When the vendor has reserved to himself the usufruct of the thing, and therefore retains also the physical possession of the thing in the name of the purchaser. In this case a real delivery cannot be effected, and therefore it is regarded as having taken place by the simple consent of the parties, and this kind of delivery is known as "traditio"constituto possessorio". The same thing may be said in all those cases in which the seller continues to hold the thing on any other title.

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c) In any other case in which delivery cannot be made at the time of the sale, e.g. in case of hanging fruits.

In the last two cases, Section 1431 says, this consensual delivery does not prejudice third parties. Thus, if the vendor sells for a second time the thing to a second acquirer and really delivers it to him, the latter, if he receives the thing in good faith, will become its owner notwithstanding that there was a former acquirer, because the consensual delivery effected between him and the vendor does not prejudice third parties, i.e. the successive acquirer.

The application of this rule has been drawn to such an extent that it has been held by a constant jurisprudence that if, after such consensual delivery, a creditor of the vendor seizes the thing sold such seizure is perfectly effective vis-a-vis the purchaser, so that the latter cannot claim back the thing seized against the creditor who may have obtained the warrant of seizure. This application is, however, erroneous because seizure does not give any right to the creditor.

Incorporeal movables are not susceptible of true possession and delivery, but only of a "quasi-possessio" and a "quasi-traditio", which is effected (Section 1431) either by the use which the purchaser or assignee makes of the thing with the consent of the vendor or assigner, or by means of the delivery of the relative titles in case of rights or actions arising from titles transferable by endorsement or by delivery.

Expenses of delivery. As delivery is a payment the same rules of payment apply; therefore as the expenses of payment are at the charge of the debtor so those of delivery are at the charge of the seller (Sections 1206, 1433).

In case of a sale by weight, number or measure, the expenses of delivery include those for weighing, numbering or measuring the goods, because delivery cannot take place unless the amount sold and which has to be delivered is separated from the rest. If, on the other hand, the goods are sold "en masse" and the purchaser wants, in his own interest, to number, measure or weigh the goods, the relative expenses are borne by him.

On the contrary, the expenses of carriage are at the charge of the purchaser, because as soon as delivery

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is effected in the place in which it has to be made, the vendor is dsicharged: these expenses of delivery include those which are incurred in order to transfer the thing from the place of delivery to any other place in the interest of the purchaser. On the other hand, those expenses of carriage from the place where the thing is found to the place where it must be delivered are a charge on the delivery and are therefore borne by the seller: these include the expenses incurred with regard to packing, freight and all other expenses necessary for the carriage of the goods.

All these rules hold good in defect of agreements to the contrary.

With regard to this question there are certain clauses which are frequently used in case of transport of goods from one market to another: they are F.O.B., and C.I.F.

F.O.B. (free on board), e.g. F.O.B. Genoa, means that the vendor must pay all the expenses until the arrival of the goods on the ship at the port of Genoa, i.e. the goods must be delivered on board the ship at Genoa. Any subsequent expense, i.e. those necessary for the transport of goods from the ship's hold to the warehouse of the purchaser are at the latter's charge.

In case of transport by rail the clause used is "franco stazione", which means the same thing.

C.I.F. means Cost Insurance and Freight; e.g. goods sold at £100 c.i.f. Malta, means that the price agreed upon includes not only the value of the goods but also the freight of the ship and the insurance of the goods until they reach Malta.

Place of Delivery. The place of delivery is determined according to the rules of payment, which Section 1434 applies to the sale of a certain and determinate thing, by laying down that the delivery must be effected at the place where it was at the time of the sale, because it is held that the parties intended that it should remain or be delivered there. In all other cases the general rules of payment apply.

Time of Delivery. Here too the Ordinance applies the rules of payment, by laying down a series of special rules.

(1) If a term for delivery was agreed upon, the purchaser cannot demand from the seller, and the seller

is not bound to deliver, the thing before the term expires. If, however, he executes it before, he can not claim back the thing delivered on the ground that it was unduly paid. Whether the seller may renounce to the term and bind the purchaser to receive the thing before the term elapses, is a question which has to be solved according to the general principles, i.e. according to whether the term is agreed upon in the interest of the vendor or of the purchaser.

In case of delay on the part of the seller, the Sections 1435 and 1436 give to the purchaser the right to demand at his choice, either the dissolution or the forced execution of the contract, according to the general rules governing the "pactum commissorium", which apply to sale since it is a bilateral contract. In either case he has a right to the reimbursement of dilatory or compensatory damages, according to whether he demands the forced execution or the dissolution of the contract, on condition, however, that the delay is due only to an act of the seller which is imputable to him (Section 1435).

Besides these general rules other special rules are laid down by Sections 1437, 1438 and 1439.

(a) In case of goods which are to arrive on a vessel which the seller has reserved to himself to name within a fixed term, if he does not name such vessel within the term agreed upon, the purchaser may compel him to deliver other goods within a term to be fixed by the Court, saving always his right to the reimbursement of damages (Section 1437).

(b) In case of goods which are to arrive on a vessel named in the agreement, and which have to be delivered within a given term, if the seller is in mora, the same effects of the previous case apply. However, the seller may discharge himself from all responsibilities by showing that he had done his best in order that the vessel, and therefore the goods, should arrive at the time agreed upon; and that consequently the delay was due to "force majeure" (Section 1438).

(c) In case of a sale of goods which have to be numbered, weighed or measured, and delivered within a given term, it is in the interest of the purchaser that the goods be not numbered, weighed or measured at the last moment, but that this should be done some time before the expiration of the term, in order that the delivery may be effected at the time agreed upon. The

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purchaser, therefore, has the right to present himself before the seller to receive the goods in time to be weighed, numbered or measured before the expiration of the term, and the seller is bound to deliver the goods notwithstanding that the term has not yet fallen due. Otherwise the seller would be liable for non-performance and the purchaser would have the right to demand the dissolution of the contract, besides the payment of damages.

This harsh rule is mitigated in case the seller is prepared to deliver the goods at a time when the weighing, counting or measuring of the goods, can conveniently be commenced before the expiration of the term. In this case the purchaser cannot dissolve the contract, but he can only demand the payment of damages, if any.

2) The case of a sale contracted without a term for delivery, is not contemplated by law, and it is, therefore, governed by the general rules according to which delivery must take place immediately, unless there is a tacit term.

Notwithstanding that delivery should be effected, the seller, where no time has been agreed upon, is not bound to effect the delivery of the goods, unless the purchaser has paid the price (Sections 1441 and 1483). It is natural, however, that this rule does not hold good if a term for payment has been agreed upon. In this case the seller cannot refuse to deliver the thing until the price is paid, which is not claimable before the expiration of the term. The following cases are excepted (Section 1442):-

(a) If the purchaser has, after the sale, diminished through his own acts the securities given to the seller;

(b) If, after the sale, the purchaser has become insolvent or bankrupt, or his condition has altered to such an extent as to give rise to the suspicion that on the expiration of the term he will not be in a position to pay.

(c) If, notwithstanding that the purchaser was already insolvent or bankrupt at the time of the sale, his condition was only made manifest afterwards, and the seller was unaware of it at the time of the sale.

In these cases, notwithstanding that the sale is on credit, and that the term has not yet elapsed, the seller

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cannot be compelled to deliver the thing, but he has the right to refuse, unless the purchaser pays the price or gives a security for its payment on the expiration of the term.

The purchaser, in all these cases forfeits the right to the term, and therefore his obligation is claimable immediately, unless he gives a security for the future performance of his obligation on the expiration of the term.

Object of Delivery. The object of delivery is the thing itself which is sold and which must be delivered in its entirety according to the rules of payment. It must be of the same quality as that which was promised, and in case it is not the purchaser may refuse it and demand the reimbursement of damages or receive it at a reduced price fixed by experts. It is generally agreed upon that the purchaser has also the right to insist that the thing be of the same quality, and that he may be authorized to purchase the thing at the expense of the seller. In case of a certain and determinate thing, it must be delivered in the state in which it was at the time of sale (Section 1443), because from that moment it had become the property of the purchaser. If the thing has deteriorated, the seller is responsible for such deterioration because he is bound to preserve the thing during the interval between the sale and delivery, unless he can show that such deterioration has happened through accident or before he was in delay.

The thing must be delivered with all its accessories, and together with all that which is destined for its use: thus, e.g. in case of a house or other building is sold which has access to a street belonging to the seller, it is presumed that also the use of such street is sold together with the building, notwithstanding that no mention is made in the contract.

With regard to the division of fruits between the seller and the purchaser, Section 1444 begins by laying down the rule that from the moment in which the sale is contracted the fruits belong to the purchaser, and the reason is that the fruits are an element of ownership. If the sale is subjected to a suspensive condition, the fruits do not belong to the purchaser except from the day in which the condition takes place. This rule is contrary to the retrospective effect of suspensive condition, but it is due to the probable intention of the parties of compensating the fruits of

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the thing with the interests of the price.

The industrial and natural fruits are acquired, according to the general rules, by gathering them, and, therefore, the fruits still hanging at the time of the sale, or when the condition takes place, belong to the purchaser, even though they were sown by the seller; those gathered by the seller remain his. The civil fruits are acquired "dietim", i.e. the fruits are acquired each day by the person who had the right of enjoyment on that day. Suppose, e.g. that a house is sold, the rent due for the term during which the sale takes place, or the condition is verified, is divided between the seller and the purchaser in proportion to the time previous or posterior to the sale or condition.

This rule has the following two exceptions:-

i) The rent of rural tenements which falls due after the sale or after the condition takes place, belongs entirely to the purchaser.

ii) When a vessel is sold "in transitu", the freight for that voyage belongs to the purchaser (Section 1447).

Amount of Delivery. In order that an obligation be performed precisely, the thing sold must be delivered in the whole amount stipulated in the contract (Section 1449). It must be the case of a quantity which is stipulated and not of a mere indication of quantity made for the purposes of description.

The Ordinance foresees certain special cases of deficiency or excess of quantity in comparison with that stipulated, with regard to the sale of immovables; it solves, by means of special rules, the difficulties raised by Sections 1450 and 1457, which correspond to Articles 1616 and 1623 of the French Civil Code. These Articles form an integral part of the system proper to sale of immovables, which, in the old system of law and also according to the compilers of the French Civil Code, are considered as an essential object of the [illegible] of ownership.

Although the present economic conditions have given an almost preponderant importance to corporeal and incorporeal movables, still juridical traditions have preserved for a long time those special rules governing immovables, which appear more evident in the contract of sale, and which render the two categories of movables and immovables the "summa rerum divisio" of present legislations.

From the modern rules regarding the amount of delivery of immovables, doctrine derives a special obligation on the part of the vendor of immovables which is called by French authors the warranty of amount.

When, as is generally the case, the sale has for its object a specified immovable without any indication as to its extension, this is altogether immaterial, and the obligation of warranty imposed on the seller is regulated by the general rules. When, on the other hand, as seldom happens, the extension is an element of sale, e.g. in case it has for its object so many square canes to be taken from a given piece of ground, it is certain that if the seller does not deliver the whole amount, the purchaser has the right to demand the rest.

Between these two extreme cases there are, however, certain intermediate ones, of which the following two are contemplated by law:

1) The first type of sale includes those contracts in which, though the object of the sale is a specified tenement, the extension is an important element, because the price is calculated at so much for each measure (Sections 1450 and 1451).

2) The second type ("vendita a corpo") includes those sales in which there is an indication of the extension, but the price is not calculated at so much for each measure (Sections 1452, 1453).

In the sales by measure there may be a deficiency or an excess of amount: in case of deficiency, according to general principles the purchaser should have a right to the delivery of the remaining amount, unless this is impossible or the purchaser does not require such deficient amount; and in these two cases the seller, whatever be the deficiency, must sustain a reduction of the price. The law, however, according to a unanimously accepted interpretation, does not grant to the purchaser the right to recede from the contract, whatever be the amount of the deficiency, unless the amount delivered is completely insufficient for the purposes (e.g. building of an office or school, etc.) which he had in mind, in which case he would have the right to demand the nullity of the sale on the ground of mistake with regard to the substantial quantity, and not on the ground of non-performance (vide Planiol et Ripert, op. cit. Vol. X, para. 252, Aubry et Rau).

On the contrary, in case of excess, it is the purchaser who, as a rule, must pay a higher price. In order that he may not be compelled to pay a price considerably higher than that foreseen, the law gives him the right to recede from the contract in case the excess is higher than the twentieth part of the extension declared in the contract: he has therefore no such right when the excess is smaller and consequently tolerable. He can neither demand, in this case, the separation of the excess because this would constitute, in the majority of cases, a serious damage to the seller for whom such part would be useless. For the same reason, the purchaser can neither demand such separation in case the excess is higher than the twentieth part, but he may repudiate the sale.

In the case of the sale of a "corpo", the measure of which is expressed, the law allows any difference in the extension, which does not exceed in value the twentieth part of the value of all the things sold: in case the excess or deficiency does not exceed the twentieth part, the price remains unaltered; in case the excess or deficiency exceeds the twentieth part there must be an increase or a reduction in the price, as the case may be, in proportion to the amount in which the value of the excessive or deficient part exceeds the limit allowed by law. In case of excess, however, so as not to impose on the purchaser a forced acquisition which may be of no use for him, and the corresponding increase in price, the law gives him the right ~~to~~ recede from the contract, provided the excess is higher than the legal limit. If he prefers to uphold the sale he must pay interest on the supplement of the price. These rules on "vendita a corpo" do not apply to a judicial sale, because in a sale by auction the things are sold "tale quale" and the sales made expressly without warranty of amount or in which the clause "tale quale" or similar clauses are inserted, saving the effects of lesion, if there be any. Even in sales by measure the validity of agreements contrary to law are generally admitted (Planiol et Ripert, Vol. X, para. 252).

Rules common to both cases.

1. In those cases in which the purchaser may recede and recedes from the contract the seller must return, besides the price, the expenses of the contract and any other lawful payment made by the purchaser with regard to the sale (Section 1454).

2. If two or more tenements are sold by the same contract and for one and the same price, but with an indication of the respective measure of each of them, and it is found out that the real extension of one of them is greater than the extension specified in the contract, and the other is smaller, there is a compensation between such excess and deficiency, and the reduction or increase in the price takes place only according to the rules explained above.

3. The actions for the increase of the price belonging to the seller, and for reduction or for receding from the contract belonging to the purchaser, must be exercised within two years from the contract (Section 1457). This term runs against absentees, and also against interdicted persons, minors and married women when they claim under a purchaser or seller with regard to whom the running of prescription is not suspended. It is debated whether it is the case of a prescription of an action or a forfeiture of a right. The Italian Civil Code adds after the corresponding article the words "under the sanction of forfeiting the respective rights", which are taken to mean that it is a case of a forfeiture of rights: this is also the opinion prevailing amongst French Commentators (Planiol et Ripert, Vol. X, p. 256).

Sale of Movables. Movables are, as a rule, visible, and therefore the question relating to the amount of delivery does not present many difficulties. In case the deficiency cannot be made good, it is generally held that the purchaser may either dissolve the sale or receive the quantity offered by the seller and have the price reduced.

(2) Warranty.

(a) Warranty of Peaceful Possession.

The second obligation of the seller is the warranty of peaceful possession and against eviction and molestation. It is known as warranty of peaceful possession and against molestations and evictions because it takes place in case the purchaser is molested in his possession of the thing by a third party who claims certain rights over it, because peaceful possession is tantamount to possession free from any molestations.

Although the modern notion of sale implies, contrary to that of sale in Roman Law, the obligation on the part of the vendor of transferring to the purchaser

the ownership of the thing, and not merely that of ensuring peaceful possession, still the French Civil Code, and consequently our own, have preserved the terminology and the rules of Roman Law. Section 1458 does not impose on the seller the warranty of ownership, but that of peaceful possession. After all, the one would be the consequence of the other: the seller who has bound himself to transfer the ownership to the purchaser, must abstain from any act which would cause molestation, which prevents the purchaser from enjoying or from making use of the thing, because ownership consists exactly in this: if the seller were to act otherwise, he would be violating the contract which must be executed in good faith.

Similarly, if a third party manages to evict the purchaser, in whole or in part, this is an evident sign that the seller did not perform his obligation of transferring ownership and, consequently, he is responsible for the consequences.

It would seem, therefore, that this obligation of warranting peaceful possession must be governed by the general rules of the effects of contracts and of the relative non-performance; and this is the system followed in the German Civil Code (Articles 434 to 440). Our Code, on the contrary, following the French Civil Code (Articles 1625 to 1640), regards this obligation as an obligation which is altogether proper to the seller, independently from the transfer of ownership, and which is very similar to the Roman notion of the transfer of peaceful possession, both with regard to terminology and to the rules which govern it.

Object of the Warranty. This warranty has a double object, i.e. it refers both to acts done by the seller, and the acts done by third parties.

1) Acts done by the seller. The warranty for one's own acts implies that the seller must abstain from any molestations on his part. He must abstain from any act which deprives the purchaser, in whole or in part, of the thing or of any rights over it, or which prevents him from exercising all the rights of ownership, or forbids him the exercise of such rights, or disturbs him or molests him in such exercise. The reason for this is obvious, i.e. the seller has transferred all the rights which he had over the thing to the purchaser. From this principle the maxim follows: "quem de evictione tenet actio, eundem agentem repellit exceptio" -- if the seller who is subject to the

warranty against eviction, tries to evict the purchaser, his claim is opposed by the exception of warranty, which was enumerated by early writers among the fraudulent exceptions ("dolo malo"), because the attempt on his part to deprive the purchaser of the thing which he has sold to him, is fraudulent. This exception may be pleaded against the "actio reivendicatoria" exercised by the seller, with regard to a "res aliena" of which he subsequently becomes the owner, and against that exercised by the owner, who subsequently becomes a pure and simple heir of the seller of the "res aliena".

2) Acts done by a third party. Our Code, faithful to Roman traditions and to the French Civil Code, regulates this warranty by means of special rules which distinguish it from similar institutes such as the dissolution of a bilateral contract on the ground of non-performance by one of the parties (Section 1111) and the nullity of the sale of a "res aliena" (Section 1422).

