Conveyance of Title in the Sale of Corporeal Moveables

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Rumour has it that before too many years are out a new Civil Code, apt in philosophy and language for the needs of the new Quebec, will be promulgated. The observations which follow are made in the hope that this rumour is not a lying jade. They will suggest that the new codifiers should consider whether a restatement is required of the law of sale in its application to corporeal moveables, otherwise known as "goods".

There has always been, and doubtless there will always be, a gap between the practice of the market place and the relevant legal rules and concepts. Commercial problems are functional in character and cannot be forced into a procrustean bed of self-contained legal categories lovingly created by lawyers unwilling or unable to understand the needs of the merchant and the public.[1] Sometimes, as in the case of rights in security over corporeal moveables, the gap grows so wide as to become intolerable. Then, albeit reluctantly, the lawyer discards the gown of the pathologist and, attired in the smock of the artist, tries his hand at creation. For a time the gap appears to be closed.

A highly interesting attempt to close the gap, at least partially, was made between 2nd and 25th April, 1964, by those[2] who, at The Hague, participated in the Diplomatic Conference on the unification of Law governing the International Sale of Goods. The Conference produced two conventions, one relating to a uniform law on the international sale of goods, the other relating to a uniform law on the formation of contracts for the international sale of goods.[3]

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[1] c.f. Ziegel — "Legal Problems of Wholesale Financing of Durable Goods", (1963) XLI Canadian Bar Review at p. 57.

[2] The representatives of the following 28 states — Austria, Belgium, Bulgaria, Columbia, Denmark, Federal Republic of Germany, Finland, France, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, U.S.A., Vatican City, Yugoslavia.

[3] A convenient publication in English is "Some Comparative Aspects of the Law Relating to Sale of Goods" being Supplementary Publication No. 9 (1964) of the British Institute of International and Comparative Law, hereinafter referred to as "S.P. 9, B.I. of I. and C.L.".

The differences among the representatives were many[4] but, on the whole, reason and good will triumphed. The conventions to some extent make strange reading for a lawyer trained in the Anglo-American Common law, but even stranger reading for a lawyer trained in a system derived from the Civil law. A uniform law is bound to displease, if not outrage every traditionalist.[5]

According to Professor Zweigert, Director of the celebrated Max-Planck Institute for Comparative Law at Hamburg, one of the reasons why "in many a point the authors of the draft Uniform Law on International Sales of Goods have fairly closely followed the common law" is "that in England the law of sale has at all times been regarded as a body of law designed for merchants to serve as an efficient means to handle problems arising in a context of trade and commerce."[6] Professor Zweigert also makes a point very pertinent to the aspect of the law of sale which this article seeks to discuss. He says —

> I have tried to demonstrate on another occasion[7] that the difference between the continental systems and the common law is first of all a difference in the legal approach to problems. All the legal systems with the heritage of Roman law are characterised by a tendency to develop abstract legal rules, by a desire to get hold of entire branches of the law through building up well arranged conceptual systems and finally, by a preference for logical deduction from pre-existing legal concepts. The common law, on the other hand, being sceptical of sterile generalisations, has developed in a continuous process of paying tribute to the peculiar features of individual cases thus "stumbling forward in its empirical fashion blundering into wisdom," as... Maitland has put it. Are these basic attitudes also reflected in the law of sales of both these legal systems ? In my opinion they are.[8]

These observations have a considerable bearing on one difficult problem of the law of sale upon which the participants at the Diplomatic Conference were unable to reach agreement, namely, of the transfer from seller to buyer of the former's proprietary interest in

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[4] See "Some Comparative Aspects of the Law relating to Sale of Goods", I. & C.L. Quarterly, Supplementary Publication No. 9: Honnold. "The Uniform Law for the International Sale of Goods" and "Critique" thereon by Berman both in Law and Contemporary Problems. Vol. XXX, No. 2: Nadelmann, "The Uniform Law on International Sale of Goods", and Tunc's "Reply", 74 Yale L.J. 449 and 1409, respectively.

[5] Tunc, The Uniform Law on International Sale, 74 Yale L.J. 1409, at p. 1414.

[6] Anglo-American law of sale was undoubtedly a law for merchants but in this century has developed warranties for consumer protection.