The dissolution, in force of the "pactum commissorium tacitum", and the nullity of the sale of a "res aliena" may be demanded by the purchaser for the simple reason that the seller does not actually transfer to him the right which he had bound himself to transfer. The warranty against eviction on the part of third parties presupposes something else, i.e. the eviction, or the threat of eviction, on the part of a third party, and it has therefore for its essential object the obligation of the seller to defend the purchaser in the action instituted against him by the third party. The other distinctions between these different institutes refer to the amount of the reimbursement of damages in the various cases (vide with regard to the warranty the rules laid down by Sections 1463 et seq.), and to the extent of the respective application.

The action for warranty results very often from ...ct that a third party claims the ownership of the ...sold, but it also arises in case of relinquishment ...d by a hypothecary creditor, any claim of servi... or burthens not declared in the contract: all ... may constitute eviction even though the ... is not a "res aliena".

...ty against eviction due to an act of a ...rise to two positive and successive ...seller:-

... defending the purchaser and ...cations caused by the third

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party, or evictions threatened by him. Thus, if the third party attempts the "reivendicatio", the seller must defend the purchaser by furnishing him with means of evidence and all other exceptions necessary to counter the claims of the third party. The purchaser, therefore, has the right, as soon as he is molested, to give notice of the molestation and of the suit to the party under whom he claims (Section 1463), which notice is generally given by a "protesto dei laudatorio"; and in the case of a lawsuit he has the right to call the seller in the suit (Section 1472).

2. The second obligation of the seller takes place in case of actual eviction and it is transformed into an obligation of returning the price to the purchaser, and of making good the damage. The ground for the obligation of returning the price is that, once the purchaser is evicted, the price becomes an "indebitum"; and the seller must make good the damages because, once there is eviction, it is evident that the seller has not performed his obligations.

In early Roman Law, when the formalities of the "mancipatio" were observed, the purchaser threatened with eviction could turn against the seller by means of an "actio auctoritatis", and this is the origin of the action for warranty against eviction on the part of third parties. By means of this action he summoned the seller to defend him against the claims of third party, i.e. that he should help the purchaser in his defence: "ut actor fierit". In case the seller did not manage to free the purchaser, who therefore remained evicted, the latter had the right to claim double the price.

When the contract of sale, which was "juris gentium", was introduced in Rome, and took the place of the "mancipatio", it became usual to add to the contract of sale certain stipulations which imposed on the seller the obligation of warranty: these agreements were the stipulation of double the amount, or the "pactum haberi licere". Subsequently jurisprudence held that, even without such agreements ("stipulatio") the seller was bound to give warranty owing to the very nature of the contract, and he could be compelled to do so by the "actio empti", attributed to the purchaser, by means of which action he could obtain from the purchaser not double the amount, but only the equivalent ("quanti valet") to the damage: "id quod emptoris interest rem evictam non esse".

Persons bound to give warranty.

The seller is bound to give warranty not only to the original purchaser but also to the successors of the purchaser in the thing sold, whether they be universal or particular, on an onerous or gratuitous title. It follows that the actual possessor, if he is evicted, has an action for warranty not only against the person under whom he claims immediately, but also against the mediate seller, according to the general principles of the "actio surrogatoria" and by means of the exercise of the "actio indirecta".

This "actio indirecta" has various inconveniences and principally the fact (which renders useless most of the advantages) that what is recovered forms part of the estate of the seller or other immediate author, and is therefore subject to his debts: in other words, the purchaser who exercises successfully the "actio indirecta" must sustain the concourse of the other creditors of his immediate author over the proceeds. Moreover, the "actio indirecta" can only be exercised when the acquirer has an action of warranty against his own immediate author, and it is excluded if an agreement which does away with such warranty is entered into between the seller and the purchaser.

More advantageous is the direct action which doctrine more commonly attributes to the purchaser by means of which he may turn against former sellers "omisso medio" (vide Aubry et Rau, Vol. V, para. 355; Laurent, Vol. 24, No. 229; Planiol et Ripert, Vol. X, para. 104), because the immediate author transfers to the person claiming under him, together with the thing, all the actions which may belong to him against third parties with regard to the thing itself.

In both cases, whether the direct or indirect action is exercised, it is necessary that those, whose rights the purchaser claims to exercise, have actually such rights. If one of the sellers has acquired the thing on a gratuitous title the action can only be exercised against him, and it cannot be exercised against the person under whom he claims, because he himself has no such right, i.e. he cannot exercise the action for warranty.

Conditions in order that the obligation of Warranty may arise.

I. A molestation or an eviction,

II. Such molestation or eviction must have a cause anterior to the sale.

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1. A molestation must be of right, and if it is of fact it must be accompanied by a claim to a right. Molestations of fact do not deprive nor threaten to deprive the purchaser of the ownership or of any other right over the thing; they do not presuppose a right in the person who is the cause of such molestation, and therefore they do not presuppose a vice or defect in the ownership of the purchaser. Eviction means to deprive the purchaser of the thing acquired by him, or of some right over it, by means of a lawsuit: "evincere est aliquid vincendo afferre". It may take any of the following forms:-

i) The total or partial loss of the thing in force of an "actio reivendicatoria" or "hypothecaria": this is eviction in the strict sense of the word.

ii) The loss of an active servitude, because a servitude is a right inherent in the thing, and juridically it is regarded as a part of the property.

iii) The declaration of the subjection of the thing to a passive servitude or to a burthen not expressed in the contract, because this constitutes a diminution of the ownership of the thing.

iv) The voluntary relinquishment of the thing made by the possessor who is threatened with an "actio hypothecaria".

v) The payment of debt for which the tenement is hypothecated made by the possessor in order to avoid expropriation or relinquishment.

vi) The payment of a sum of money in order to avoid eviction (Section 1471). This supposes that a compromise has been arrived at by the purchaser - sued by an "actio hypothecaria" or "reivendicatoria" - and the plaintiff, by which the latter, in view of the sum paid to him, is to desist from such actions.

Vii) A judgement against the purchaser who has exercised the "reivendicatio" against the possessor of the thing.

2. The warranty which is due by the seller to the purchaser is limited to the evictions which have for their cause something anterior to the sale, i.e. which result from a right acquired by a third party before the sale: "auctor", i.e. "venditor ex his causis tantum suo ordine tenetur quae ex precedenti tempore causam

evictionis parant" (Const. Unica, Cod. "De periculo et comodo rei venditae et traditae"), because it is only then that eviction may be said to be due to a defect in the right of the seller for which he is responsible. An exception to this rule is the case in which the cause of eviction, though posterior to sale, proceeds from an act of the seller himself, such as e.g. if after having sold something to "A" he makes a successive sale to "B" who is the first to have his title registered.

No other condition is necessary to give rise to this warranty and in particular an express agreement is not necessary, because in our Law the obligation of warranty is a natural effect of sale.

Divisibility or Indivisibility of the obligation of warranty in case of several sellers or heirs of the seller.

As to the obligation of returning the price and of making good the damage into which the obligation of warranty is changed in case of eviction, it is commonly held that it is divisible because the price and the damages are, by their very nature, divisible. The question of divisibility or otherwise of the obligation may arise with regard to the warranty for one's own acts, i.e. the obligation in each of the sellers or heirs of the seller of abstaining from causing any molestation to the purchaser. Thus in case a person has sold a "res aliena" and has left five heirs, one of whom is the owner of the thing sold, is this obligation to the warranty for one's own acts limited to the fifth part of what he inherits or is it indivisible ? Molineo, Pothier, Troplong and Larombiere are in favour of divisibility of the thing. Now-a-days the prevalent opinion is in favour of indivisibility because the act is negative -- not to molest the purchaser -- and is therefore indivisible.

Special rules established for special cases of eviction.

1. In case of Total Eviction.
2. In case of Partial Eviction.
3. In case of loss of an active servitude.
4. In case of subjection of the tenement to a passive servitude or to a burthen not expressed in the contract.

1. Total eviction. The obligations which total eviction gives rise to against the seller, as an effect

of the warranty, are governed by the following legal rules, which apply in defect of agreement to the contrary between the parties:-

a) The seller is bound to return the price (Section 1463). This is conformable to the general rules which govern the effects of the warranty, because as soon as there is eviction the price becomes an "indebitum" which has been paid. The restitution of the price, therefore, takes place independently of any notion of reimbursement of damages or non-performance on the part of the seller.

It is therefore generally admitted that the purchaser has the right to claim back the price not only from the seller but also from the assignee of the seller to whom the purchaser may have paid it. It may also be claimed from the creditors of the seller whom the purchaser may have been delegated to pay, and whom he actually paid, because in any case in which there is eviction, the payment of the price is an "indebitum". The whole price must be returned without any reduction whatsoever, even though at the time of eviction the thing has decreased in value and substantially deteriorated, either through "force majeure" or even through the fault or negligence of the purchaser (Section 1463), because, in any case, it still remains true that the entire price has been paid "sine causa" and moreover because it is not the seller who sustains such deteriorations but the person who is the cause of eviction. The purchaser may sometimes be bound to indemnify the plaintiff in the "actio reivendicatoria" or the hypothecary creditors of the seller. It is only in case the purchaser has obtained some advantage from the deterioration of the thing that he must render an account of such advantages to the seller, unless this has already been taken into account vis-a-vis the plaintiff in the "reivendicatio".

b) The seller is bound to return the fruits, when the purchaser himself is bound to return them to the person who is the cause of eviction, i.e. in case he was in bad faith after the sale. If the purchaser was in bad faith at the time of the sale he would have no right to damages and interests against the seller, and therefore neither to the restitution of the fruits he may have had to return to the plaintiff in the "reivendicatio". If the thing sold did not yield fruits and it did not procure any pecuniary advantage, the purchaser in good faith has the right to demand from the seller the interests on the price.

c) The seller is bound to make good the damages, which include:

(i) The lawful expenses of the contract and any other lawful expense incurred by the purchaser in connection with the sale.

(ii) The judicial expenses which the purchaser may have incurred in the judgement of eviction including the expenses for giving notice of the suit to the person from whom he derives his title.

(iii) The increase in value of the thing at the time of eviction (Section 1465), notwithstanding that such increase had taken place independently of the acts of the purchaser.

(iv) The expenses which the purchaser may have incurred with regard to the thing: here we must distinguish between necessary expenses and repairs (Section 1466), "expensae utiles" and "voluptuariae". It is obvious that the necessary expenses must be returned entirely by the seller unless they were already returned by the evictor. As to "expensae utiles", in the relations between the seller and the purchaser, if the increase in value which is the result of such expenses exceeds the amount of expenses, the seller is bound to return the sum corresponding to the increase in value, because the estate of the purchaser is diminished by this amount; if, therefore, the purchaser received from the plaintiff in the "reivendicatio" the lesser sum, i.e. the amount of expenses, according to the rules governing the relations between the possessor and the evictor. the seller remains bound for the difference. In case the increase in value is less than the expenses, the seller is only bound up to the amount of the increase in value, because the purchaser would also lose the difference if he were to remain the owner of the thing. In both cases he is entitled to the amount by which his estate is diminished, viz, the increase in value. To conclude, with regard to "expensae utiles", the seller, as an effect of the warranty, is always and only bound up to the amount of the increased value. An exception must be made in case the seller was in bad faith, i.e. in case he knowingly sold a "res aliena", in which case he is bound (Section 1466) to return all the expenses, even the "voluptuariae", and, therefore, also the "expensae utiles", even though they exceed the increase in value.

As to the "expensae voluptuariae", if the seller is in good faith, the purchaser has no other right

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against him except that which he would have vis-a-vis the owner, i.e. to take back the improvements under the well known conditions. If he is in bad faith, he is bound to return all the "expensae voluptuariae".

2. Partial Eviction. The rules established by law for this case distinguish between two hypotheses according to the importance of the part evicted, i.e. according to whether the part evicted is of such importance that without it the purchaser would not have bought the thing, or otherwise.

In the first case the purchaser may demand the dissolution of the sale or demand the value of the part evicted and maintain the sale for the rest. He may demand the value of the part evicted, because as soon as he is evicted he has the right to the restitution of the corresponding price, and may demand the dissolution of the contract on the ground of vice of consent. The term for the dissolution of the sale is of one year from eviction and it runs also against absentees, minors, married women and interdicted persons if they claim under a seller with regard to whom prescription is not suspended (Section 1467).

In case the purchaser prefers not to dissolve the sale but to demand the value of the part evicted, such value is determined (Section 1468) not in proportion to the total price of the sale, but in accordance with a valuation regard being had to the time of eviction, irrespective of any increase or decrease in the value of the thing sold.

In case the value has decreased the purchaser will not receive a proportionate part of the price, but a lesser sum, whilst in case of total eviction the entire price is always returned. It is difficult to justify this difference. Aubry et Rau give this reason (Vol. V, para. 355, Note 4): in case of total eviction the whole price must be returned because it is an "indebitum"; but in case of partial eviction, as the sale is not without cause nor the price without cause, what is due to the purchaser is not due on the ground that it is an "indebitum", but as a reimbursement of damages.

This last rule, for similar reasons, applies to the second hypothesis foreseen by the law.

3. Loss of an active servitude declared in the contract. This case is omitted by law, but doctrine —

and jurisprudence regard it as equivalent to partial eviction and the same rules are applicable, because an active servitude is a part of ownership. It is hardly necessary to say that in order that the warranty may take place, it is necessary that the servitude be declared in the contract, because servitudes are not presumed.

4. Subjection to a passive servitude or burthen not declared in the contract. In Roman Law this case was regarded as similar to the case of a latent defect, and it was therefore subjected to the "actiones redhibitoriae" or "estimatoriae". In modern legislations the principle has prevailed that this is also a case of partial eviction, because such a subjection implies a decrease in the rights which together make up ownership.

The condition in order that the warranty may apply to this case is that the servitude or burthens be not declared in the contract; if they are, the purchaser would be accepting them willingly. The same thing may be said if he was aware of their existence. It is therefore necessary in the case of a servitude, that it be not apparent, because if it is, the law presumes that the purchaser was aware of it because no "bonus paterfamilias" buys a tenement without visiting it.

If these conditions concur, in case the servitude is of such importance that the purchaser would not have bought the tenement had he been aware of it, he may demand either the dissolution of the contract (on the ground of vice of consent) or compensation which will consist in an equivalent to the servitude according to a valuation made by experts at the time of eviction. If the servitude is not of such an importance or it is the case of a burthen, the purchaser, according to the general rules laid down in Section 1459 has the right to have the damages made good.

The warranty for this cause does not take place in sales by auction, because in judicial sales the property of the debtor is sold "tale e quale". The object of this rule is to prevent judicial sales by auction which, as a rule, involve considerable expenses, from being annulled on account of servitude or a burthen which may be found to exist in the tenement after the completion of the judicial sale.

Legal servitudes, as a rule, do not give rise to this warranty, because strictly speaking they are not servitudes but natural limitations inherent in the ownership of contiguous tenements.

Section 1470 after dealing with this special case of eviction gives us the meaning of the clause "free and exempt from any burden or servitude", or any other clause corresponding to the "optimus Maximus" of the Romans. This clause had a special effect according to former jurisprudence, which has been preserved by the present laws. The purchaser may demand the dissolution of the contract or an indemnity in case of any servitude or burden not mentioned in the contract, if the seller does not put an end to them. It is indifferent whether the servitude is apparent or known to the purchaser at the time of the sale or not, because it is held that by means of this clause the seller wanted to assume the obligation of discharging the benefit from any servitude or burden in order to be able to give it to the purchaser "libero e franco". If, however, it results clearly that it was the intention of the parties not to include such burdens or servitudes in the promise of warranty, the warranty does not apply to such burdens or servitudes.

These rules, relating to the warranty against eviction, which are established by law may be modified by agreement (Section 1460), i.e. the effects of the warranty may be either extended or restricted. In case, then, the purchaser has avoided eviction by means of the payment of a sum of money, or in case he pays the debt in order to avoid eviction, the vendor may avoid all the consequences of the warranty by returning to the purchaser the sum paid, together with the interest on such sum and all the expenses incurred by the purchaser.

Cessation of the Obligation of Warranty against eviction.

1. The obligation does not hold good if there is an agreement which excludes the warranty, because it is a natural but not an essential effect of sale. Notwithstanding the general terms in which such agreement may have been conceived, it does not exempt the seller from the restitution of the price in case of eviction, because such restitution is due on a title of "indemnity", unless the contrary has been expressly agreed upon, because there is nothing to prevent the purchaser from assuming the risk of eviction or from making a liberality in favour of the seller.

Moreover, the agreement of not giving warranty does not exempt the seller from the warranty against that eviction which results from his own acts, whether it be previous (e.g. constitution of a hypothec and the

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relative registration before the registration of the sale) or posterior (e.g. annulment of his own title on the ground of vice of consent) to the sale; because if the vendor could, in virtue of such agreement, cause eviction by his own acts, he would be in a position to defraud the purchaser very easily. This rule is therefore so absolute that the contrary cannot be agreed upon (Section 1461).

2. The warranty, or rather the relative action of the purchaser, ceases by prescription: the term is as a rule, of two years which runs from the day in which the judgement of eviction becomes "res judicata" because "contra non valentem agere non currit praescriptio". The term is rather short because the purchaser cannot leave in suspense for a long time the relation which has arisen between him and the seller by effect of eviction. Nay, there is a case, i.e. in case of partial eviction when the part evicted is of such importance that without it the purchaser would not have bought the thing, when the term for the dissolution of the contract is one year. This term runs against interdicted persons, insane persons, minors and married women when they claim under a purchaser with regard to whom prescription is not suspended.

3. Any obligation of the seller which arises from the warranty ceases through the fault of the purchaser if he has allowed a sentence to be passed against him without calling the seller in the suit, if the latter can show that he could have brought forward sufficient pleas to avoid eviction and which were not alleged by the purchaser (Section 1472).

(b) Warranty against Latent Defects.

This warranty takes place when the thing bought and delivered is found to be affected by such vices or defects which render it unsuitable for the use to which it is destined or which reduce its value: in virtue of this warranty, the seller is answerable for such defects towards the purchaser who may either dissolve the contract by the "actio redhibitoria" or demand the equivalent by the "actio aestimatoria" or "quanti minoris".

It may seem that when the thing has such defects there is a vice of consent through error on the substantial qualities of the thing, and that, therefore, the rules relative to the nullity of contracts on the ground of vice of consent should apply. But the

historical development of the law has elaborated certain rules proper to sale (and, according to the majority of writers, also to other contracts which transfer ownership). When the mistake relates to certain defects which comply with certain specified conditions, the purchaser has an action subjected to particular conditions and having special effects different from those of the action for nullity on the ground of error or of non-performance of the obligation of delivery.

There are historical reasons, as in the case of the warranty of peaceful possession, which explain this distinction. In Roman Law the "edictum aedilium" and the "edictum curile" which regulated markets and fairs had imposed on the sellers of slaves and of animals the obligation of revealing the defects to the public, in order to prevent fraud: "quod mancipia venduntur certiores faciant emptores quid morbi vitiive cuique sit, et his enim causis judicium dabimus" (D. De Aed. Edicto, Tit.1)

The conditions which are required to give rise to this warranty are:-

1. The seriousness of the vice.
2. The vice must be latent.
3. The vice must exist at the time of the sale.

1. The defect must be such as either to render the thing unsuitable for the use to which it is destined or to diminish its value to such an extent that the purchaser, had he been aware of it, would not have bought it or would have bought it at a lower price. If the defect is not serious, the purchaser has no legal remedy, because insignificant defects are tolerated.

2. The defect must be latent (Section 1474) and non-apparent (Section 1475). The reason is that, if the vice was apparent, the purchaser has either noticed it or could have noticed it. If he has noticed it, he will have taken it into account in agreeing to the price; and if he has not noticed it but could have done so he should only blame his negligence in examining what he was buying. The degree of care which is required to exclude the warranty is deduced from the words of Section 1475, i.e. the vice is apparent when the purchaser could have discovered it by himself. This shows that it is not necessary that the defect be such that the purchaser may notice it at first sight, but it is enough if he could have discovered it without the help of others. In case of goods forwarded from one trade centre to another, though the defects become apparent

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on arrival, they were in reality hidden to the purchaser on their departure and during the voyage, and, therefore, he is entitled with regard to such defects to the exercise of the "actio redhibitoria" (vide Art. 70, Italian Commercial Code).

3. The vice must exist at the time of the sale, because if the seller delivers to the purchaser a thing which at the time of the sale was unaffected by vice, he would be performing his obligation: the sale is perfect, and the "periculum" and "commodum rei" pass to the purchaser.

These are the only conditions which are required for the "actio redhibitoria", and it is indifferent whether the seller was aware or not of the defect, because the obligation of the warranty against latent defects does not derive from his bad faith. But such knowledge or ignorance are important to determine the effects of the warranty.

Effects of the Warranty.

In case there is a latent defect the purchaser may avoid the damage in two ways: he may return the thing and have the price back, or keep the thing and claim back a part of the price equivalent to the defect, i.e. to the reduction in value of the thing. In the first case his action is called "Redhibitoria": "redhibere est facere venditor quod habuerit et quia reddendo id circo redhibitio est appellata quasi redditio" (Dig. loc. cit.). In the second case it is known as "aestimatoria" or "quanti minoris", because it tends to establish at what lower price the purchaser would have purchased the thing, and in order to do so, it is necessary to establish by how much the estimated value of the thing exceeded the real value.

Both actions were introduced by the "Edictum Aedilitium", in which the choice between the two actions was attributed to the purchaser only in case the defect was so grave that the purchaser, had he been aware of it, would not have bought the thing at any price because it was only in this case that he could exercise the "Redhibitoria". In case the defect was not so serious he could only exercise the "aestimatoria".

In modern legislations the principle prevails that the purchaser must be the judge of what suits him best.

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and the "actio redhibitoria" is attributed to him even in case he would have bought the thing at a lower price: so that he may choose between the two actions in all cases.

It has been constantly held by jurists that the choice between the two actions does not become irrevocable for the simple fact that the purchaser has instituted one of the two, because he may abandon the action which he may have instituted, and resort to the other instead, as long as the first one has not been accepted by the Court or by the seller.

If the thing bought is affected by several latent defects, the "aestimatoria" may be instituted as many times as there are defects, and as many reductions of the price may be obtained: if the purchaser chooses the "redhibitoria" he must return the thing to the seller and the latter must return the price.

The restitution of the thing includes the restitution of the fruits; and the restitution of the price that of the interests. If the purchaser institutes the "aestimatoria", he keeps the things and has a right to a reduction of the price, i.e. the price is reduced to what he would have paid for the thing had he been aware of the defects. Such reduction is determined by the Court on a valuation made by experts (Section 1477).

Moreover, the seller who was aware of the vice is bound to make good the damages which the purchaser may have sustained; if he was unaware, he is not bound for the damages except for the expenses of the sale.

Cessation of this Obligation.

This obligation ceases:-

1. By agreement to the contrary, the effects of which are subjected to the condition that the defect was unknown to the seller. In fact if he was aware of it, he would be committing an attempt of fraud by stipulating such agreement.

2. By the extinctive prescription of the above-mentioned actions. In case of immovables, the term for prescription is of one year from the contract; in case of movables it is of one month from delivery. The terms are so brief because it is convenient to ascertain as soon as possible the existence of the defect and especially the condition that the defect existed

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at the time of the sale. It may happen that the defect could not have been noticed at the time of the sale or of delivery; in such a case the above terms begin to run from the day in which the purchaser could have become aware of the vice. The general rule, with regard to sale, that the term runs against absentees, interdicted persons, minors and married women, if they claim under a purchaser against whom prescription is not suspended, applies here (Sections 1481 and 1457). It is necessary that the thing has perished exclusively by accident, because if it has perished owing to its defects, the seller is answerable for such loss (Section 1480). If the action has been instituted the purchaser has a vested right which holds good notwithstanding the subsequent destruction of the thing, even though through accident.

3. The obligation of warranty against hidden defects does not apply to judicial sales by auction (Section 1482) because in these sales the goods are sold "tali e quali".

With regard to the term for the exercise of such actions we must add that it is generally considered as a term of forfeiture and not of prescription, consequently there is no possibility of interruption and the defect cannot be pleaded by way of exception but it must be brought forward by way of an action.

Divisibility or otherwise of the "Actio Redhibitoria".

This question arises in case of concourse of several sellers or heirs of the seller, or of several purchasers or heirs of the purchaser. If the action is divisible and there are several purchasers, each of them would be entitled to exercise the "actio redhibitoria" for his share and return his part of the thing in order to receive his part of the price. If, on the contrary, it is indivisible, all the purchasers would have to exercise it for the whole, if they are of one mind; and if one of them wants to return the thing in order to receive the price, whilst the others do not want to avail themselves of such an action, he would have to place himself in such a position as to be able to return the whole.

This question is not contemplated by any Code. Ulpian, however, in his commentary on the "Edictum Aedilitium" (Fr. 31, par. 1, D. B. 21, T. 1), distinguishes according to whether the sale of the things was made

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by parts or not, in which latter case the action is indivisible. "Si quasi plures rei fuerunt venditores, singulis in solidum, si tamen partes emptae a singulis recte dicitur alteri quidem posse redhiberi, cum altero quidem agi quanti minoris: item si plures singula pari ab uno emant, tunc pro parte quisque eorum experietur; sed si in solidum emant, unusquisque in solidum redhibuit".

But though the Codes have not contemplated this indivisibility properly so called, they have foreseen another similar question, which takes place in case several things are sold some of which are affected by a latent defect. Section 1478 solves the question according to whether one of the things would have been sold or bought without the other: in case the answer is negative, i.e. the seller would not have sold, and the purchaser would not have bought one only of the things, the purchaser will have to exercise the action with regard to all the things and return all the thing to the seller, because he must replace him in the same position in which he would have been had he not contracted at all. If, on the contrary, the two things were independent from one another, in the sense that one of the things could have been sold or bought without the other, the action must be limited to that thing which is defective.

The only condition which is required for the application of this rule, and especially for that of the first one, is that all the things were sold by means of the same contract, whilst the unity or otherwise of the price is immaterial. Therefore, supposing that it be shown that the things sold are connected with one another, there is indivisibility notwithstanding that there is a multiplicity of prices; on the contrary, in case that the things sold are not connected with one another, then, notwithstanding that the price be one, there is no indivisibility and the price of the defective thing, with regard to which the "actio redhibitoria" is exercised, is determined in proportion to the whole.

D. Obligations of the Purchaser.

His obligations are:-

1. To pay the price.
2. To pay, in certain cases, the interest on the price.
3. To receive the thing bought.
4. To pay the expenses of the sale.

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1. To pay the price. The principal obligation of the purchaser is that of paying the price. "Veniunt autem in hoc judicio (actio venditi) inscriptae: in primis pretium..." (Fr. 1, par. 20, D. de actionibus empti et venditi).

Place and Time of Payment. - If the time and place are laid down in the contract, the agreement must be observed; if nothing has been agreed upon, the price must be paid at the time and place where the thing is delivered. This rule is not conformable to the general principles with regard to the payment of a debt which consists in money, which according to Section 1202 must be effected at the residence of the creditor. The reason for this exception is the necessity that the delivery of the thing and the payment of the price should take place at the same time. Delivery and payment must be effected in such a way that the one be not separated from the other by time: it follows, therefore, that they must also be effected in the same place, because identity of time is not possible without identity of place and vice versa.

The two transactions must be made at the same time for safeguarding the interests of both parties: the seller is not bound to trust the purchaser, nor is the latter bound to trust the former.

This rule, i.e. that payment and delivery must take place at the same time, brings about another exception to the general rules governing obligations, in case the sale is "ex die" as well; but, since sale is subject to this special rule, i.e. the price must be paid at the same time at which the thing is delivered, if the sale is "ex die", though no term has been agreed upon for the payment of the price, the purchaser cannot be compelled to pay before the thing is delivered.

On the contrary, in case a term has been agreed upon for the payment of the price, but not for the delivery, the delivery must be effected immediately, and the sale is in this case known as "on credit", because the seller trusts the purchaser, delivers the thing immediately and credits for the payment of the price after the expiration of the term.

The rule that payment is to be made at the place of the delivery of the thing does not hold good whenever there is a disconnection between delivery and payment such as in sales on credit, or when the price must be paid not to the seller but to a third party.

As soon as the term fixed expires, or in case there is no term, as soon as the thing is delivered, the purchaser must pay the price. But he has the right to suspend payment (Section 1487) if he is molested by an "actio reivendicatoria" or "hypothecaria" or other similar action, or has reasonable grounds to fear such molestations. He has this right whenever there is such danger: so that instead of being compelled to pay the price which, if paid, could only be claimed back by exercising the action for warranty, in case of eviction he may refuse payment . This means of security was known also to the Romans (Fr. 1, par. 1, D. De peric. et com. rei venditae).

The right to suspend payment lasts as long as the seller has not put an end to the molestations or removed the causes for which they may be feared, e.g. by discharging the tenement from the hypothec which is a sufficient motive for the purchaser to fear the "actio hypothecaria". This right is denied in the following cases:-

(a) If there has been an agreement between the seller and the purchaser to the effect that the price must be paid notwithstanding any molestation (Section 1487). This amounts to a renunciation to this security on the part of the purchaser.

(b) If there has been an agreement which exempts the seller from the warranty entirely, i.e. also from the obligation of returning the price in case of eviction. The text of the law does not contemplate this case, but the suspension of payment, in this case, can in no way be justified.

(c) If the seller gives a security for the restitution of the price in case of eviction (Section 1487). The seller, by means of this "cautio", obtains the benefit of being entitled to make use of the capital, i.e. of the price of the sale, without any damage being caused to the purchaser, who is effectively secured.

2. To pay, in the following cases, the interests on the price:- (a) In case of agreement to that effect -- and the interests are then known as conventional or by agreement.

(b) If the thing sold and delivered yields fruits or other profits, notwithstanding that, for any cause — even accidental -- it may not have produced any.

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Since from the day of the sale the enjoyment of the thing belongs to the purchaser and the thing is capable of yielding fruits, it is just that the enjoyment of the price should belong from the same day to the seller. These interests run from the day of the delivery (Section 1484), and this without the necessity of a judicial intimation. Delivery here means, according to Laurent, Pacifici Mazzoni and other commentators on the French and Italian Civil Codes, the moment in which the enjoyment of the thing belongs to the purchaser, and, therefore, the day of the sale: Planiol et Ripert teach that delivery must be taken in its proper meaning, because it may happen that there has been a term for delivery and, therefore, an agreement with regard to the advantages of the fruits and interests: if, then, there is no term, the seller may always call the purchaser to receive the thing and cause the interests to start running.

(c) In case of delay on the part of the purchaser in paying the price, even though the thing does not produce fruits or other profits. The purchaser may be put in "mora", for this object, either by means of an intimation to pay, or in case of a movable thing and the purchaser is in delay in receiving the thing, by an intimation to receive the thing (Section 1484). The form of this intimation is the usual one: it must be made by a judicial act, and the seller, in case of dilatory interests, need not show that he has sustained any damage, because money is always "in potentia proxima" of producing fruits. These interests run from the day in which the intimation is served; and they are due at 5% in all cases indistinctly, saving any agreement to the contrary (Section 1464). The rules of Civil Law, in the matter of sale, apply also to commercial sales, in conformity with the general rules which govern commercial obligations, and therefore in case of commercial sales the interest is at 6% and runs "ipso jure" (Sections 1182 and 1183).

It is true that Section 1484 does not make any distinction between civil and commercial sales: it has, however, been decided that it is not possible that by means of these rules, laid down in the title on sale, the legislator wanted to derogate to the general rules laid down in Sections 1182 and 1183 with regard to commercial transactions, thus not applying these rules to sale which is the most frequent commercial transaction (Commercial Court, 22.1.1901, in re Apap vs. Tabone, Vol. XVIII, part III, page 11).

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The interests are not due in case the purchaser has stipulated a term for the payment of the price, unless the contrary has been agreed upon. But this does not take place in case of a term of grace granted spontaneously by the vendor, who is not presumed to have renounced to his rights, to demand the interest. However, the contrary will take place if the term of grace has been granted by the seller on a title of legacy, because in this case it is the effect of the liberality of the testator which the legislator, following the teaching of Pothier, interprets in this way, i.e. in favour of the purchaser.

The interests are still due, in any of the three cases mentioned above, notwithstanding that the suspension of the payment of the price be justified in terms of Section 1487, because otherwise the purchaser would have in his possession both the thing and the price. He may in this case exempt himself from the obligation of paying the interests by depositing the price under the authority of the Court.

3. To receive the thing bought. The purchaser is bound to receive the thing, because, as the seller is the debtor of its delivery and, therefore, of the custody of the thing until the delivery, he has an interest in discharging himself from such debts and responsibilities. The purchaser, must, therefore, present himself to receive the thing at the time and place where the delivery must be effected and offer, at the same time, the price, unless the sale is on credit. He is liable for non-performance if he fails to do so: and he exposes himself to the relative consequences and especially to the dissolution of the sale. The seller may, in this case, either compel the purchaser to execute the contract by suing him for the payment of the price and the reception of the thing, and if he does not receive it the seller may, on his demand, be authorized by the Court to deposit the thing on behalf and at the risk of the purchaser; or he may avail himself, in certain cases, of the "pactum commissorium tacitum", with which we shall deal at the end of this treatise.

4. To pay the expenses of the sale. This rule is modified with regard to the fee for brokerage and with regard to the experts and other persons entrusted with the determination of the price which must be borne equally by both purchaser and seller. It is hardly necessary to say that it is lawful for the parties to derogate from these rules.

The legislator here determines the fee for brokerage: in defect of agreement to the contrary between the parties and the broker the fee is 2% of the price in case of immovables and 1% in case of movables. It is useless to note that these fees of 1 or 2% are payable for brokerage on condition that the sale has been concluded. If the sale is not effected, the broker can only obtain a compensation corresponding to the work done (Vol. X, C. of A. No. 45).

Remedies attributed to the seller in case the purchaser does not perform his obligations of paying the price and receiving the thing.

1. The seller has the "actio venditi" to obtain the forced execution of these obligations, i.e. to compel the purchaser to pay the price against the delivery of the thing, and to obtain the authorization, in case the purchaser insists on not receiving the thing, to deposit it under the authority of the Court on behalf and at the risk of the purchaser.

2. When he obtains such authorization the seller may take the necessary steps for obtaining the price by means of sale by auction of the thing deposited and of all other property of the purchaser. He has, moreover, the right to delay the delivery of the thing until the payment of the price, unless the sale is on credit. May he, finally, as it is a bilateral contract, avail himself of the "pactum commissorium tacitum" for non-performance ? In Roman Law this action for dissolution was not acknowledged to the seller of an immovable on the ground that the price was not paid: "Si venia distraxisti nec pretium enumeratum est actio tibi pretii non errorum quae desisti repetitio competit" (Cod. Cont. emptione, c. 8).

The reason is, according to the opinion of the Roman jurists, that the Lex Commissoria was introduced and took place at Law principally in innominate contracts ("facio ut facias"), in which there was no contract, and no cause for civil obligation, until one of the parties had executed his performance in favour of the other. The effect of such performance by one of the parties was not only that such party could compel the other to perform his obligation, but also, in case of non-performance, he could take back what he had given. This was the object of the Lex Commissoria, and this was the purpose for which it was introduced principally in such innominate contracts without being applicable, as a rule, to nominate contracts, to which class sale belongs.

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Our law, in Section 1487, follows Roman Law with regard to the sale of immovables, where it does not grant to the seller the right to dissolve the contract on the ground that the price is not paid. Now, though it is true that in Roman Law the "pactum commissorium" did not apply to sale because it was a nominate contract, and this rule had, therefore, a juridical reason, the same cannot be said in favour of our law, because in the system of our law the "pactum commissorium" is common to all bilateral contracts. The other codes in fact do not admit this exception, so much so that both the Code Napoleon (1055) and the Italian Code (1511) have abandoned the Roman tradition and admit the "pactum commissorium" even in sales of immovables. The Italian Code contains provisions to the effect that the resolutive condition, whether it be express or tacit, for non-performance of the obligations of the purchaser in sales of immovables does not prejudice third parties who may have acquired rights over the immovable before the registration of the demand of the seller for dissolution. Our legislator has departed from these general principles because otherwise, as Sir A. Dingli comments, the seller would be in a position to recover the price or the thing by means of a privilege without registration.

Dingli quotes Troplong, in the Treatise on Sale, para. 620, who criticizes the French system and upholds the tradition followed by our legislator which protects the good faith of third parties, who may have acquired rights over the immovable, whilst they are unaware of the fact that the price has not been paid. But the protection of the rights of third parties is obtained in a way more conformable to the general principles, by a special provision of the Italian Civil Code which subjects to publicity the demand of the seller for the dissolution of the sale, so that those who have acquired rights before the registration of the demand are not prejudiced by the dissolution.