[7] "Zur Lehre von den Rechtskreisen", XXth, Century Comparative and Conflicts Law, Legal Essays in honour of Hessel E. Yntema (1961) p. 42 *et seq.*

[8] The quotations are from Zweigert, Aspects of the German Law of Sale, S.P. 9, B.I. of I. & C.L., pp. 12-15.

the goods,[9] otherwise variously described as "ownership",[10] "property in the goods",[11] and "passing of title".[12] As will be shown the Roman law of sale did not function in this context with a concept of "title".[13] The Anglo-American law does. German law still adheres to the Roman but French law with the Code Napoléon adopted a concept of title and Quebec followed suit in the Code of 1866. The apparent similarity between the French and the Anglo-American approaches may conceal a gulf between them considerable enough to make the problem of uniformity more difficult of solution than appearances suggest.

The Roman law drew a clear distinction between the contract of a sale and the conveyance which, at least so far as the seller was concerned, consummated the bargain. This distinction is of considerable importance and in this article, unless the context demonstrates otherwise, "sale" means the transfer to the buyer of the seller's proprietary interest in the goods, and "contract for a sale" means the convention preceding, or synchronous with the sale and which is the legal basis upon which the sale proceeds. Furthermore, for there to be in Roman law a synallagmatic or mutual "consensual"[14] contract for a sale the contract (not the sale) had to be "perfect", that is, the goods had to be certain and determinate and the price certain.[15] This requirement of perfection had several important consequences, namely, —

(i) unless the contract were perfect there was no contract at all, that is, the seller was under no obligation to sell;

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[9] Arts. 52 & 53 of the general convention deal only peripherally with the problem by entitling the buyer to require the seller to free the goods from a right or claim of a third person.

[10] Code Napoleon, art. 1583, and indirectly Quebec C.C., arts. 1025, 1026, 1472.

[11] English Sale of Goods Act 1893 S.S. 16 to 20.

[12] American Uniform Commercial Code 2 - 401.

[13] "Title" is preferable to "ownership", the latter being much too absolute for modern purposes.

[14] Roman law, at least during the period having direct influence on the Civil law systems, had no theory of "contract" but of "contracts", each genus having its own "figure". Apart from the "consensual" contracts of sale, hire, partnership and mandate the other important genus was the verbal stipulation, but it was an unilateral obligation, that is, a promise to sell could be made by stipulation and also a promise to buy but the two together did not make a synallagmatic contract of sale *(emptio)* and purchase *(venditio)* whereas the consensual contract was *"emptio venditio"*.

[15] Perhaps to distinguish the agreement as consensual from *permutatio* (exchange) an innominate (quasi-real) contract, see Lesage, *Roman Private Law*, p. 376 *et seq.*

(ii) the contract as a functional concept was in principle limited to the transfer of specific goods; it was not designated to deal with transactions involving generic and future goods.[16]

In brief, it applied essentially to a market transaction of immediate exchange of the goods for cash, and was not intended to cope with the multi-faceted transactions which, outwith the dealer-consumer field, are the bones and sinews of modern mercantilism. Zweigert takes the point when, writing of the German law which still in form adheres to the Roman, he states "the authors of the Code [were] under the somewhat vague idea that the average sales contract was for a specific thing such as an old picture by a Dutch painter or a specific bottle of Liebfrauenmilch Auslese".[17]

To return to the separation of the contract and the sale the consequences in Roman Law were —

(i) the requirement of an overt and public act over and above the private agreement of the parties. Ordinarily this act was of physical handing over of the goods by the seller to the buyer, *traditio longu manu*, what is now called "delivery".[18] It is true that no physical change in the custody of the goods was necessary if a documentary conveyance, the *constitutum possessorium*, were executed. This document effected *traditio brevi manu*. It is the forerunner of the public declaration of transfer of land, and perhaps of the Anglo-American chattel mortgage.

(ii) it was consistent with and emphasized the importance of the concept of possession as the badge of ownership. The seller was not obliged to be owner, or procure ownership. His undertaking was to *transfer juristic possession*, therefore, his warranty was only against eviction.[19]

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[16] The principle was clear enough. Of course there were exceptions, but as Zulueta points out the needs of "big business" in Rome were better served by *stipulatio* or *locatio conductio* (hire) *Roman Law of Sale*, pp. 13-16. Buckland, *Textbook of Roman Law*, (3rd ed.), at p. 484 (editorial footnote) states that throughout Asia Minor, over a vast period of time, sale of a *genus* was handled as something juristically distinct from an ordinary sale. Kaser, *Romisches Privatrecht* s. 41, II, 2, states bluntly, "a (pure) generic sale was unknown".