With regard to movables the "pactum commissorium tacitum" for non-payment takes place in favour of the seller according to the general principles, except that, with regard to the "pactum tacitum", the law on sale (Section 1488) derogates to the general rules according to which it operates only "ufficio judicis". In the case foreseen in this Section, on the contrary (i.e. in case of goods or other movables), the dissolution of the contract takes place "ipso jure", even though the resolutive condition be not expressed, if the purchaser

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does not present himself before the expiration of the term established for the delivery, in order to receive the thing, or in case he has presented himself but did not, at the same time, tender the price, unless a delay had been agreed upon for the payment thereof.

The obligation of the purchaser of receiving the thing could not be better sanctioned by law than by inflicting the dissolution of the contract if he fails to perform his obligation or to pay the price at that moment: in both cases the "pactum commissorium" takes place, and though it is tacit it produces its effects (of course, in favour of the seller) "ipso jure", contrary to the general principles. If these conditions concur, and the seller avails himself of this right, he may regard the contract as dissolved and dispose of the thing immediately without any authorization of the Court or intimation to the purchaser, so that he may dispose of the thing without loss or with the least possible loss, to the advantage of both parties and of trade in general. According to general principles, the seller has also a right to the damages sustained both if he demands the dissolution of the sale and in case he insists in the performance of the obligation.

The law, in Section 1489, gives, in case of movables, another remedy to the seller if he is not paid, and this consists in the right to take back the thing or prevent its sale. The conditions for the exercise of this right are the follwing:-

1. The thing must be movable.
2. That there was no delay for payment of the price.
3. That the thing is in possession of the purchaser and in the state in which it was at the time of delivery.

If these conditions concur, the seller has the right, which must be exercised within fifteen days from delivery, to take back the thing and prevent its sale. Pacifici Mazzoni teaches that this action is nothing else but the ordinary "reivendicatio" which the owner exercises against the possessor of the thing: the seller, by effect of dissolution, becomes the owner of the thing, and when he claims it back he simply exercises the "reivendicatio" which has its usual purpose of acknowledging the right of the plaintiff over the thing and to compel the purchaser to return it.

But, as this right derives from the Code Napoleon (1612), which, in turn, has taken it from tradition and

especially from the teachings of Molinco, we are rather inclined to follow the opinion of the interpreters of French jurisprudence, in the sense that this right aims only at the possession of the thing and not at the "reivendicatio" of the ownership: its purpose is simply that of putting the seller in the same position in which he was before he delivered the thing to the purchaser. By effect of sale ownership passes to the purchaser, but until he pays the price the seller may refuse delivery. If, trusting the purchaser, he delivers it without demanding the price, the law grants him this action in order to regain possession and thus put himself in the same position as before, and thus keep the possession of the thing until he is paid. In this way it is possible for him to secure the action for dissolution and the forced execution of the sale for the exaction of the credit by a privilege over the thing; because the action for dissolution could otherwise be eluded by the purchaser, who, having the thing in his possession, can deliver it to third parties, and, moreover, the privilege of the seller could also be extinguished by an alienation of the thing made by the purchaser.

Section 1489 deals with the right of preventing the resale as distinct from the right of taking back the thing. In this respect, our legislator has departed from the Code Napoleon (1162) which attributes to the seller the right to claim the thing and prevent its resale, and has followed the Italian Civil Code which distinguishes one action from the other.

The interpreters of the French Civil Code and French jurisprudence agree that this right of preventing the resale is not different from the right to take the thing back. The commentators of the Italian Civil Code, on the contrary, argue that the right of preventing the resale is distinct from this right, and, according to them, the difference consists in this: by means of the right to prevent the resale the seller may effectively achieve his purpose without regaining possession of the thing, i.e. by seizing it from the possession of the purchaser and putting it under the custody of the Court, or by sequestrating it if it is in the hands of a third party; by means of this action the seller does not assume any responsibility for the custody of the thing, which is, on the contrary, imposed upon him in case he retakes possession of the thing.

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3. Annulment and Dissolution of Sale

The contract of sale can be annulled or dissolved through all the causes common to all contracts, such as incapacity, unlawful object or cause, vice of consent, "pactum cominissorium" and so forth. Moreover it may be annulled or dissolved for reasons which are particular to the law of sale such as the case of the sale of a "res aliena" and the exercise of the "no redhibitoria."

Besides these cases which have already been dealt there are two cases i.e. "Retratto" and Legion which deserve special mention The former is a cause of dissolution of sale, while the latter is a cause of rescission

RETRATTO

Retratto is of four kinds :-

1) Conventional retratto or Redemption which can be stipulated in sale and in "datio in solutum."

2) "Retratto successorio" which forms part of the law of Succession and Partition.

3) Litigious retratto (also called Retratto Anastasiano) concerning this assignment of certain contexted debts.

4) Jus offerendi which arises in judicial sales of immovables.

Up to 19 there was a fourth kind of Retratto namely Legal Retratto, but it was abolished by Act of 19 . Actually the second and the third cases aforementioned are also Legal in the sense that they emanate directly from the law as opposed to the first case which arises from contract. However, the term Legal Retratto or Pre-emption was a special right granted by law to a person to assume the sale of immovable property made to another person, thereby succeeding to all his rights and obligations (v. art. 1508 now abrogated). Pre-emption presupposed a sale or datio in solutum;" then the third party having the right of legal Retratto ("retraente") intervened and took the purchaser's place, put him out of the sale and assumed it in his stead. The purchaser was called "retrattario."

The right of Pre-emption was granted by law only on the following grounds:

(a) Co-ownership - co-owners are those who own a thing "pro indiviso." The right arose if one or more of the co-owners sold his or their share. The law favours consolidation of ownership and pre-emption in this case terminated this co-ownership or at any rate reduced it by diminishing the number of co-owners.

(b) Consanguinity - this is the so-called "retratto pentilizio." It was granted to persons related by consanguinity to the vendor up to 12th degree, if this property sold had belonged to a common ancestor and had not previously been transferred to persons not descending from him.

(c) Contiguity, (Vicinanza) - According to custom which was

right of pre-emption vested only in the following persons and in the following order of precedence:-

(a) The owner of a contiguous tenement which was subject to a praedial easement towards the property sold.

(b) The owner of a contiguous tenement enjoying a servitude over the property sold.

(c) The owner of an urban tenement underlying in whole or in part to the tenement sold.

(d) The owner of an urban tenement overlying in whole or in part the tenement sold.

The purpose of this third case was to put an end to praedial easements on to the difficulties arising from tenements which underlyed only the property of others by means of the consolidation of the 'two proprietos

The right of Pre-emption was exercisable even if the property transferred was head on emphyteusis and in the law of Emphyteusis there was a Right of Preference which was aimed at achieving the consolidation of the " directum' dominium" with the "utili dominium or the consolidation of tenements subject to the same groundrent.

Both pre-emption and Preference created serious restriction to liberty in effecting sales and various practices developed with the purpose of evading them especially by effecting exchanges instead of sales. The practice of granting the property in antichresis for 500 years instead of transferring title became quite common in Gozo. Substantial premiums were also often enacted in order to obtain a waiver of these rights.

Consanguinity and to a lesser extent, contiguity or reasons for pre-emption were creating many more difficulties than advantages and amendment of the legal position had long been overdue. On the contrary, pre-emption on the basis of co-ownership definitely presented certain economic advantages, but it was decided to abrogate the institute entirely and in addition to pre-emption also the right of preference in Emphyteusis which had many points of contact with pre-emption was abolished.

The above is a brief conspectus of the institute of "Retratto. We shall now deal specifically with the Conventional retratto or Redemption which forms part of the Law of Sale . Retratto successorio has been considered under the Law of Partition, while Litigious retratto will be considered under Assignment.

REDEMPTION

Conventional retratto or Redemption is a right reserved in the Vendor's favour to re-purchase the property by returning the price and other expenses. In this manner, the Vendor redeems the property which he had sold to the purchaser. It is also known as "ius luendi."

The right of Redemption is a right of a patrimonial character and may be assigned by him to others both by universal and particular title.

Redemption brings about over absolute dissolution of the sale,

(a) Nature of Right - This right is a "jus in re" and, consequently, its holder may exercise it not only against the purchaser but also against any possessor of the thing subject to it and, therefore, against any successor, even though on a particular title, of the purchaser, and even though the thing has been transferred several times. The person entitled to the right of redemption, whether he be the seller himself or the assignee of the "jus luendi", may avail himself of this right against any possessor. However, with regard to redemption over movables, the nature of this right must be reconciled with the general principles which govern movables, in virtue of which redemption over a movable thing cannot be exercised against third parties, i.e. a successor of the purchaser on a particular title. This seems to be a rule proper to redemption rather than an application of the general rules which govern movables: it is not the case of the right of ownership but of a part therof which the seller has reserved and, therefore, it seems that we must not distinguish in this case between a third party in good or bad faith.

(b) Reciprocal obligations.

1. The obligations of the "retraente" are:-

(i) the obligation of reimbursing to the "retrattario" the price and the expenses of the sale;

(ii) the obligation of reimbursing to him the necessary and useful expenses;

(iii) the obligation of reimbursing the interests on the said sums.

(iv) in case of concourse with the assignee of the "jus luendi" the obligation of paying to him the price and expenses of the assignment.

(v) the obligation of paying the expenses of the resale.

(i) The reimbursement of the price and expenses of the sale. - Since in the relations between "retraente" and "retrattario" the sale is dissolved, the effects of the dissolution take place, i.e. there is a reciprocal restitution. The price and the expenses of the sale which has given cause to retratto must be returned. This fact is important when the thing has formed the object of several successive sales for different prices: A sells to B a house for £500 and B sells it to C for £400 or £600. A has the right of redemption with regard to the first sale and he must therefore pay to the "retrattario" the price of the first sale which gives rise to redempti

The reimbursement of the expenses of the sale is due for the same reason, ie. the "retrattario" must be put in the same position in which he would have been had he never purchased the thing. On the

"retrattario" and, therefore, the expenses incurred must be borne by him. We shall see later on that the "retraente" must deposit the price and expenses of the sale as a necessary condition for the validity of the exercise of retratto.

(ii) The reimbursement of necessary and useful expenses. -

The "retraente" must return to the "retrattario" the necessary and useful expenses incurred with regard to the thing either by the purchaser or by his successor in possession of the thing. This obligation takes place even though the benefits resulting from such expenses do not exist at the time of redemption for any cause whatsoever, provided that neither the purchaser nor his successors in possession of the thing are responsible for the non-existence of such benefits. In fact, in such a case even the "retraente" had such expenses been incurred by him, would have lost such benefits.

In case of "impevsae utiles", the "retraente" must refund such expenses even though they exceed the amount by which the thing has increased in value, because the "retrattario", until redemption is exercised, is not a possessor of a "res aliena" but an owner, though under a resolutive condition. Redemption is an extraordinary right granted and allowed by law against the purchaser, but without any prejudice to him, and, therefore, he must be reimbursed all that which he may have spent.

The "impensae voluptuariae" are not included, and the purchaser and his successors cannot complain because they know that their right of ownership is subject to dissolution, and they should, therefore, abstain from incurring such expenses.

(iii) Payment of interest on the said sums. --

This obligation of the "retraente" corresponds to the obligation of the "retrattario" of returning the fruits of the thing. These interests are due at the rate of 5% per annum and they run in favour of the "retrattario" from the day on which he may have paid such sums, until the day of the notification of the deposit of that for which he is to be reimbursed (Section 1495). If, however, withdrawal of such deposit by the purchaser is, without a just cause, restrained by the "retraente", the running of the interest continues until the day on which such restraint ceases.

(iv) Payment of the expenses of the resale. -

This is that act by means of which the "retrattario" transfers the possession of the thing to the "retraente". These expenses are at the charge of the latter, because the "retrattario" is being deprived of the thing, and he should not, therefore, bear any expenses.

(11) The obligations of the "retrattario" are;-

(ii) The obligation of returning the fruits;

(iii) The obligation of making good the damage in certain cases.

(i) The Release of the thing. -- This release is a transfer of possession and not of ownership, because this right returns to the "retraente" in virtue of the retratto exercised by him. The resale is, therefore, a mere "traditio" of possession which the retrattario is bound to make because as he is no longer the owner, he has no title for keeping possession of the thing. Until the complete reimbursement of all that which is due to him, however, the "retrattario" has the "jus retentionis" (Section 1503).

(ii) The restitution of the fruits:-

Redemption brings about the dissolution of the sale; hence the necessity of reciprocal restitution. The "retrattario" must return the fruits received or which could have been received "cum diligentia boni patris-familias" by the purchaser or any successor of his from the moment of the sale which has given rise to redemption until the resale (Section 1494). There are thus two reciprocal credits between "retrattario" and "retraente": the "retrattario" is a creditor of the interests and the "retraente" of the fruits. Therefore, the fruits which the "retrattario" owes to the "retraente" must be deducted from the interests which the "retraente" owes to the "retrattario". But the "retrattario" has the right to keep the fruits by renouncing to the interests. We have here an absolute compensation and not the ordinary one: in virtue of the latter the two reciprocal credits eliminate one another up to the amount of the smaller credit and the other credit subsists with regard to the excess; the "retrattario", on the contrary, retains the amount by which the fruits exceed the interests, as a kind of reward for the custody of the thing of which he is now being deprived. This right of the "retrattario" is limited to the fruits received or which he could have recieved until the day on which the running of the interest ceases, and if the "retrattario" retains the thing and receives the fruits after the running of interest has ceased, i.e. after the deposit of the price and expenses of the sale made by the "retraente", his right of keeping the fruits does not extend to these fruits received after such cessation. The fruits not yet gathered on the day of the release belong to the "retraente", but he is bound to return to the "retrattario" the expense incurred for their production or preservation (Section 1497)

(iii) The reimbursement of damages. -
This takes place only in the following two cases:-
(a) If the person who has caused such damage has derived some advantage. This is due on the ground of equity; "nemini licet locupletari cum aliena jactura".

(b) If the person causing damage did so with the object of doing harm and of avoiding redemption.

However, the purchaser cannot change the form of the thing during the time-limit for redemption; and if he alters it he is bound to make good the damages and replace the thing in its former state.

Sanctions to these Reciprocal Obligations.

The sanctions to the obligations of the "retraente" are:-

1. He is bound to deposit the most important part of what he owns to the "retrattario", ie. the price and expenses of the sale. This deposit is an essential condition for the validity of the exercise of retratto, and if it is not made within the legal time-limit (i.e. ten days), the acts performed by the "retraente" for the exercise of redemption are null and without effect, saving his right of repeating them, if he is still in time to exercise the right of retratto (Sections 1499 and 1500).

2. The "jus retentionis" granted to the "retrattario" until the complete reimbursement of all that which is due, including therefore, the necessary and useful expenses and the interests

3. The "retrattario" has finally a personal action for compelling the "retraente" to pay the sums due by him according to the general rules governing obligations.

The sanctions to the obligations of the "retrattario" are:-

1. If the "retrattario" does not release the thing, the "retraente" has an action to compel him to do so, after that the retratto is declared to be valid (Section 1499), or the "retrattario" had admitted that the retratto had been validly exercised.

2. The "retraente" has moreover an action for the restitution of all that which may be due to him by the "retrattario", i.e. fruits or damages.

(c) Formalities for the exercise of Redemption and Essential Conditions for its Validity.

The legislator determines the procedure which takes place when the parties do not agree, i.e. when the "retrattario" "retrattario" does not admit the right of the "retraente", because if there is no disagreement between the parties it is not necessary to resort to these judicial formalities, and the parties may execute the retratto by means of a notarial deed registered in the Public Registry, for the protection of third parties, in case of immovables. In default of such agreement the retratto is exercised (Section 1498) by presenting in the Registry of the competent Court an act known as Schedule of Redemption which is perfected by the Deposit of the price and expenses of the sale.

SCHEDULE. The schedule is a judicial act which must be vested, besides its own requisites, with the formalities common to all judicial acts in general. It must therefore

Parts of the general formalities, are the presentation of the schedule, its notification to the "retrattario" and the signature of the advocate and of the legal procurator.

The schedule must be directed against the actual possessor because the right of retratto is real in nature, and must therefore be availed of against the person who is in the possession of the thing.

According to the principle "actor sequitur forum rei", the schedule must be presented in the forum of the domicile of the possessor of the thing. However, in order to favour the "retraente", if he was not notified by means of a judicial act of the transfer of the thing from the purchases to another person, the law grants him the right to exercise retratto by presenting the schedule against the purchaser himself and in his (the purchaser's domicile (Section 1498). In this case all subsequent acts of the retratto will be made before the same Court, even though it is subsequently found out that the purchaser served with the schedule is no longer the possessor of the thing. Of course, in this case the actual possessor must be served with all the acts executed until then and with the subsequent acts. This rightis granted to the "retraente" who may, if he chooses, and if he is aware of the transfer independently of any notification served by the purchaser, notify from the very beginning the actual possessor by presenting the schedule in the Court of his domicile.

The schedule must be presented within the time-limit established for the exercise of redemption.

DEPOSIT

The exercise of Redemption is perfected by the deposit of the price and expenses of the sale. The purpose of this deposi is the reimbursement which the "retraente" owes to the "retrattario". Instead of allowing the "retraente" to have the thing and then perform his obligation of paying these sums, and of subjecting the "retrattario" to the necessity of proceeding judicially against the "retraente" in case of non-performance, the legislator has imposed the deposit of these sums before the exercise of redemption as an essential condition for the validity of its exercise.

The deposit must include the price of the sale.which has given rise to redemption, the fees of the notary who may have received the deed in the public Registry (provided, of course, these were borne by the purchaser) or any other lawful expense which results from the deed of sale or which the "retraente" is otherwise aware that they were borne by the purchaser. It is not necessary, therefore, that the deposit include also the necessary and useful expenses which may have been incurred by the purchaser or by his successors, nor the interests due to the "retrattario". These expenses, in fact, are generally not liquid, and the parties have the right to demand their liquidation. The interests due must be compensated with the fruits. saving the right of the purchaser to keep the fruits and renounce to the interests.

...ich, being a judicial act, must be similarly vested with all the ...rmalities of judicial acts in general.

The deposit, as we have already said, may be made be means of ...e schedule of redemption or by a subsequent schedule: in this ...tter case, the schedule must be presented within the term of ten ...s from the presentation of the schedule of redemption (Section ...9, 1500) even though this would take place after the expiration ... the term established for the exercise of redemption.