[17] S.P. 9, B.I. of I. & C.L., p. 14.

[18] A difficult concept which gave considerable trouble to the drafters of the international uniform code. It is not without significance that the Quebec C.C. on occasion uses the Roman term "tradition", arts. 1025 (French) 1478 (French and English).

[19] Contrast the position of the transferor in *permutatio*, Leage, *op. cit.*, p. 378.

In view of the changes in French law (1804) and Quebec law (1866) and of the technical language and concepts employed by both these legal systems it is important to emphasize that the seller was not under an *obligatio dandi* (à donner, to give) but merely *rem tradere*. On the other hand the buyer's obligation in respect of the "currency" he handed over in payment of the price was *obligatio dandi*, that is, to transfer ownership.

(iii) the maxim *nemo dat quod non habet* had little, if any, application. If A agreed to sell to B but, before tradition to B, agreed to sell and delivered to C, as B never had ownership C did not have to worry about title.[20]

It is now time to turn to the changes made by the French and the Quebec codifiers in the law of sale with respect to the passing of title to the goods. These changes must be seen against the Roman background because that background continued to influence both French and Quebec legal thinking and language.

Art. 1583 C.N. declares "Elle (la vente) est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé". Complementary is article 1138 "l'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met les choses à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne soit en demeure de la livrer; auquel cas la chose reste aux risques de ce dernier".

A moment's reflection should bring about the conclusion that this change was fundamental to the structure of the law of sale, at least, sufficiently so to make all the difference that there is between a "high rise" modern apartment block and a sedate Outremont villa, but the surprising thing is that some French writers tend to dismiss the change as not all that important .Thus Professor Houin says that the Code Civil only sanctions a custom based on the *constitutum possessorium*.[21] That may well be, but the essential difference is that a written conveyance, executed with some solemnity, is not only

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[20] Compare Quebec C.C., art. 1027, second paragraph.

[21] S.P. 9, B.I. of I. & C.L. at p. 23; see also the footnote to article 1353 of Planiol's *Traité Elémentaire* (trans. Louisiana State Law Institute) where he says that the only differences between the Roman and the French sale are: (i) in transfer of ownership, (ii) that the sale of a thing of another was not null as a contract.

extrinsic evidence that a proprietary transfer has taken place but also a conveyancing mechanism other than the contract itself.[22]

There are many important consequences which flow from such a change, for example,

(i) it does lead to the concept of an abstract title capable of movement in space and time, no matter where the goods are, who has them under immediate control, or when and to whom ultimate "delivery" is made.

(ii) the seller's warranty against eviction tends to develop into an obligation to transfer title, that is, the shift is from an obligation *rem tradere* to an obligation *à donner*. Planiol asserts this though the French code (and the Quebec) does not say so directly.[23] If a warranty of title is imposed on the seller, the result in English law is that the buyer is entitled to have the contract set aside although he is under no threat of eviction.[24]

(iii) it disturbs the security of the rule that *possession vaut titre*. Professor Houin thinks not and maintains that

> it has no force in the relationship between the purchaser and third parties. With regard to these, the purchaser only becomes owner on the day when he enters into possession of the thing (arts. 1141 and 2279 C.N.). If, for instance, the seller has sold a specific thing to two purchasers successively, it is he who is put in possession first who will have the better right, even though he was the second purchaser, provided at least that he is in good faith; the first will not be able to set up his own purchase against him, since he cannot rely on possession of the thing. That is one of the effects of the rule "En fait de meubles possession vaut titre".[25]

This is to put the cart before the horse, because the security of the rule is only preserved by express legislation. Even so, to assert that the consensual conveyance only applies between seller and buyer and does not affect third parties is misleading. The fact that the buyer has bought, that is, become "owner", enables or may enable him to deal significantly with third parties in commercial matters. Conversely, a seller in possession who has "sold" but remains unpaid must be secured by a privilege. The goods are no longer his and may not be immune

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[22] According to Rabel "Merchants everywhere, whether under legal necessity or not, used official registers as in London and Bordeaux, other records of brokers and very often notarial instruments. Even at fairs, notaries documented transactions on which a debt remained due" — "Statute of Frauds and Comparative Legal History", (1947) 63 L.Q.R., at p. 177.

[23] *Op. cit.*, art. 1353.

[24] *Butterworth* v. *Kingsway Motors Ltd.* [1954] 2 All E.R. 694.

[25] S.P. 9, B.I. of I. & C.L., p. 24.

to claims by third parties against the buyer-owner.[26] Finally, (although this may may not be true of French law), exceptional provisions have to be made to protect *bona fide* buyers from possessors who have no title to transfer.[27]

(iv) The remedies of the buyer against the seller and third parties are altered. A buyer who is "owner" is, for the purposes of enforcing a claim in respect of "his goods", in a somewhat different position from one who can only assert that he is the creditor of an obligation on the part of the debtor to deliver the thing to him. It is true that by a variety of expedients the difference can be ignored or eliminated but because subtle, the difference can confuse. In Quebec law much of the dispute over the effect of a promise of sale may be traced to a failure to attach sufficient weight to it.

(v) Most important of all, it blurs, or can blur, the vital distinction between the contract and the sale.

It is worth considering whether both the French and Quebec laws have blurred this distinction in such manner as to cause unnecessary difficulties and sterile disputes.

It will be recalled that for the Roman consensual contract for a sale to come into being as a synallagmatic or mutual bargain it had to be perfect. "Perfect" meant an enforceable obligation. It did not mean a completed sale. Both the French and Quebec codes retain "perfect" but use it to denote the sale.[28] In their search for what Professor Zweigert calls an "abstract legal rule" the French converted a custom[29] which the parties could take or leave into an absolute legal rule "the contract must be the sale". Thus, Houin says "the first effect of the sale[30] . . . is to transfer property in the thing to the purchaser, automatically and immediately".[31] As Planiol puts it: "the contract to give is of itself translative of ownership", but, most important is his deduction — "the modern French sale does no longer consider tradition a juridical act, as effecting the transfer of ownership, but only as a simple delivery, a material act,

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[26] See Zulueta, *op. cit.*, pp. 52 & 53.

[27] Compare articles 1487, 1488, 1489 of the Quebec C.C. with the English Sale of Goods Act, 1893, s.s. 23 to 26, Factors Act, 1889, and, in the case of motor vehicles, Hire Purchase Act, 1964, s.s. 27 to 29.

[28] Art. 1583 C.N. with arts. 1025 and 1472 Quebec C.C.

[29] Houin, S.P. 9, B.I. of I. & C.L., p. 23, where he speaks of the conveyancing clauses in contracts of sale before the promulgation of the Code Napoleon.

[30] Presumably he means the bargain.

[31] *Op. cit., loc. cit.*

not having any other effect than to transfer possession".[32] Thus even a contract to deliver is, so far as the legal effects of the delivery is concerned, consummated by the contract.[33]

The consequences of creating such an apparently absolute rule can lead at best to ludicrous arguments, at worst to misunderstandings. For example, Planiol asserts "It would be an improper act of sale, or a poorly drafted one in which the parties stated: 'I promise to sell . . . I promise to buy' instead of "I sell . . . I buy".[34] In a sense he is correct, if speaking of a formal conveyance, in which the narrative or inductive clause might commence, "I, A having promised or agreed to sell", then flow into the dispositive clause "and I hereby sell and convey", but, as Mignault, equally correctly, points out, given the rule that the contract is the sale "lorsque les parties disent : je promets vendre, je promets d'acheter, c'est tout comme si elles avaient dit: je vends, j'achète".[36] Again the rigidity of the rule makes it difficult to interpret such a bleak statement as "la promesse de vente vaut vente, lorsqu'il y a consentement réciproque des deux parties sur la chose et sur le prix."[36] It may be that this refers to an option to buy, agreed to by the parties so that upon the buyer exercising his option there is a complete sale, with the usual consequences, but Mignault records a dispute upon the facts that A promises to sell to B who promises to buy from A, the "sale" to take effect in one year, and that some had argued that upon the exchange of promises the sale was immediately effected. He adds "Je crois qu'il ne s'agit d'interpréter la volonté des parties, et qu'aucune solution absolue ne peut être admise *a priori.*"[37]

A more concrete and recent illustration of the clumsiness of the rule is the Quebec case of *Inns* v. *Gabriel Lucas Ltd.*[38]

There, Mrs. M. and Lucas agreed that the latter should, from precious stones belonging to or to be acquired by him, manufacture a brooch and earrings for her at a price of $8,250. Subsequently, Lucas was able to obtain stones superior in quality to those upon which he had been working and it was agreed between the parties that he should use the better stones. No new price appears to have been fixed at this time. On completion of the work Lucas telephoned

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[32] *Op. cit.*, art. 1148: note that the seller's obligation is changed from *rem tradere* to *rem dare. (à donner).*

[33] Art. 1138 C.N.