If the term of ten days expires and the deposit is not effected ... the acts which may have been done become null (Section 1500) ...n though the deposit is effected within the term of redemption. ...s sanction of the law in these cases is not the extinction of the ...ht but the nullity of the acts performed in connection with the ...ercise of retratto so that the "retraente" may still perform these ...s, again, provided the term fixed for redemption has not expired.

In the following cases this condition, i.e. the deposit within ... days is dispensed with; in other words, the law does not inflict ...llity in case the deposit is not made within ten days:-

When the "retraente" is a creditor of the "retrattario" of a ... of money which is liquid and which has fallen due, provided he ... set off such credit in whole or in part with what he should ...osit (Section 1501).

In case of partial defect of deposit, when it results clearly ...t such defect is due to some mistake or oversight on the part of ... "retraente", provided however that the "retraente", on being ...med by means of a judicial act of the defect and on being invited ... correct the mistake, reinstates the deposit within ten days from ...h intimation. If he fails to do so within such term, the acts ...formed by him become definitely null.

The final act of the ... the re-sale which ... "retrattario" is bound to make to the "retraente". In case the ...ties agree the re-sale is made by a notarial deed; if, on the ...trary, the retratto has been exercised judicially, i.e. by means ... the presentation of the relative schedule and after having ...ected the deposit, the "retrattario" who admits the right of ...ratto, must effect the re-sale in the act in which he withdraws ... deposit, i.e. in the act of the receipt which he gives to the ...istrar for the deposit which he withdraws. When the Registrar ...l register the resale in the Public Registry in order to notify ...rd parties.

If, notwithstanding the presentation of the schedule of retratto ... the deposit, the "retrattario" does not resell, so that the ...traente" will have to take judicial steps against him to compel ... to do so, it is up to the Court to establish the time and mode ... the re-sale, (Section 1504 (2)). It is held in practice that it ...not necessary for the Court to order the public deed for the re-..., which can be regarded as having taken place in force of the ...gement which pronounces it. For this purpose the "retraente" ...lly adds in the last part of the writ-of-summons the demand that ... Court declare the re-sale to have taken place in virtue of the ...ement itself (argued from Sections 255-257, Laws of Organization ... Civil Procedure).

regard to the ownership, the fact that the "retrattario" is regarded as if he had never been the owner of the thing implies the application of the principle "soluto jure dantis solvitur et jus accipientis": the tenement returns to the "retraente" free from any servitude, hypothec or burden which the "retrattario" may have imposed (Section 894). the only expectation to this rule is the lease of the thing provided it has been granted in equitable conditions and for a normal period of time, i.e. for not more than 8 years with regard to rural tenements (Cf. also Section 1665).

The "periculum" and the "commodum rei" follow ownership, and they pertain to the "retraente" from the very beginning. and the seller is regarded as if he had never ceased to be the owner. This is why the "retrattario" is not bound to make good any accidental damages.

The "retraente" may recede from the redemption which he has instituted as long as the "retrattario" has not accepted it by a judicial act, because until that moment the acts of redemption are merely unilateral acts of the "retraente". But when it is accepted by the "retrattario", the redemption becomes a bilateral act and it binds both parties vis-a-vis one another.

A sale subject to redemption was known in Roman Law as is shown by Const.II, God. "De pactis inter Emptorem et Venditorem Compositis"; and it is still admitted not only by our laws but also by Continental Codes, to the evident benefit of those persons who want to obtain a certain amount of money without depriving themselves of their property permanently. When compared with hypothec and loan it presents the advantage of inducing the purchaser to furnish the capital required by the vendor with the hope that the property acquired subject to the right of redemption will become his own irrevocably.

## CONDITIONS FOR THE EXISTENCE AND VALIDITY OF REDEMPTION

1. The agreement must be expressed because it is not a natural effect of sale, and it is in the nature of this contract that it should transfer the ownership of the thing sold irrevocably. Therefore, in order to exclude redemption an express agreement is not necessary, and the clause by which Notaries at times exclude conventional retratto is useless. It is only in judicial sales by auction of immovables that the law grants to the debtor the right to redeem the tenement within 4 months, owing to the fact that in this case the sale is a forced one. (Section 356 of the Code of Civil Procedure).

2. The agreement must be contemporaneous with the sale (Section 1530). If, after the conclusion of a pure and simple sale, the parties agree on a re-sale, i.e. by a subsequent agreement one of them stipulates to buy the tenement and the other to resell it, this does not constitute a conventional retratto; and if such an agreement is actually executed it would not be through the exercise of redemption, but a new sale, and therefore there is no dissolution of the previous sale in such a way that the thing returns to the vendor free from all debts and burdens contracted or imposed by the purchaser, but, as it would constitute a new transfer, such debts and burdens would still cover the thing.

3. The limitation of the time for which redemption is stipulated. There must be a limited term for the exercise of redemption, because otherwise the position of the purchaser would remain uncertain for an unlimited time. The legislator has limited the time to 5 years, while in former laws it was of 30 years because it was considered as the normal term for prescription. The time-limit runs from the day of the sale and not from that of registration, because the "retraente" in this case is not a third party but one of the parties.

If the parties do not establish any term or they agree on a longer term, it is reduced to 5 years.

The term, whether it be legal or conventional, is peremptory (Section 1531) and it runs against all, even against those with regard to whom prescription is suspended, because this is not a term of prescription

4. The parties cannot stipulate that the seller will have to return higher sums than those established by law, i.e. the price and expenses of sale and the relative interests, and the necessary and useful expenses incurred by the purchaser in the meantime. In this case the agreement would constitute usury and it is null with regard to the excess and, therefore, it is reduced to the amount allowed by law.

Effects of Redemption.

Conventional retratto constitutes a resolutive condition of sale and in order to apply the relative rules we shall have to distinguish between the three stages in which the condition may find itself; and we must also distinguish the relations existing between the parties and those existing between the parties and third parties.

1. Relations between the parties.

(a) During the term established for retratto and until it is not exercised by the seller, i.e. "pendente conditione", the purchaser is the owner of the thing and he may exercise all actions belonging to an owner including the "actiones possessoriae" (Section 1533). He may also acquire the thing by prescription against the true owner (supposing that a "res aliena" was sold) and also against any other person (e.g. a hypothecary creditor) having any right over the thing. Finally, he may set up the plea of "escussione" against the creditors of the seller in case he is molested with a hypothecary action.

But this right of ownership is subject to dissolution and the seller hopes to recover the thing and become its owner. Consequently the law does not allow the purchaser to alter the form of the thing and to exercise the right of expelling the tenant, a right which the seller may have reserved to himself in the deed of lease in case he were to alienate the thing given on lease during the lease (Section 1665). This applies to both legal and conventional retratto; but the purchaser can exercise this right as soon as he becomes the owner of the thing irrevocably (Section 1665). As in this case the alienation may be dissolved it is not fair to allow the purchaser to avail himself of this faculty, because in case of dissolution the tenant would not be in a position to recover the enjoyment which he has lost.

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As to the responsibility of the "retrattario" for the damages which may have been caused "pendente conditione", we have already said, in the general part, that he is not responsible for accidental damages nor for voluntary damage except in case he has derived some profit, or in case he has caused them with the purpose of causing damage to the "retraente".

(b) In case the condition takes place "eveniente conditione", i.e. if the retratto is exercised within the term established, the sale is regarded as if it had never taken place. It is dissolved with retrospective effect and the thing is regarded as if it had always been at the "periculum et commodum" of the seller. A reciprocal restitution takes place between the parties, i.e. the price and expenses together with the interests will be returned by the seller and the fruits by the purchaser, saving the right of the latter to keep the fruits and renounce to the interests.

(c) In case the condition does not take place, i.e. the term expires without the seller having exercised retratto, the purchaser becomes definitely the owner of the thing.

2. Relations with third parties.

If the seller exercises retratto, all the rights acquired by third parties from the purchaser during the interval are dissolved, and the property returns to the seller free from all rights and burdens contracted by the purchaser in favour of third parties. An exception must be made in respect of movables, with regard to which retratto cannot be exercised when they have been transferred to third parties (Section 1532); and moreover any lease contracted by the purchaser on reasonable conditions and for a time not exceeding the normal period of leases, is not subject to the effects of dissolution.

Cessation of the right of Conventional Retratto.

It ceases:-

1. By the expiration of the time agreed upon;
2. By the transfer of the movable thing to a third party, saving, in these cases, the right of the seller against the purchaser who has not performed his obligations.
3. By renunciation on the part of the seller to his right.

Divisibility or otherwise of the right of Conventional Retratto in case of concourse of several sellers or purchasers.

1. Concourse of several sellers or heirs of the [illegible] Section 1535 et seq. distinguish between two cases according to whether the sale is made in parts or not. In the latter case, or as the law expresses itself "if several persons have jointly and by a single contract sold a tenement held in community (Section 1535)" or if the only seller has left several heirs (Section 1536), though each of the sellers may redeem the tenement only for his share (Section 1535), still the purchaser has the right to compel them to redeem the whole tenement.

This indivisibility of retratto is in the interests of the purchaser. It is not a natural indivisibility because a tenement is always divisible but a conventional indivisibility resulting from the fact that the tenement was sold and bought as one. Just as he would not have bought a part of the tenement, so the purchaser cannot be compelled to sustain the exercise of retratto only for a part of the tenement and retain the other part. It is a faculty which is attributed to the purchaser in his interests and it is not an obligation imposed upon him. If, therefore, he prefers to keep a part of the tenement, there is no indivisibility and each of the sellers can only redeem that part which belonged to him. If the purchaser wants to avail himself of this faculty, he must call upon the sellers or heirs of the seller by means of a judicial act to declare whether they are willing to exercise the right of retratto (Section 1537). The declaration of the sellers or heirs of the seller must be made within the term which remains for the exercise of retratto; if such term has expired when they were served with the abovementioned intimation, or in less than ten days, such declaration must be made within ten days from the day in which the intimation was served.

If they all declare to be willing to exercise retratto, it is exercised for the entire tenement; if one of them fails to make such a declaration, the purchaser must call upon those who want to exercise retratto to redeem the entire tenement (Section 1538), and if they do not redeem it within ten days from such intimation, the purchaser will remain irrevocably the owner of the whole tenement.

This intimation must be made by a judicial act (Section 1537).

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If the sale has been made in parts by several sellers, the retratto is perfectly divisible: there are as many things sold as there are sales, and as many sales as there are vendors. Therefore the seller is free to exercise retratto for his part -- he cannot exercise it but for such part -- and he cannot be compelled to redeem the other parts as well (Section 1539).

2. Concourse of several purchasers or heirs of the purchaser.

Section 1540 distinguishes between three cases, according to whether the thing is still undivided, or has been divided between the several purchasers or heirs of the purchaser in such a way that each of them has received a part, or the division has taken place but the thing has been entirely allotted to one of the heirs. In the first case the thing belongs to all the purchasers "pro indiviso", in the second it belongs to all, but "pro diviso", in the third case it belongs to one only.

In the first two cases, Section 1540 says, the retratto is divisible and cannot be exercised except against the individual purchasers for their respective parts. Of course, in the first case the seller will redeem from each of them their respective intellectual parts, and in the second case their respective concrete parts apportioned to them by effect of the division.

From the fact that the retratto is divisible it is argued that the seller may redeem the part belonging to one of the purchasers and refuse to redeem that of another, and that the several purchasers or heirs cannot compel him to redeem from all (divisibly) their respective shares, i.e. the whole tenement.

The reason for this difference between the concourse of purchasers and the concourse of sellers is that the purchasers or heirs of the purchaser cannot set up the indivisibility which they have acquired in order to keep the property in common for ever, because each of them has the right to demand at any time that the thing be divided. However, the exception to division, which is admitted by writers, seems just: it refers to the case in which it results that the purchasers had a contrary intention, i.e. they have bought the thing together, or the purchaser has left the thing to several heirs with the intention of making use of the thing in such a way that the entire tenement is required, and a part of it cannot serve for such purpose, such as in case a piece of ground is sold and the purchasers or purchaser intended to construct a theatre.

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In the third case, the retratto. Section 1540 goes on, may be exercised for the whole againse the copartner to whom in virtue ofdivision the tenement was apportioned. The seller has a personal action against him for his share, and, moreover, as the right of retratto is a real right, he has a real action for the share belonging to the other co-partners for their respective parts and thus redeem the share of one or of some of them only. The personal action, as Troplong observes, holds good even against the heirs, and if the seller prefers to exercise retratto against them he is free to do so, because the law has given him the right to redeem the entire tenement, butit has not bound him to do so (Troplong, Sale, Art. 377.)

The law deals here with a special case which takes place when the purchaser of an undivided part of the tenement, which was bought with a stipulation of retratto, becomes the owner of the entire tenement by effect of licitation instituted against him. He may in this case compel the seller, in case he wants to avail himself of retratto, to redeem the entire tenement and return the whole price, i.e. both that which he received from the purchaser and that paid by the purchaser to the other co-partners for the licitation of the other portions.

The ground for this special reuleis that the purchaser has become the owner of the entire tenement, i.e. he has freed the thing entirely, so as not to sustain a loss by obtaining for his share a lesser price than that for which he wouldhave bought the tenement: and the seller of the undivided part, had he not sold his share or had he already redeemed it, would have sustained the licitation instead of the purchaser, and, in order not to sustain the same loss, he would have found himself in the same position as the purchaser, i.e. he would have had to make the highest offer.

Moreover, if theseller had theright to redeem only the undivided share sold by him, and could not be compelled to redeem the entire tenement, he would again give rise to a co-ownership over a perfectly divisible thing and thus render necessary a new licitation.

These are the reasons why the purchaser has the right to compel him to redeem the entire tenement; he may, however, allow him to redeem only a part, i.e. the part sold by him. The purchaser is free to compel him to redeem that which is more convenient, because he has acquired the ownership of the other shares as free and without the stipulation of redemption and, like any other owner, he has the absolute right of disposal.

## "Jus Offerendi".

We shall here deal in brief with an institute contemplated by the Laws of Procedure, which is very similar to retratto, and which is called the "jus offerendi". This right takes place in judicial sales of immovables; whenever an immovable has been adjudicated to a creditor "animo compensandi", any other credotor not summoned and who has not taken part in the sale, has the right to recover it from the person to whom it is adjudicated, by paying the credit which had been compensated.

This is the "jus offerendi" which is known by this name because the person who exercises itoffers to the person to whom the immovableis adjudicated the payment of his credit.

Now-a-days it is very rarely used and the ground for its existence is merely the advantage of the creditor who exercises it in case the tenement can fetch a higher price than that for which it was adjudicated.

## LESION

Lesion, with regard to contracts, is an unjust damage which one of the parties sustains as a consequence of the contract. In sale it is the damage which the seller sustains for having sold a thing at a price lower than its value, or that which the purchaser sustains if the value of the thing is lower than the price.

In Roman Law, before Diocletian and Maximilian, there was no juridical remedy of which the seller or the purchaser could avail themselves in case of lesion. The influence of the Stoic Philosophy had for a long time prevented any remedy in case of duress, error or fraud, and much less could a low price, provided it was not ridiculously low, expose the sale to rescission.

Those Emperors by a Rescriptum of the year 285 introduced for the first time the remedy of rescission in favour of the seller who sustained lesion "ultra dimidium". The remedy of the rescriptum referred to the particular case in which the seller of a tenement sold at a price inferior to half its value sued the purchaser before the Emperors, and the rescriptum granted to the seller the right to rescind the sale, saving, however, the right of the purchaser to prevent its rescission by paying the just value: "Inmanum est pretium te restituturn emptoribus dundum venditum accipias".

Justinian included this rescriptum in the Code (Const. II, De Resc. Vend.) and thus raised it to a law on the ground that it was against equity that the purchaser should enrich himself excessively at the expense of the seller. Canon Law (Decretari Can. 32 et seq. De emptione et venditione) approved the Law of Justinian, and the remedy of the rescission of sale was always favourably accepted by writers on Civil Law from Curaccio to Pothier. Moreover, the jurisprudence of the Common Law not only maintained this remedy in favour of the seller, but extended it also to the case of lesion sustained by the purchaser.

Recently this institute had several opposers, also before the unification of the various Italian States.

when the various codes then in force were being co-ordinated, certain members of the Commission criticized the institute of rescission on the following grounds:-

1. That in the present economic conditions there is no just price of a thing: the just price is only that which the seller receives when he offers the thing for sale.

2. That rescission is contrary to the freedom of the contracting parties and to the stability of contracts, especially those which transfer wonership, a stability which, if not maintained, would affect the whole economic system.

This notwithstanding, the institute has been maintained even in the Italian Code, because it has been observed as against those criticisms, that it is not always true that the price which the seller stipulates and receives is the highest price which he can obtain, because very often the seller, compelled by necessity, accepts the first price which is offered to him. Moreover, though apparently it is true that the institute is contrary to the freedom of the contracting parties, however, such freedom can only be said to exist when it is equal in both parties and there is no real freedom when the seller is compelled to sell by necessity. To deny any help to the seller in this case would be to protect the prevalence of one will over another, instead of protecting reciprocal freedom. As to the general interest in the stability of contracts, it was already been observed that this must give way to the general feeling of morality which do[illegible] not allow the purchaser to enrich himself at the expense of the seller.

But it may be debated whether the same remedy should be granted also to the purchaser who cannot find himself in the same position of the seller which is the ground for the remedy granted by law. In Roman Law, in fact, this remedy was not granted to him, and it was Jurisprudence which introduced this extension, which was afterwards excluded both by the Code Napoleon and by the Italian Code. Our legislator on the contrary (Section 1541) has allowed this remedy also in favour of the purchaser, because there may be other reasons in his favour such as his inexperience or inadvertence, which may have been unjustly availed of by the seller.

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Conditions for the Rescission of sale on the ground of Lesion.

1. The object of the sale must be an immovable by nature: therefore both movables and incorporeal immovables are excluded. The exclusion of movables is also common to other codes and the principal reason is that they have no constant price like immovables; there is also an economic reason, i.e. the free circulation of movables which are the object of very frequent transactions. These reasons are not equally applicable to incorporeal immovables; in fact both in the French and in the Italian Civil Codes incorporeal immovables are not excluded.

2. The second condition is that the immovables by nature must not have been sold together with movables or incorporeal immovables for one price. Also this provision is proper to our law and difficult to justify, nay it facilitates the evasion of the rules of rescission.