[34] *Op. cit.*, art. 1400.

[35] Droit Civil, vol. 7, p. 32.

[36] Art. 1589 C.N.

[37] *Op. cit., loc. cit.*

[38] [1963] B.R. 500.

Mrs. M., who then went to his office, and expressed herself as satisfied with the ornaments. The "price" came to $9,820, plus $589 sales tax. Mrs. M. gave Lucas a cheque for $1,000, which he accepted, told him that her husband would pay him the difference the following day, and left with the ornaments. Mrs. M's cheque was dishonoured, her husband refused to pay the difference and Mrs. M. went into bankruptcy. Her trustee in bankruptcy claimed the ornaments as being her property. Lucas claimed them as his.

Rivard, J. classified the agreement as "un contrat d'entreprise pour une part et de la vente d'une chose future qui n'est encore ni déterminée, ni acceptée" to which the rules of the contract of sale concerning the passing of the property by consent did not apply. Ownership in the ornaments passed only by delivery and as that delivery had been obtained by fraud it was a nullity. Bissonnette, J. concurred. Taschereau, J. was of much the same opinion. He held that articles 1025, 1026 and 1472 did not apply to mixed contract of work and sale and that by inference from article 1684 [39] delivery was necessary to pass the property.

Tremblay, C.J. (with whom Owen, J. concurred) disagreed. He examined the history of articles 1025 and 1026, reached the conclusion that "la jurisprudence et la doctrine françaises n'ont donc aucune application" and added — "Revenant à l'article 1026 C.C., je crois que la livraison n'est pas nécessaire pour opérer le transfert de propriété. Il suffit que la chose vendue soit devenue certaine et déterminée et que l'acheteur en ait été légalement notifié." He was of the opinion, therefore, that the property in the ornaments passed by consent to Mrs. M. before delivery took place and was unaffected by her misrepresentations.

Whether the codifiers had the clear intention which Tremblay, C.J. attributes to them is debatable; what is not is that there is no necessary reason why the rule of consensual conveyance cannot apply when the agreement is of a kind which contemplates the eventual transfer of ownership in a corporeal moveable yet to come into being in exchange for payment of money. On the other hand, just because consensual conveyance is possible, it does not follow that there can be no "contract" of "sale" unless the conveyance is effected consensually and, with the exception of the classical conditional sale, contemporaneously with the making of the contract.

The irony of the reasoning in *Inns* v. *Gabriel Lucas*, *supra* is that just because the Roman law requirements for a *perfect* consensual contract for a sale were, in terms of there being a constract, so rigid,

[39] Requiring delivery to pass the property in the thing.

the very same dispute raged among the jurists. On the facts of such a case it was difficult in Roman law to decide whether in law the agreement was for a sale or of letting and hiring. The Sabinians classified it as a sale, the Proculians as a contract for work *(locatio rei)* and Cassius as mixed, but, contrary to the reasoning of the majority in the *Inns* case, a sale of the materials and a hire to the manufacturer's services.[40] The explanation of the reasoning of the majority of the Quebec court seems to have been this, that, having decided to find for Lucas, they were fearful lest 1026 C.C. compelled them to reach the same result as the minority.[41] If the rule of arts. 1025 and 1472 C.C. were that the contract can be the sale if such be the intention of the parties, express or implied, and that transfer of title may be either consensual or by delivery, the courts would be free to exercise a little responsibility. It is a healthy legal system which has sufficient confidence in its judges to permit within the frame-work of principle every action to be an action on the case.

In a curiously involuted way the Quebec controversy over promise of sale has its origins in this belief that the contract must be the sale.

There are three aspects of this problem —

(i) What is a promise of sale ?

(ii) Depending upon the answer to (i) — what is the remedy of the promisee should the promisor fail to perform ?

(iii) If the promisor is willing to perform how must he transfer title to the buyer ?

The relevant articles of the Quebec code are:

1025 — A contract for the alienation of a thing certain and determinate makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made...

1026 — If the thing to be delivered be uncertain or indeterminate, the creditor does not become the owner of it until it is made certain and determinate, and he has been legally notified that it is so.

1472 — Sale is a contract by which one party *gives* a thing to the other for a price in money which the latter obliges himself to pay for it... It is perfected by the consent alone of the parties, although the thing sold be not then delivered...

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[40] See *Gai Institutiones* 3.

[41] For wholly different reasons there has been the same fruitless controversy in English law. When the Statute of Frauds applied to a contract of sale, to escape the consequences of the Statute the plaintiff would argue and the court might hold that the action was not for a price in sale, but for the cost of work and labour done. No legal principle is involved, only ingenuity.

1476 — A simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favour according to the terms of the promise, and, in default of so doing, that the judgment shall be equivalent to such deed and have all its legal effects; or he may recover damages according to the rules contained in the title *Of Obligations.*

1477 — If a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it; he who has given the earnest, by forfeiting it, and he who received it, by returning double the amount.

1478 — A promise of sale with tradition and actual possession is equivalent to sale.

The interpretation of the expression "promise of sale" has given rise to much recent literature.[42]

The immediate dispute is over the commencing phrase of article 1476 —

> "A simple promise of sale is not equivalent to a sale" — and the outlines of the controversy can be seen in this statement upon articles 1476 and 1478 by Archibald C.J. — "It is perfectly plain that both of these articles of our Code refer to a bilateral promise of sale, where the vendor has promised to buy, because nobody pretends that a sale takes place before the acceptance of the purchaser; so that these articles are of very little assistance, except to show that in one respect, our Code hesitates to go the length of the Code Napoleon in the application of the doctrine that a contract of sale is perfect by the mere consent of the parties."[43]

Taken at its face value this would seem to mean that whenever the contract is not expressed as "I here and now sell . . . and I here and now buy" but as "I promise to sell if and when you accept . . . and I now accept and hereby promise to buy", (although possibly in the Roman sense the contract may be perfect or nigh thereunto), there can be no sale unless and until either a formal conveyance has been executed by the seller or he has "delivered" the goods to the buyer. Generalised out this would mean that whenever the bargain is not of present sale and purchase, articles 1025 and 1472 do not apply and the pre-1866 requirement of tradition still applies.

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[42] A. M. Honoré: La promesse de vente dans les droits romains et québecois (1961) 11 Thémis, No. 40, p. 199; G. E. LeDain: The Real Estate Broker (1958) 4 McGill L.J. 219 at p. 235-242; D. Lefebvre L.: La vente en droit québecois est-elle un contrat consensuel (1962) 22 R. du B. 181; J. Pineau: Le problème de la promesse de vente (1965) 67 R. du N. 387.

[43] *Clendenning* v. *Cox* (1915) 49 C.S. (Que.) 71 at p. 75; the reference is to article 1589 of the Code Napoleon which declares — "Promise of sale is equivalent to sale when there is a reciprocal consent of the two parties upon the thing and upon the price."

On the other hand it has been argued (as, in the case of the analogous article 1589 C.N., has been argued by Planiol) that promise of sale is, in this context, confined to the circumstances where A offers to sell to B and declares that his offer is irrevocable for a period of ten days. On the fifth day A changes his mind and informs B that his offer is withdrawn. On the ninth day B purports to accept the offer. A refuses to perform — quid iuris ?

The preliminary difficulty is whether and if so why, A is bound by his promise to keep open his offer, because Quebec law, or so it is said, whilst it accepts the doctrine of contract rejects the doctrine of the unilateral juristic act.

Amos and Walton usefully describe an obligation as

> a legal bond between two persons in virtue of which one of them is bound, in favour of the other, to do a certain act or to abstain from doing an act... The person who is bound to make the performance — including under that term an abstention — is called the debtor, and the person who has the right to compel the performance is called the creditor... It is of the essence of an obligation in this sense that the rights arising under it should not only be recognized by the law, but also be enforced by it.[44]

A voluntary obligation is one created by the will of the debtor and with his consent. This concept of voluntary obligation is common to the legal systems of the West, but the circumstances which must occur in order to create or give rise to such an obligation vary among these systems. The variations depend to some extent on the theory or theories which a particular system has or is said to have adopted. The principal dispute has been upon the question whether for the creation of a voluntary obligation, as above described, the act of the debtor alone is enough or whether for all obligations the participation of both creditor and debtor is required. If the latter theory applies then, in principle, there can be no obligation without a minimum agreement between the parties. Cutting across the dispute is the word "contract" with its several meanings.