The rescission on the ground of lesion is also denied in case of judicial sales by auction because the formalities prescribed for such sales are more than sufficient to prevent any abuse on the part of the purchaser of the strained condition of the seller and ensure the highest offer for the thing sold.

3. Lesion. In order that the sale may be rescinded the lesion must be considerably serious, because if it is insignificant it would not justify a derogation to the stability of contracts. The Rescriptum of the Emperors Diocletian and Maximilian required a "lesio ultra dimidium". Under Common Law, Jurisprudence distinguished between two degrees of lesion: the first degree was exactly that of "lesio ultra dimidium", which was called enormous; the second degree was that of "lesio ultra bessem", i.e. exceeding two-thirds of the just value of the thing, which was called "enormissima". The practical importance of this distinction consisted in a more severe treatment of the purchaser in the more serious case, because in this case he could not prevent the rescission of the sale by paying the just value of the thing. The same degrees and the same treatment applied to the case in which the lesion was sustained by the purchaser.

Our Municipal Code followed this system (vide pag. 9, Ch. VIII, B. III). But the Code Napoleon and those which came after it, including our own (Section 15/2). have abolished these distinctions, and "lesio ultra dimidium" produces always the same effects.

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In order to decide whether there is lesion or not the price agreed upon must be compared with the just value of the immovable, regard being had to the time of the sale, because any subsequent variation in the price remains to the advantage or detriment of the acquirer.

Effects of the "Actio Rescissoria".

The abovementioned Rescriptum granted to the purchaser, sued by this action, the choice between the restitution of the tenement or its retention by paying the just value, "ut vel fundus venditum recipias vel, si emptor elegerit, quod deest juste pretio recipias".

Section 1543 is in perfect agreement with the rescriptum, and Section 1545 applies the same rule to the case in which the seller is sued. This attributes to the seller the right to accept the rescission demanded by the purchaser or to maintain the sale by returning the excess of the price.

The choice is, in both cases, given to the defendant and not to the party sustaining lesion, because the defendant can say that he would only have sold or bought the thing at the price agreed upon and not at a higher or lower price, and therefore that he prefers rescinding the sale to returning the excess or pay the just value.

Supposing the defendant prefers paying the just price or returning the excess, as the case may be, to rescinding the sale, how is the amount of such payment or restitution to be measured, i.e. up to the limit of the excess or deficiency, as the case may be, or up to the limit of the lesion ?

If the defendant is the purchaser he must pay "quod juste pretio deest" and if it is the seller, he must return the excess of the just price. The reason is that if the seller is the plaintiff he has the right to demand the rescission of the sale and, therefore, the restitution of the tenement, so that the purchaser, owing to the right of option granted to him by law, is a debtor of an optional obligation; he is bound to return the thing (and this is the object of his obligation) but he may pay instead the just price or the equivalent of the thing (and this is the object of his right of option). Similarly, the right of the purchaser when he is the plaintiff is to rescind the sale and therefore to obtain the restitution of the price and the obligation of the seller consists in returning the entire price; consequen-

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if he avails himself of the abovementioned right to maintain the sale he must return all that which is in excess of the just price.

If, in both cases, the defendant accepts the rescission, the sale is dissolved, and a reciprocal restitution follows. The fruits and the interests which are to be returned reciprocally are reckoned from the day of the demand and not from the day of the contract, because those fruits and interests gathered or fallen due after the conclusion of the sale until the demand are compensated in an absolute way. If, however, the purchaser does not receive any fruits he has a right to the interests from the day in which he paid the price (Section 1542).

If, on the contrary, the sale is not dissolved, the interests on the supplement of the price which has to be paid or on the excess which has to be returned, run from the day of the demand.

The seller, who has sustained lesion, may institute the "actio rescissoria" even though the tenement is in the hands of a third party, to whom the purchaser may have alienated it, because he has the right to rescind the sale vis-a-vis the purchaser; and on becoming again the owner, just as if there had been no sale, because of the rule "soluto jure dantis solvitur et jus accipientis", he may exercise the "actio reivendicatoria" even against the third acquirer. The same rule applies to alienations made by the purchaser of any other rights over the thing. In these cases the seller will direct his demand against the purchaser because the sale was contracted with him, but he must also call the third party to the suit because he has an interest and because if the ownership of the thing has been transferred to him he is in a position to return it. The third party who has succeeded to the purchaser has the same right of option, i.e. he may either accept the rescission of the sale, or avoid it by paying the supplement of the price (Section 1543).

Causes of Cessation of the Remedy of Rescission.

This remedy is extinguished by the following causes:-

1. Renunciation;
2. If the just value of the immovable cannot be established.
3. By the expiration of the period of two years from the day of the contract.

1. Renunciation. For the validity of this particular renunciation the law requires very strict conditions in order that it may result that the party making such renunciation was fully aware of all the circumstances. The renunciation is not valid (Section 1549) unless it results from the contract itself that the contracting party -- whether it be the seller or the purchaser -- has renounced to his right after he was made aware of the just value of the immovable declared by one or more experts, and expressed in a report inserted in the contract itself.

With regard to the renunciation made by the purchaser these conditions are certainly sufficient, because he can only sustain lesion through inadvertence. But we cannot say the same thing for the seller who is supposed to have accepted the price, not through ignorance of the just value but because of his strained conditions. What must be therefore ensured is not his being aware of the just value, but his freedom. More rational, therefore, are the French (Art. 1674) and Italian (Art. 1529) Civil Codes which grant this remedy only to the seller and declare that his renunciation is absolutely without effects.

In order to protect the seller it would have been expedient to add another condition for the validity of his renunciation, i.e. it cannot be validly made in the same act of sale but only in a subsequent act.

Without these conditions the renunciation is null even if it is simulated as a donation and contains a declaration, made by the party renouncing to his right, that he wants to make a donation; because such a declaration may not be sincere but only the effect of the strained condition of the person making the renunciation. The nullity of these indirect renunciations should not bring about the nullity of the donations simulated as sales: in this case the donation may be maintained by the purchaser, who is actually the donee, if he can show the "animus donandi" of the seller, who is actually the donor.

2. If the just value of the immovable cannot be established. -- In this case one of the elements for the necessary comparison is wanting and it cannot be decided whether the price was higher or lower than the just value. This takes place, e.g. if the immovable has perished and there are no means for establishing its value at the time of the sale.

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3. The expiration of two years from the day of the sale. -- This term runs also against absentees, insane and interdicted persons, minors, and married women, contrary to the rules of prescription, when they claim against a seller or a purchaser against whom prescription is not suspended. It is however suspended during the term agreed upon for conventional retratto, both because the seller could by exercising retratto rescind the sale, which is also the object of rescission on the ground of lesion, and also because the term for the "jus luendi" reserved to the seller has to be taken into consideration.

Sir Adrian Dingli in his comment on this provision observes that it is not a term of prescription of an action, but a case of forfeiture of right for which reason it is not susceptible of interruption or suspension, which is proper to prescription.

Divisibility or otherwise of the "Actio Rescissoria" on the ground of Lesion.

Sections 1546, 1547 and 1548 are the special provisions governing this matter, whilst the French and Italian Laws more conveniently apply those rules governing the divisibility or otherwise of the exercise of the right of retratto.

The fundamental distinction of our laws is that between a sale in parts and a sale in whole. If several sellers (Section 1546) "jointly and by means of one and the same contract" sell an immovable, each of the sellers or the heirs of the seller may demand the dissolution but only for the part sold by him. However, the purchaser may have an interest that this should not take place, and therefore he may demand total rescission, because though there is no absolute natural indivisibility (a tenement can always be divided), there is a tacit voluntary indivisibility, resulting from the fact that he acquired the tenement as a whole. It is within the rights of the purchaser to avail himself of this indivisibility, by demanding that the other co-sellers or co-heirs be called to take part in the suit, if the action is instituted by one or only some of them, in order that they declare, within a term fixed by the Court, whether they are willing to rescind the sale for their respective portions, and thus rescind the sale completely. If they declare that they are willing to rescind the sale, the action is continued in the interest of all. If one or some of them fail to make such a

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declaration, the purchaser will be discharged, unless those who are willing declare that they are prepared to return the entire price, and thus effect total rescission.

The same rules apply in case several purchasers have bought a tenement jointly and by means of one and the same contract, or in case several heirs have succeeded to the original purchaser. There is, however, this difference: i.e. if the action is exercised by some of the purchasers only or by some of the heirs or persons called to take part in the suit, if the others do not declare that they are willing to dissolve the sale, those who have instituted the action and those who were willing to dissolve the sale, cannot exercise the right to demand total rescission. This is so because they are not in a position to return the entire tenement, in which case, therefore, the seller will be discharged.

The provisions of the lawdo not contemplate the case in which the sale has been made in parts, i.e. each of the purchasers has bought a part or each of the sellers sold a part. There would be in this case as many sales as there are purchasers and sellers, and the "actio rescissoria" would therefore be perfectly divisible. The party who has sustained lesion can only exercise the action for his part and the defendant cannot compel him to exercise it for the whole tenement.

Agreements which may be added in the Contract of Sale

1) Sale on assay or trial (Section 1401).

To assay means to taste a thing in order to see whether it tastes good or not; while trial is an examination of the thing in order to see whether it can serve the purpose for which it is destined or not.

This agreement may be either express or tacit, i.e. when assay or trial are required by usage. The effects of the agreement may be divided into two according to whether it is express or tacit. In the first case the purchaser has the right to approve the thing or not because it must satisfy his personal taste, and it is not sufficiently that it be of good and merchantable quality. It follows, therefore, that as long as the purchaser does not approve the thing he is not bound, because he cannot be regarded as bound except on condition that the thing is to his liking: this is a mere potestative condition, which, according to the general principles, is null and annuls the obligations which depend on it.

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We have said that there is no obligation until the purchaser approved the thing: this means that there is no sale. However, this does not prevent the seller from being bound to submit the thing to be tasted, and if the purchaser approves it, to execute the sale. In such an assay, therefore, we have a promise of sale on the part of the vendor accepted by the offeree without any counter-promise and, therefore, without obligations.

In the absence of an express agreement, in case the object is a thing which according to usage should be assayed or tried, we must distinguish according to whether usage requires such an assay or a trial, in order to see whether the thing satisfies the personal taste of the purchaser or to ascertain whether the thing is of good and mechantable quality. In the first case the abovementioned rules apply; but in the second case the right of the purchaser to approve or disapprove is not unlimited, but he can only avail himself of the agreement "cum arbitrio boni viri".

In case of contestation the seller may sue the purchaser in order that the thing be submitted to the judgement of the Court by means of experts, and if the Court regards the thing as being of good and merchantable quality, the purchaser is bound to receive it and to pay the price; so that the sale is in this case perfect, but subject to the suspensive condition that the thing be of good and merchantable quality.

2) <u>"Pactum Addictionis in Diem."</u>

This agreement was very frequent in old law; this fact is argued from the existence of a title which is dedicated to it in the Digest: "In die addictio ita fit ille fundus contuum esto ille emptus nisi si quis intra calendas Januarias proximas meliorem conditionem fecerit qua res a domino habeat" (Fr. 1, Dig. De in diem addictione).

The purpose of this agreement is that the seller may avail himself of a better offer which is made to him within a pre-established term. This agreement (Ulpian, Fr. 2 of the title mentioned above) may assume two forms, i.e. the form of a suspensive condition or of a resolutive condition: "si hoc actum est ut perficiatur emptio nisi melior conditio offeratur; erit emptio conditionalis; si contra hoc actum est ut alterius conditione discendatur erit pura emptio quae sub conditione resolvitur". In the first case it is subjected to a negative suspensive condition, i.e. that no better

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offer be made within the given term; in the second c the agreement includes a condition on which the dis lution of the contract depends, but not the contract itself, which consequently is not subject to any co tion.

This agreement remained in use in the Middle A and we find examples even in Malta in notarial deed Now-a-days this agreement has been substituted by a with conventional retratto, which ensures to the se the same faculty of availing himself of a higher of by redeeming the tenement in order to sell it at a higher price or grant to the offeror of the latter the "jus luendi".

3) "Pactum Prelationis vel Protomiscos."

In force of this agreement the seller stipulate with the purchaser that he will be preferred to othe in the sale of the thing, on the same conditions. is commonly taught that this agreement does not giv rise to a real right but only an obligation of doing something on the part of the purchaser, who in case non-performance is responsible for the damages caus If, therefor, the purchaser resells the thing to a third party, the seller has no action against the th party because the agreement does not give him any re right over the tenement or other thing which he had sold.

This agreement is no longer in use, here in Mal as an accessory agreement to sale, but a similar agr ment is usually stipulated with regard to the reserv tion of the "jus luendi". The seller stipulates the right to redeem the tenement on condition, however, that the purchaser will be preferred to any other per in case the "jus luendi" is assigned by the seller.

Promise of Sale.

Sale is a bilateral contract, and it therefore requires a double promise and a double acceptance. seller must promise to sell and accept the promise of the purchaser; the purchaser must promise to buy and accept the promise of the seller. Evidently, in def of all these elements there is no condent and, there no sale: the obligation of the purchaser and of the seller do not arise and the transfer of property does not take place. The law is right, therefore, when it says that a promise of sale is not equivalent to a sa (Section 1407), and that a promise to buy does not amount to a purchase (Section 1408).

If we apply the various stages of the formation of contracts to sale we shall find that the first moment of consent is a promise made by one of the parties to the other to sell or to buy. This promise, until it is accepted, does not, as a rule, give rise to obligations because in order that an obligation may exist it is necessary that there be someone who has the right to demand its performance. If, however, such a promise is accepted, supposing that the general requisites of obligations concur, the promiser is bound to perform it, and the promise to sell or to buy does not, as was erroneously taught, evade this rule. It is true that in this case no obligation will arise on the part of the acceptor because an obligation which depends on a merely potestative condition is no obligation at all. This, however, prevents the existence of the sale which requires bilateral obligations but it does not prevent a unilateral agreement from arising, which has effect beforehand, in so far as it binds the promiser as soon as his promise is accepted, but before he performs his promise. From what has been said it follows that we cannot accept the view which regards the promise to sell or to buy, which has been accepted, as a sale subject to the condition that the offeree will counter promise. The reason is that there can be no sale unless there are obligations, even though it be subject to a condition, against both parties. A unilateral promise which is accepted implies, therefore, an obligation "of doing" which is merely personal to the promiser, the obligation of executing the promise which in virtue of the principle "nemo potest precise cogi ad factum" is not susceptible of forced execution in a specific form, but only of the secondary effects of obligations, i.e. responsibility for damages in case of non-performance.

But our laws, following Pothier ("Trattato della Vendita", No. 279), attribute a wider effect to such a promise, becuase the principle of the incoercibility of obligations "of doing" is true only with regard to exterior and material acts, and our laws, therefore, acknowledge to the acceptor an action to compel the promiser to transfer or acquire, as the case may be, the ownership of the thing contemplated in the promise. This is obtained by means of the appointment of curators made in the judgement itself, who will execute the contract in the name of the promiser. Although this still remains the practice according to our present laws of procedure the judgement could of itself effect directly the transfer of ownership.

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It is only when the promise cannot any longer be performed, e.g. if the promiser has sold the thing to another, that the effects of a unilateral promise must be restricted solely to responsibility for damages, because it does not give to the offeree a real right.

In order that a promise to sell or to buy may produce these effects there must be a valid and perfect contract of its kind, i.e. a unilateral contract, and therefore its requisites are:-

1) Capacity of the parties. This contract is destined to be transformed into a perfect sale and it therefore required the same capacity as the contract of sale itself;

2) Consent. The consent required is not made up of two promises and two acceptances, because this would constitute a bilateral promise;

3) Object. The object must be capable of being the object of sale, because otherwise the agreement cannot give rise to the obligation of concluding the sale;

4) The price. This may be fixed by the parties either directly or indirectly; it may also be left to the judgement of specified third parties or of unspecified third parties. The promise to sell or to buy may also be made for a just price (Section 1408), in which case, according to Pothier, it requires the implicit agreement that the price must be determined by one or more experts to be subsequently appointed by the parties.

Before Ordinance XIV of 1913 the form of these promises was free, even though they referred to immovables. This Ordinance has imposed the written form, i.e. at least a private writing, for the validity of the promise, in case it relates to immovables.

Extinction of the effects of unilateral promises.

The effects which we have mentioned cease if the acceptor does not call upon the promiser to execute the promise within three months from the day on which the agreement may be carried out, unless the parties have fixed a longer term. In order not to leave the promiser bound indefinitely the law has interpreted the silence of the offeree as a renunciation to his right of changing the unilateral promise into a bilateral promise, i.e. a definitive contract, and frees the promiser from any obligation.

The intimation must be made by means of a judicial act and by means of it the counter-promise is united to the original promise and transforms the unilateral promise into a bilateral one.

Bilateral Promises of Sale.

These promises appear to constitute a sale, i.e. a bilateral contract conceived in the form of an expressed promise instead of in the form of an actual sale. Former Jurisprudence regarded it as equivalent to sale. Molineo departed from this general opinion and distinguished between a promise "de praesenti" and a promise "de futuro"; he included the former among true sales and regarded the latter as a "pactum de inuendo venditione". The Code Napoleon laid down that a promise of sale amounts to sale when the parties agree on the thing and on the price, and it appears that it means to refer to unilateral promises (Planiol et Ripert, op. cit. Vol. X, par. 182). Our legislator does not even mention bilateral promises, and the Italian Code does not mention either of them.

Italian commentators, however, teach that it is not possible to distinguish between a bilateral promise, whether it be "de praesenti" or "de futuro", and a sale when the necessary requisites concur: it is therefore according to this view a perfect contract of sale, which may be pure and simple, or conditional or limited. It is pure and simple if it is "de praesenti"; conditional or limited ("a termine") if it is "de futuro", according to whether reference is made to a future and uncertain event or to a certain day.

Under the system of our law Jurisprudence has never had the occasion to give judgement on the nature of bilateral promises, but in practice they are treated as "pacta de inuenda venditione", and the same rules governing unilateral promises apply, including that which refers to the extinction of its effects, unless one of the parties calls upon the other to effect the promise by means of a judicial act within three months from the day in which the promise could have been fulfilled. In other words, the bilateral promise is regarded as the sum of the two unilateral promises to each of which the relative rules apply.