"Contract" comes from the Latin noun "contractus". Both "contractus" and the verb "contrahere" were terms of art in Roman law but it is by no means certain that throughout the development of that law they were coincident terms. The latter was wide enough to include lawful conduct resulting in the liability of an obligation, that is, which was not only unilateral in its enforceability but also unilateral in its creation. The former was or became restricted to a civilly actionable agreement. Such an agreement involved in principle a concurrence of two wills as to the future conduct of one or both of the parties, and was a contract although the obligation it

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[44] *Introduction to French Law* (2nd ed.) 138.

created might be unilateral as in the *stipulatio* or bilateral (synallagmatic) as in sale. In Roman law, the *causa contrahendi* was *form* (which in the case of some contracts meant "consent"); therefore, in many contracts provided the requirements of *form* were complied with it was not strictly necessary that there should have been true psychological consent.[45]

English law speaks of contract under seal and a simple contract. The former refers to an obligation arising out of and created by a written instrument called a deed. To such an obligation agreement is not necessary, and it has been held that the grantor may by his deed become debtor in an obligation to a creditor who is unaware of its existence.[46] The latter involves agreement to this extent at least that for there to be an obligation enforceable against the debtor consideration must have moved from the creditor.[47] In either case consent is not the formal *causa obligandi* or *contrahendi*. It is true that in the cases of France and Quebec there is the small matter of "cause" but, for present purposes, what has been judicially described as "a nightmare of confusion" may be ignored. In these systems the doctrine of consent *omne verbum in ore fideli cadit in debitum* has been the seed bed of a very protracted controversy whether an obligation can be created by an unilateral juristic act or there must be *conventio*. In this controversy "contract" has been used in the narrower sense as meaning agreement, or, at least, participation by both debtor and creditor in the creating of the obligation.

Castel attributes the doctrine of the unilateral juristic act to Siegel, an Austrian jurist.[48] In its modern form this may be accurate enough, but the problem itself and the discussions about it are much older. Grotius gave the problem a great deal of attention and concluded that a *promissio* to become *perfecta* and be enforceable required to be met by acceptance.[49] On the other hand, in 1681 the Scottish jurist, Stair, was maintaining that a promise which is

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[45] Buckland, *Text Book of Roman Law* (3rd ed.) ch. X, CXLIV, CXLV. Kaser, *Romisches Privatrecht* (Dannenbring's translation) 5 II & 38 I.

[46] *Fletcher* (1844) 4 Hare, 67; *Xenos* v. *Wickham* (1867) L.R. 2, H.L. 296: *Nass* v. *Westminster Bank* [1940] A.C. 366.

[47] "When, in the sixteenth century, the common lawyers evolved a general law of contract, they based it unhesitatingly upon the idea of bargain." Cheshire & Fifoot, *Law of Contract* (6th ed.) p. 60.

Per DeVilliers, A.J.A. in *Conradie* v. *Roussow*, 1919 A.D. 279 (South Africa). There is also ignored, although probably much more important than *cause*, the impact upon the *causa* of requirements as to writing, or more generally, restrictions on testimony.

[48] *The Civil Law System of the Province of Quebec*, 249.

[49] *De Jure Belli ac Pacis* 2.11.14 - 16.

simple and pure, and has not implied in it as a condition, the acceptance of another, is binding unless the promise rejects and renounces the right thereby conferred on him.[50] Whatever the merits of the differing views, there seems little disagreement that whereas the German Civil Code by its concept of Rechtschaft probably accepts the doctrine of the unilateral juristic act, French and Quebec laws do not.[51]

The essence of a contract of sale is agreement, or, the mutual assent of the parties to an alleged bargain consisting of reciprocal promises, that is, each promise is the counterpart of the other. The facts of life notwithstanding, lawyers are accustomed to analyse the contract (oral, written or silent) in the context of the categories of offer and acceptance. Assuming the parties speak as lawyers would wish them to, a contract of sale complying literally with article 1472 might be as follows —

A — I hereby offer to sell to you, B, this certain and determinate motor car, being a 1960 Rambler Station Wagon, engine no. 123456, for price in money of $3,000 dollars, payment in exchange for delivery, delivery to be here and now if you accept this offer of present sale.