Earnest.

The promises to sell or to buy are very often accompanied by the giving of earnest. We recall that when

Justinian reformed the former law by Const. VII De Fide Instrumentorum, he attributed to earnest a penitential character, so that it was regarded as given in order to entitle each of the parties to recede from the contract. In the Middle Ages some commentators on the Digest thought that this reform of Justinian should be extended to all contracts. But others, following the Glossa, limited this change to promises "de inuendo contractu" and taught that with regard to definitive contracts earnest should continue, in conformity with the law previous to this reform, to have a confirmatory effect. The Rota Romana and the Rota Fiorentina accepted this distinction and the Code Napoleon, followed by our law (Section 1409) have declared that in the absence of an agreement to the contrary the function of earnest in a promise to sell or to buy, whether it be unilateral or bilateral, is penitential and it is meant to reserve to the parties the right to recede from the contract. If this faculty is availed of by the party who has given earnest he forfeits it; if it is availed of by the party receiving it, such party must return twice the amount.

In case of an earnest given for a definitive sale, it seems that we must follow the opinion which holds that the penitential character does no longer hold good, and that earnest has instead a confirmatory character, exactly because it is presumed that it has not been made with the intention of receding from the contract, whilst in unilateral or bilateral promises one can easily argue the intention of the parties to reserve the right to recede from the contract before the definite conclusion of the sale.

Assignment of Debts and other Rights.

Assignment is the sale or the transfer for a price of an incorporeal thing. In its wider sense it is the sale of any incorporeal thing. In its proper and stricter sense, assignment is the transfer of debts or other rights having an autonomous existence, and of actions or claims.

When we refer to rights having an autonomous existence we mean those which are not inherent to a corporeal thing, and such are credits, i.e. rights against specified persons ("contra certam personam") which are rights to things, but are not inherent to a thing. In the wider meaning of the word, assignment means any transfer of an incorporeal thing under any title whatsoever, whether onerous or gratuitous, so that a donation of a credit would also be an assignment. In the

proper and stricter meaning, however, assignment is similar to sale, i.e. the transfer of a credit under an onerous title for a price or for any other consideration. The rules laid down by the law in Section 1551 et seq. refer exactly to this kind of assignment.

Besides the assignment of credits, rights and actions, this part of the Ordinance deals also with the assignment or sale of hereditary rights, which is subject to special rules. We shall deal with these rules in the last part of this thesis.

Assignment of Debts and of Actions.

This assignment, as we have already said, is a kind of sale because by means of this contract the creditor (assignor) transfers his credit to another (assignee) for a price. It has, moreover, as a rule, the same requisites of sale and, like sale, it takes place between assignor and assignee, whilst the debtor takes no part in the assignment.

The requisites of assignment are internal and external. We have already dealt with the internal requisites in the contract of sale. The form of assignment is solemn: in other words it must be made by means of a writing, whether public or private, under the sanction of nullity (Section 1552). With regard to credits arising from titles to order the form of assignment assumes the special form of endorsement, which is also a written form and made on the back of the title. The endorsement may be made in full, i.e. by mentioning the name of the endorsee, or in blank, i.e. without mentioning the name of the endorsee, and, in this case, it contains only the signature of the endorser. It is only in case of credits arising from titles to bearer that the form of assignment is free, i.e. the delivery of the title by hand is sufficient. In case of hereditary rights, or credits or other rights or actions which result from a notarial deed or other public deed (e.g. acknowledged by a judgement) the assignment must be made by a public deed.

Effects of Assignment.

1. Transfer of the Debt.

The assignee acquires the credit and, therefore, he may claim the entire sum or thing which forms the object of the assignment, even though the price of the assignment is less than the amount of the debt or the value of the thing due.

The assignee acquires also all accessory rights, and, in particular, the rights to the interests and other fruits which have not yet fallen due. However, the interests and fruits which have already fallen due are not included, because they form the object of a separate debt. They have ceased to be accessory and have become a principal thing, and the assignee can only acquire them if they are expressly included in the assignment. The assignee acquires besides the securities of the credit belonging to the assignor, all the actions which tend to preserve it, among which is included the "actio Pauliana" which the assignor could have exercised before the assignment. In case, therefore, that a seller who is a creditor for the price, has assigned his right, the assignment would include the action for the dissolution of the sale, granted to the seller in the event of the price not being paid, because this action is also granted to the seller in order to secure the payment of the price and is therefore accessory to the credit assigned by him. However the action for the nullity or rescission of sale is not included because we cannot call accessory to a credit that action which aims at destroying the title from which it arises and hence to destroy the credit itself together with the title. The inclusion of such an action cannot be regarded as having been meant by the parties -- nay, by assigning the credit the assignor shows that he meant to renounce to the action for nullity or rescission which would have annulled the credit (Section 1547). However, an agreement to the contrary would be quite lawful, i.e. an agreement to the effect that the assignor wanted to transfer, and the assignee wanted to acquire, all the restitutions made as a result of the act of annulment or rescission of the title in the event that the assignee were to exercise the relative actions with success.

The assignment transfers to the assignee all the rights of the assignor, but he does not acquire greater rights than those of the assignor; consequently, the debtor whose debt has been assigned may plead against the assignee all the exceptions which he could have pleaded against the assignor; and this notwithstanding the notification of the assignment, because such notification is a unilateral act of the assignor or assignee and the debtor does in no way give his consent thereto so that he may be deprived of none of his rights through its effects. In particular he may, therefore, plead the compensation which he could have pleaded against the assignor unless he has accepted the assignment purely and simply, because such acceptance would amount

to a renunciation of the right of pleading compensation (Section 1854).

It is hardly necessary to point out that the rights inherent to the person of the assignor are not included, such as e.g. the suspension of prescription established in favour of minors and interdicted persons. The assignee, however, acquires the credit in the state in which it is at the time of the assignment, so that he can always avail himself of the suspension of prescription which may have had its effect before the assignment, and after which prescription would again begin to run.

The moment when the debt is transferred. -- The credit is transferred in virtue of the contract itself from the very moment in which this comes into existence and becomes perfect, i.e. from the moment in which the consent of the parties with regard to the things which form the object of the contract is complete and the necessary formalities have been complied with.

From this moment the credit is acquired by the assignee notwithstanding that the quasi-traditio has not yet taken place nor the price paid (Section 1551). However, vis-a-vis third parties (Sections 1553 and 1555), the assignee cannot avail himself of the rights assigned to him except after the notification of the assignment of the debt to the debtor or the acceptance of the assignment on his part.

The purpose of this formality is the protection of third parties who may be interested in the debt. Such is, in the first place, the debtor himself who has an interest in knowing whether and to whom the debt has been assigned and thus know whom he will have to pay. Such are also the creditors of the assignor who, as soon as the debt is assigned, cannot any longer exercise their rights over it. And such is, finally, any other person to whom the creditor may have offered to assign the same credit.

This means of publicity which is more simple and less costly than the registration in the Public Registry, is quite perfect as far as the debtor is concerned, because the notice is served upon him, and it attains its purpose also with regard to all the other third parties who can easily be informed by the debtor whether the debt has been assigned or not. There is no reason to suppose that the debtor has any interest in concealing the assignment so as to deceive third parties.

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This formality and all the rules which derive therefrom and constitute its sanction are limited to assignment of debts and do not apply to those credits constituted by means of titles transferable by endorsement or delivery; because the endorsement, when necessary, and the possession of these titles establish the transfer of the credit which they represent "quoad omnes".

The notice must be effected by means of a judicial act and served upon the person to whom it is directed, i.e. the debtor, and it may be given either by the assignor as well as by the assignee who is the more interested party. With regard to acceptance the French and Italian Codes require that it be made by means of an authentic act and bearing a certain date in order to avoid fraud, which would otherwise be possible by anticipating the date of acceptance and therefore the moment of the transfer of the credit vis-a-vis third parties. No such condition is required by Section 1555 of our Ordinance, and the form of acceptance is free; so that in case any question arises the exact moment in which it did take place will have to be proved. It is, therefore, in the interest of the assignee that the acceptance be made in writing; that it should be dated and that the signatures be authenticated by a notary or any other person authorized to do so.

The assignee cannot avail himself of the rights assigned to him before, or in the absence of such notice or acceptance. In fact, Section 1554, differently from the French and Italian Codes, which simply enunciate this principle, provides that in default of such notice or until such notice is given:

(1) the debtor may not set up the assignment against his creditor, and if he pays the debt to him he is thereby discharged. He can also pay the debt in any other way, e.g. by means of a real offer and deposit. This rule which is expressly laid down in our law is accepted also by French and Italian Jurisprudence except in case the debtor is otherwise aware of the assignment.

(2) if the creditor, after having assigned the debt to one person assigns it for a second time to another who is in good faith, the second assignee who has notified the assignment made in his favour is preferred to the former.

(3) if the creditors of the assignor sue out a garnishee order attaching the sum due in the hands of the debtor they are preferred to the assignee even though

they have only become creditors after the assignment, provided the sequestration is notified to the debtor before notice or the acceptance of the assignment.

(4) the debtor is entitled to set off any sum which may become due to him by the assignor but the assignee may not set off the debt assigned to him against any sum owing by him to the debtor, because he cannot avail himself of the credit assigned to him. If, therefore, in the interval, there is a sequestration against the debtor in the hands of the assignee, the latter cannot, not even after the notice or acceptance of the assignment, plead compensation against the sequestrators, but he will have to pay or deposit the amount in favour of the sequestrator and compete with him, thus losing the chance of being paid with his own debt.

2. Reciprocal Obligations.

a) Delivery. The law deals with this obligation in the Chapter on Delivery in General, where it lays down (Section 1526) that the quasi-traditio of incorporeal things is effected by the use which the assignee makes of the thing with the consent of the assignor, i.e. by the exercise of the credit, e.g. by exacting the interests or intimating the debtor to pay. In case of credits arising from titles to order or to bearer, delivery is effected by the delivery of the title itself. These modes of quasi-traditio are mentioned by law in a demonstrative way, and, therefore, they do not exclude other modes, e.g. the delivery of the document when the credit results from a document.

b) Warranty. In virtue of a traditional rule, the warranty which the assignor owes to the assignee, by law and by virtue of the very nature of the contract refers only to the existence of the credit, but it does not warrant its payment or, in other words, the solvency of the debtor "Si nomen sit detractum, Celsus scribit, locupletiorem esse debitorem autem cum esse , debere praestare" (Fr. 4, Dig. De hereditate vel actione venditā). Our laws(Sections 1558, 1559) reproduces the opinion of Celsus: the warranty of the solvency of the debtor can only exist in virtue of an express agreement, whilst the warranty of the existence of the debt exists in virtue of the law; it is therefore known as warranty by right, because it is due even in defect of an expresa agreement.

I. Warranty "ex lege". -- It is obvious that this warranty is a consequence of the nature of the contract

of assignment, because the assignor cannot perform his obligation of delivering the credit assigned if the credit is inexistent. Such inexistence may assume several forms, the principal of which are:-

(i) Absolute inexistence, either because it never existed or because it had been extinguished at the time of the assignment. This would entitle the assignee to resort to the action for nullity on the ground of defect of object, rather than to the action for warranty.

(ii) If the debt is declared null or is annulled.

(iii) If, though the credit exists, it belongs to another person and not to the assignor.

(iv) If the debt exists and belongs to the creditor but it is not due by the debtor who is assigned.

(v) If the credit, before it is paid, is subjected to an "actio hypothecaria", because though hypothecary as a rule do not pursue movables, by way of exception they pursue credits which have not yet been paid.

Since assignment includes also the accessories of the debt, their inexistence gives also rise to the warranty: thus, e.g. if a credit has been assigned as capable of yielding fruits and as secured by a hypothec, whilst actually it does not yield fruits and is not secured by any hypothec.

The assignor, however, is only responsible if the debt was already inexistent at the time of the assignment (Section 1558); if it was still in existence at that time, but ceased to exist after the assignment, the assignor cannot be regarded as guilty of non-performance, unless the cause of the inexistence of the credit is an act of his, such as if he makes a second assignment and the second assignee has excluded the former one by notifying the debtor before him. This rule is similar to that of eviction.

By effect of the warranty the assignor is bound to return the price received on the ground of warranty and on the ground of "indebiti solutio". He must besides return to the assignee all the expenses incurred with regard to the assignment, including those for the notification of the assignment: he owes this on the ground of reimbursement of damages. It is commonly held that the assignor is not responsible for any other damage and especially for the payment of the excess of

the credit over the price of the assignment (e.g. if a credit for £100 is assigned at £80), both because the "indebitum" is the price of the assignment and because the price represents the real value of the credit as established by the parties themselves.

Cessation of the obligation of warranty. -- It may cease by an agreement to the contrary because the warranty is a natural element of this contract, but not an essential one: it does not affect public interest, but only that of the assignee. When the warranty is excluded we have rather an assignment of a claim than of a credit. The assignor who wants to exclude this warranty shows clearly that the existence of the credit is more or less doubtful, and the contract would be a hazardous transaction for the assignee. No special formula is required for this effect, nor is it necessary that the exclusion of the warranty be expressed: but it may be excluded by means of other expressions provided they are apt to show the intention of the parties. Thus, e.g. the cluase that the assignment is made at the risk of the assignee would have the same effect as an express exclusion of the warranty.

In any case, however, and whatever be the expression used, an agreement which excludes the warranty of the existence of the credit can never exempt the assignor from the consequences of his own acts.

II. Warranty of the solvency of the debtor.

This warranty is not a natural effect of assignment, but it is the effect of an express agreement which binds the assignor to this further warranty. Also here the expressions may be various provided they are capable of showing that the parties meant that the assignor is to warrant the solvency of the debtor. They may do so either by declaring that the debt is claimable or by means of other expressions, e.g. if the assignor warrants not only the existence of the debt but also its payment.

This warranty is not imposed by law because the solvency or otherwise of the debtor is an element which affects the determination of the price, and therefore the parties are left at liberty to regulate the matter in the way which is more convenient to them.

It is only with regard to the division of an inheritance in particular, and not to division in general, that the warranty of the solvency of the debtors exists

by right as a homage to the necessary equality between the parties to a division, which would be set aside if a claimable credit is allotted to one of the parties, whilst the debtor of one of the other parties is found to be insolvent, and the former were not bound to make good for such insolvency.

Effects of this Warranty. -- The obligations which fall upon the assignor depend in the first place on the agreement between the parties, and the law simply provides for these cases where there is no such agreement by means of the following two rules which interpret the intention of the parties:-

1. The first rule determines the extent of the warranty, and lays down (Section 1559) that the assignor is not bound beyond the amount of the price of the assignment. This rule seems to be in opposition to the notion of the warranty which, "per se", should include the entire credit; but it is based on the presumed intention of the assignor, because it cannot be presumed that he wanted to bind himself to return a sum higher than the amount received as price. However, the assignor is bound to pay the entire credit if he has promised to pay for the debtor should the latter fail to pay on a mere request of the assignee (Section 1562). By means of this further promise the assignor becomes almost a surety of the debtor, and he is therefore bound as a surety, i.e. for the entire debt, independently of the price of the assignment.

2. The second rule determines the time for which the actual solvency of the debtor was meant to be warranted.

In interpreting the intention of the parties, the law lays down that it is not enough to warrant the actual solvency of the debtor, because if it were so, the assignee would have to start proceedings immediately in order to ascertain whether the debtor is actually solvent or not. In order to avoid possible frauds or consequence of which the debtor may appear to be solvent whilst actually he is about to become insolvent, practice requires that the assignee should be given a certain time in which to start proceedings against the debtor after the assignment. On the other hand, however, the "periculum et commodum rei" and especially the risk of the future insolvency of the debtor should be at the charge of the assignee. The law, therefore, has reconciled these conflicting interests, and lays down that the time for which the assignor warrants the solvency of the debtor is of one year as from the day

of the assignment, if the debt has already fallen due and from the day on which the debt falls due if at the time of the assignment it has not yet fallen due (Section 1560 (1)).

In case, however, the credit implies the constitution of an annuity, whether perpetual or for life, the warranty extends up to ten years from the assignment, so that if the debtor become insolvent during this time the assignor will be responsible for the whole of the remaining time, but if the debtor becomes insolvent after ten years, the insolvency is then borne by the assignee, and the assignor is no longer bound because it would be too much to hold him responsible for a longer period of time or even indefinitely. With regard to a life or perpetual annuity allotted to a party to a division, the other parties are only bound for five years.

Before the assignee can turn against the assignor, he must sue the debtor, because it is only the failure of the escussion which shows that the debtor is insolvent. An exception is to be made in the case in which the assignor has promised to pay for the debtor should the latter fail to pay on a mere request to do so: if the assignee has made such a request and the debtor has failed to pay, he may sue the assignor straight away.

Cessation. This warranty ceases through the fault of the assignee, i.e. if the credit cannot be claimed because of his negligence, such as if he does not renew the hypothec which secured the debt, or if he allows the effects of a warranty of seizure or of precautionary sequestration to cease.

However, in case the assignor had bound himself to pay for the debtor, the assignee is not bound to perform any act for the preservation of the debt (Section 1562) and since he is not at fault if he omits to do any act necessary for the preservation of the credit or of its securities, he does not forfeit the warranty because in this case it is the assignor who is bound to perform such acts.

The only obligation of the assignee is that of paying the price.

Assignment "in solutum" and "pro solvendo".

Assignment "in solutum" is a complex transaction which resolves itself into two simple transactions, i.e.

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the sale of the credit for a price and the compensation of the debt of the assignor towards the assignee. Assignment "pro solvendo", on the contrary, does not effect payment but aims at procuring the payment (for the creditor) of what is due to the assignee by the assignor. It is called an assignment, but actually it is no assignment at all because it does not transfer ownership: it is neither the sale of the credit for a price but it is only an assignment ("assegno") which the debtor makes to his creditor of the credit due to him by a third party. It is a sort of mandate in order that the assignee ("assegnatorio") may keep what he exacts in payment or in account of his credit against the assignor "pro solvendo". If the assignee "pro solvendo" does not obtain payment from the debtor of his assignor he remains a creditor of the assignor just as he was before and remains entitled to demand from him the payment of his credit: this is why it is said that the solvency of the debtor who is assigned is warranted, by right, by the assignor "pro solvendo".

Assignment of Hereditary Rights.

The assignment of hereditary rights is the alienation of an inheritance made by the heir to a third party in consideration of a price. We must distinguish between the assignment of an inheritance and the assignment of claims to an inheritance or the sale or assignment of particular hereditary things. The assignment of an inheritance and that of claims to an inheritance have this in common: both have a universal object, i.e. an "universum jus". The first, however, has for its object an inheritance which belongs to the assignor and the second has for its object an inheritance which is merely claimed by him: the first is commutative and the price must be regarded, at least in the minds of the parties, as the equivalent to the inheritance; the second is hazardous, because the pretension or claim may be unfounded. So that whilst in case an inheritance is assigned he must warrant his title of heir, in case a mere claim to an inheritance is assigned, he is not bound to give any such warranty.

The difference between the assignment of an inheritance and the sale of particular hereditary things is obvious: the first has for its object the universality of the hereditary things, and the second has for its object particular hereditayy things; the first implies the warranty that the assignor is the heir, but not that any particular thing belongs to the inheritance; the second implies the warranty of peaceful enjoyment, with regard to corporeal things, and the warranty of

the existence of the credit with regard to incorporeal things.

The assignment of an inheritance must be made by means of a public deed, because an inheritance apart from the particular things of which it is made up, is "universum jus" and, therefore, an immovable, as can be argued from Section 3(7 (d), which includes among the immovables in virtue of the object to which they refer the claim to an inheritance.

Effects of the assignment of an inheritance.

These effects may be divided into three groups and they refer to:-

a) The transfer of the inheritance and the relative "commodum et periculum".

b) The obligations of the assignor and the assignee.

c) The effects relating to third parties.

(a) The object of this transfer is the universality of the things which the "decujus" leaves on his death. It includes all the property, whether assets or liabilities. Consequently, in order to effect the assignment of an inheritance it is not necessary to perform as many alienations as there are particular things in the inheritance, because the assignment of an inheritance implies also the transfer of the particular things of which it is made up.

The same thing may be said with regard to the debts because these too form part of the inheritance: it is true that the heir does not discharge himself by assigning the inheritance, because only one's rights can be assigned, and not also one's obligations, but if he is compelled to pay such debts he has the right to resort to the assignee who will have to bear the "onus hereditarium". The inheritance which forms the object of the assignment is that which the "decujus" left on his death, so that it includes and it transfers to the assignee all that which existed at the time of the opening of the succession and not merely that which exists at the time of the assignment.

This transfer is effected from the very moment in which the contract is concluded, saving with regard to third parties the necessity of registration in the public

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Registry. Consequently, any accidental increase or decrease in the universality of goods belong to the assignee and are borne by him. It is a "vexata quaestio" whether the assignment of an inheritance transfers also the "jus accrescendi": e.g. if one of two heirs transfers his rights to a third party and subsequently the share of the other heir becomes vacant so that it would give rise to the "jus accrescendi", does this right belong to the assignor or to the assignee ? Pacifici Mazzoni arguing from the rule that all the advantages of the inheritance belong to the assignee, attributes to him the "jus accrescendi"; on careful consideration, however, it will be found that this right is connected with the quality of an heir, and once the assignor remains the heir, the "jus accrescendi" should also belong to him (vide Planiol et Ripert, Vol. X, par. 358).

(b) Reciprocal obligations between assignor and assignee. The obligations of the assignor are:-

(i) the transfer of the hereditary things;
(ii) the restitution of any advantage which he may have derived from the inheritance;
(iii) the warranty that he is the heir.

(i) The assignor must transfer to the assignee all the hereditary property together with all their accessories, and this delivery must be effected in the ways established by law according to the particular objects of delivery.

(ii) If, however, before the assignment, the heir has sold some hereditary property or has exacted a hereditary credit, he must return either the price or the amount received.

The things which are still in existence form the object of the obligation of delivery, but it is obvious that those which have ceased to exist cannot be delivered If, however, the assignor has derived some profit, he is bound to return it to the assignee, because assignment transfers the inheritance in the state in which it was at the opening of the succession, and it therefore excludes only those which have been lost, destroyed or deteriorated accidentally, or even as a consequence of an act of the assignor performed before the assignment and provided he has not derived any profit. In fact, in case of an accidental loss of a thing it would have been equally borne by the assignee had he acquired it from the very beginning. In case of a voluntary

destruction or alienation, which has not procured any profit, the assignor is not bound to pay anything because he was the owner of the thing at the time, and he cannot incur any responsibility merely by exercising the rights to which he is entitled.

The assignor must also return the credits exacted by him including his debts towards the inheritance. The extinction of these debts by confusion owing to the material impossibility of effecting payment is dissolved by the cessation of such impossibility, and the assignee must be reimbursed by the assignor, saving the effects of an agreement to the contrary between the parties who are free to change, by means of an agreement, these effects of the assignment of an inheritance.

(iii) The assignor must warrant that he is the heir. If he is an heir, the inheritance which he transfers to the assignee is his, and it is indifferent what rights belong to the inheritance over the particular things, because the extent of this warranty depends on its object, which refers exactly to the quality of heir in the assignor and not to the inheritance. So that, though the first effect of this warranty is the obligation of the assignor to abstain from any molestation or eviction to the detriment of the assignee, this does not prevent the assignor, if he is the owner of some particular thing transferred to the assignee as forming part of the inheritance, from claiming back such property, because the inheritance does not cease to be so merely because one of its component parts is taken away. The responsibility of the assignor by reason of this warranty therefore arises only if the inheritance is not yet opened (properly speaking, in this case the assignment would be null through lack of object) or is opened but not in favour of the assignor. If, however, the assignment has been made by specifying the particular hereditary things the contract is double and besides the alienation of the "universum jus" it includes also that of the particular things with regard to which, therefore, the assignor must also give the warranty.

If the object of the assignment is a claim to an inheritance, the contract is hazardous and it does not imply any warranty that the assignor is the heir, and the assignor is not responsible except in case of fraud. i.e. if he is quite certain that he has no right to the inheritance.

The obligations of the assignee are: the payment of the price and the reimbursement to the assignor of

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any debts or burdens of the inheritance discharged [illegible] borne by him (Section 1562). Also those debts and burdens form part of the inheritance, and just as assignor is bound to return any advantage recovered from the inheritance, so also he has the right to be reimbursed of any expense incurred in favour of the heritance and, therefore, he is entitled to the repayment of the sums paid, whether before or after the assignment, in order to satisfy the burdens of the inheritance. Similarly if the assignor was a creditor of the inheritance, the assignee must pay the amount of the credit. By the acceptance of the inheritance the credit of the heir had been extinguished by confusion and the inheritance, therefore, had taken advantage of the extinction of the debt by which it was burdened. Consequently, the assignee is bound to pay this credit because he would have been equally bound to do so had he been the owner of the inheritance from the very beginning. All these effects hold good provided the parties have not agreed otherwise.

(c) <u>The effects of the assignment vis-a-vis third parties who may be interested in the inheritance. ... debtors and creditors of the inheritance and legatees.</u>

As to hereditary debtors, it is certain that the assignee succeeds to the assignor in all the actions which the latter had against them, and he may exercise them directly, because one of the principles of the laws in force is that every creditor may assign his credit [illegible] together with all the actions to another person, and that the assignee may sue the debtor directly.

As to the creditors of the inheritance and the legatees, it is equally certain that the heir is not discharged from the passive actions to which he was subject, simply because of the assignment, since according to the general principles of obligations, novation "mutato debitore" cannot be made without the consent of the creditor. The creditors, therefore, and the legatees may, notwithstanding the assignment, exercise against the heir the actions arising from their credits or legacies. They may also sue the assignee by means of the "actio surrogatoria", i.e. by exercising the rights of their debtor, because whilst they are the creditors of the heir the latter is a creditor of the assignee who must definitely sustain every "onus haereditarium". But they have no direct action against the assignee of the inheritance, because they are not his creditors, nor are they in any relations with him from which an obligation on his part may arise in their favour.

It follows, therefore, that the quality of the ... does not pass to the assignee, because this quality is inherent to the person on whom the inheritance has devolved and by whom it has been accepted: "semel heres semper heres". The assignment merely transfers the advantages and the "onus hereditarium".

When there are several heirs and one or some of them sells his share before the division of the inheritance the other heirs are entitled to the so-called "retratto successorio" with which we shall deal in the treatise on hereditary co-ownership.

Assignment of Litigious Rights (Retratto Anastasiano).

This assignment has never enjoyed the favour of the legislator because transactions on such rights have always been regarded as immoral in so far as they encourage law-suits and they give, to the speculators on these transactions, the chance of acquiring litigious rights at a very low price. Moreover, such assignments induce the assignee to vex the pretended debtors or those persons whom he regards as subject to the rights assigned.

Roman Law had a particular dislike for the assignment of litigious rights to powerful persons who would thus become formidable adversaries of the person against whom such rights are claimed: in fact, such assignments were prohibited (Tut. 14, Code Const. II).

Section 1419 makes a similar prohibition with regard to persons enjoying a judicial authority, to whom rights and actions which are, or may be, the object of law-suits, cannot be assigned.

Another institute introduced by Roman Law and having the same purpose of restraining the greed of those who speculate on these transactions was that promulgated by Emperor Anastasius in a constitution of the year 500, which is reported by the Code of Justinian, Const. 22, Actio Mandati. "We have warned", the Emperor said, "that there are speculators who go in search of law-suits in order to acquire them at a very low price and then turn against third persons and vex them in all possible ways", and he laid down "ut si quis datis pecuniis hujusmodi subierit cessionem usque ad ipsam tantummodo soluta rem pecuniarum et usurarium ejus actiones permettatur exercere".

The Codes modelled on Roman Law, including our own (Section 1565) have accepted this constitution of

Anastasius and they give to the debtor the right to free himself by paying to the assignee the actual price of the assignment together with the interests from the day in which it was paid. This faculty is known as Litigious Retratto. The right is said to be litigious when the existence of a credit or of any other right claimed against him or over the things possessed by him, is contested before a Court of Law. The right may also be litigious if it is not liquid and its liquidation is difficult, because in this case it is very probable, not to say certain, that it will be liquidated by means of a law-suit.

Term in which this retratto may be exercised.

The law is silent on this point, but jurists hold that it can only be exercised until the law-suit has not been definitely decided upon, because after the judgement there is either a denial of the right, and there can be no retratto for discharging oneself from an obligation which does not exist, or a confirmation of its existence, quality and quantity, and in that case the right would not be any longer litigious.

Effects of retratto. -- The effects of this retratto consist in discharging the "retraente" from the litigious right and, therefore, it puts an end to the law-suit if it has already been instituted, or it avoids it if it has not yet been instituted.

Causes of Cessation. -- Section 1566 reproduces the provision of the law of Anastasius, according to which retratto does not take place:

(a) if the assignment is made by a co-heir or a co-owner to another co-heir or co-owner. It is supposed therefore, that the litigious right, whether real or personal, belongs to several persons in common and that it is assigned by one of the co-owners to another co-owner who is preferred to the debtor or in general to the person against whom the right assigned is claimed. This preference is given in order to favour the cessation of co-ownership.

(b) if the assignment is made by a debtor to his creditor "in solutum", because such an assignment is entitled to as much favour of the law as is enjoyed by the litigious retratto (or Anastasianum), because it also extinguishes the debt existing between assignor and assignee.

(c) if the assignment is made to the possessor of the tenement subject to the litigious right: the reason given for the previous case is here applicable.

(d) if the assignment is made on a purely gratuitous title.

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EXCHANGE.

(Ord. VI of 1859, part of Ord. VII of 1868).

Exchange is that contract in virtue of which the parties transfer to one another something provided it be not money. It does not only give rise to a mere obligation of giving a thing, but it actually produces the transfer of ownership, just as any other contract which transfers ownership. Therefore, the wording of Section 1567, "bind themselves to give to one another a thing" which corresponds to the analogous definition of sale, must be taken in its technical meaning which is proper to the distinction between obligations "of doing" and "of giving" something. In case the parties intend to transfer not the ownership but some other right over the thing, the contract would not be of exchange but an innominate one "do ut des", which is however governed by the rules of exchange.

The specific difference existing between sale and exchange indicated by Section 1567 lies in this: in exchange the thing which each of the parties transfers to the other must not be money.

Nature of exchange.

In Roman Law exchange was an innominate contract: in the present system of law it is a bilateral, onerous and commutative contract, because the two things given by the parties to one another are regarded, by the parties, as equivalent. Finally, it is a contract which effects the transfer of ownership.

Exchange is subject to the same rules which govern sale; and in case the things exchanged, or one of the things exchanged, consist in a credit or other right, or in an action, the rules of assignment apply. The specific nature of exchange, however, whilst preventing certain rules of sale and assignment from being applicable subjects the contract in question to other rules proper to it which refer to its requisites, effects and causes of dissolution.

Requisites. As to the requisites, the rules of sale apply, except those which refer to the objects of the obligation of the parties, which in exchange are two things in kind. Exchange does not cease to be so, i.e. it does not degenerate into a sale, simply because the value of the thing given in exchange is indicated: this

is merely meant to determine the amount of the supplement which may be due in case the value of one of the things is higher than that of the other.

When one of the parties besides a thing in kind, gives a sum of money, if this does not exceed the value of the thing, it is regarded as a supplement to the thing given or promised in kind, and the contract is that of exchange. If, on the other hand, the sum of money exceeds the value of the thing, the thing is considered to be the supplement of the price, and the contract is that of sale. With regard to the requisites of the two objects of exchange, the rules of sale apply and, therefore, they must be possible, lawful, "in commercio" and belonging to the parties, respectively.

Section 1572 applies textually the sanction inflicted upon the sale of a "res aliena", i.e. in case one of the parties has assigned a thing which did not belong to him: "A party to an exchange who after having received the thing given to him in exchange proves that he who has given the thing to him is not the owner thereof, cannot be compelled to deliver the thing which he has promised, but only to return the thing which he has received". Hence it is argued that if he has already delivered the thing, he can demand the annulment of the contract and obtain the restitution of the thing which he has already delivered to the other party; which is exactly the effect of the nullity of the contract, in virtue of which the parties return to their former condition. It is hardly necessary to point out that the annulment of the contract can only be demanded by the party who has received the "res aliena", for whom, moreover, the exercise of this right is optional.

As to the general requisites, Section 1571 applies the general rules governing contracts which transfer ownership: if one of the things, or both of them, are immovables, whether corporeal or incorporeal, the public deed is necessary. If there are credits, a private writing is necessary, except in those cases in which the assignment must be made by means of a public deed. In all other cases the form is free.

Effects of exchange.

These effects are:-

1. The transfer of the ownership over the things exchanged and the relative "periculum et commodum rei".

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2. The reciprocal obligations of the parties, i.e. delivery and the warranty of peaceful possession and against hidden defects, and in case of credits, the warranty of the existence of the credit.

If a supplement in money has been agreed upon, th same rules which govern price apply, i.e. the party to whom such a supplement is due may exercise all the righ of the seller over the thing given by him in exchange and, in particular, the special privilege over the thi alienated under that condition. In case of a movable thing he is also entitled to the action for dissolution and the right to take back the thing given by him or t prevent its resale.

As to the warranty of peaceful possession, the rules of sale apply, as modified by Section 1573, whic lays down that in case of eviction the evicted party can choose between the reimbursement of damages and taking back the thing given after having demanded and obtained the dissolution of the contract. If the first remedy is chosen, the thing given by him will remain the property of the other party. If he wishes to take the thing back and he dissolves the exchange, the norma effects of dissolution apply. In this case not only the right of the other party is dissolved but also thos rights over the thing which he may have transferred to third parties, in conformity with the rule "soluto jure dantis solvitur et jus accipientis", saving the limitations to this maxim with regard to immovables and to leases which may have been granted by the other party. These leases hold good, notwithstanding the dissolution provided the usual conditions concur (i.e. fair conditions and normal period) together with a condition which is proper to this case, viz: good faith on the part of the tenant.

As to the expenses of the contract, it is impossib to apply the rules of sale, according to which they must be borne by the purchaser; and, therefore, they are born equally by both parties. This rule is only departed from with regard to the expenses for the liberation of an immovable from entail, hypothecs, servitudes or other burdens ("procedura degli editti"). These are borne by the party who acquires the immovable to which such a procedure applies.

Dissolution of exchange.

It is precisely here that the most important difference between sale and exchange are manifest.

Lesion, which is a cause of rescission of sale, does not apply to exchange.

Exchange was not subject to legal retratto according to a traditional and universal opinion, which is based on the special nature of this contract. In fact, in case of retratto, the retraente must return the price to the retrattario, in order to recover the tenement. But this obligation could not be applied to exchange because the third party could not return to the party to the exchange against whom the retratto is exercised, the thing given by him to the other party.

The exclusion of the remedy of rescission on the ground of lesion is a traditional rule. The Italian Code contains an express provision to this effect in the title on Exchange, and our Code is equally explicit because, when dealing with rescission on the ground of lesion in general it lays down that, with regard to majors, this cause of rescission applies only to the contracts of sale and of division. The reason which is brought forward to justify the exclusion of this remedy is that once the price is not indicated one cannot decide whether lesion has been sustained or not. The reason, however, is not very convincing, because though there is no price there is a thing which corresponds to it, and just as the value of the immovable can be established in case of a sale, so can it equally be established for two immovables in case of exchange. Under these codes which deny this remedy to the purchaser, the distinction between sale and exchange in this respect is more justified, because in exchange it cannot be said that one of the parties is a purchaser and the other is a seller; moreover, a party to an exchange does not alienate a thing for a price, but enters into a transaction in order to obtain, even at the cost of great sacrifice, the thing which he requires and is, therefore, never in the condition of a seller who sustains lesion.

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# PREFACE

*A.M.D.G.*

The encouraging response to the first volume of "Selected Criminal Cases for Students" has prompted Dr. Stephen Tonna Lowell and me to proceed with the second volume. Like the first volume, this publication is intended to provide the student of criminal law with easy access to some judgements of the Court of Criminal Appeal which may be relevant to his or her studies in both substantive and procedural law, as well as to expose the student to the realities of criminal litigation.

The format and presentation is identical to that of the first volume; the cases are arranged in chronological order, with cases bearing the same date appearing in alphabetical order. As with the first volume, Dr. Stephen Tonna Lowell is largely responsible for the index and for the head note and summary of each case.

Dr. Stephen Tonna Lowell and I hope that students will find this volume useful.

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University of Malta
Msida
15 August, 2000
*Feast of the Assumption of the B.V.M.*

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