B — I hereby accept the offer which you, A, have made to me in respect of this Rambler Station Wagon upon the terms as to price, payment thereof and delivery of the motor car as stated by you.

The parties are face to face, and, all being well, upon B's acceptance he becomes (in manner later to be commented on) the owner of the motor car and upon payment of the price he takes delivery. Life, of course, is not that simple. It may be that, subject to minor but necessary textual amendment, A writes out his offer on a sheet of notepaper and leaves it at B's office. Until B accepts the offer there can be no contract of sale, but can A withdraw or revoke the offer ? The answer is "yes". Suppose, however, A adds to his offer — "I promise to keep this offer open for ten days expiring at noon on the 25th day of December", can A withdraw or revoke the offer during the stipulated time ? In Scots law the answer is "no",[52] but that system adheres to the doctrine of the unilateral juristic act, whereas French and Quebec laws do not, or so it is said. How does Quebec law get over the difficulty ?

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[50] Institutions I.10.4: specialties of writing or exclusions of testimony prevent Scots law from being quite as uncomplicated as this.

[51] Castel, *op. cit., loc. cit.*: Amos and Walton 141.

[52] *A. & G. Paterson* v. *Highland Rly. Co.* 1927 S.C. (H.L.) 32 per Viscount Dunedin at p. 38: proof may be difficult.

Castel says, "The person to whom the principal offer is made has no reason not to accept the collateral offer [53] that is to his advantage. His acceptance is therefore presumed and a contract is formed if it has a lawful cause."[54] If it be the policy of the legal system to enable B to act in reliance upon A's undertaking to keep the offer open this fiction may be an unnecessary complication, but like all fictions, useful enough, provided it does not mislead. But, as Castel points out, it leads to a subtle argument if A before the expiry of the ten days tells B (who till then has not accepted the offer to sell) that he does not intend to consider himself bound. Clearly A is in breach of his obligation to keep the offer open but he is not the debtor of an obligation to sell, therefore, the logicians argue, B can only get damages for breach of the promise to keep the offer open, because he cannot accept an offer which no longer exists. One reply to this, as Castel points out, is that the effect of the *"contract"* not to withdraw the offer is to "freeze" the offer for the period of time "agreed upon" so that the offer does exist at the time of acceptance by B.

Such conceptual gymnastics are, of course, time wasting and fruitless. For example, were it the theory of the general law (whatever the practice) that the primary remedy was damages and specific performance a matter for the discretion of the court "on the case", this controversy would never have arisen. It so happens that in the legal systems based on the Roman law specific performance is regarded as *the* remedy of the buyer whereas in English law *the* remedy is damages. But, as Zweigert points out, the practical results, at least so far as German law is concerned, are much the same, "the [German] buyer, having instituted proceedings for specific performance, will, as a rule, switch over to a claim for damages once it has become apparent that the seller is not really willing or not able to deliver."[55] The reason for the English rule may well be that as a law of sale primarily designed for the transactions of merchants dealing with each other (and not a retailer-consumer law) it is a consequence of the rule fundamental to remedies in sale that the party not in breach must take all reasonable steps to mitigate his loss, that is, if buyer, he must go out and buy in. Even so, there is something incongruous in legal reasoning which refuses to regard as binding *per se* an unqualified promise to sell, but is prepared to

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[53] That is, the promise to keep the offer to sell open.

[54] *Op. cit.*, p. 260.

[55] S.P. 9, B.I. of I. & C.L., p. 5: the difference between the Civil and Anglo-American systems is conceptually significant enough, or, so the lawyers concerned believed, therefore agreement on this point was not reached in the matter of the Uniform Law on International Sale of Goods.

enforce as a contract a promise not to withdraw a "conditional" promise to sell. This incongruity may be the cause of the lack of agreement as to the nature of the "promise" to which articles 1476, 1477 and 1478 refer. An aggravating factor is that the phrase "promise of sale" and "sale" are by no means unequivocal terms.[56]

The unfortunate feature of the first chapter of the fifth title of the Civil Code is the lack of adequate description of the facts and legal concepts involved when, in real life, events take place calculated to result in a sale by or from one person of a thing to another. For example, article 1472 says "Sale is a contract by which one party gives a thing to the other for a price in money....." Linguistically there is a confusion between "the sale" and the "contract", which tends to give the impression that unless the "contract" and the "sale" are synchronous, either there cannot be a contract for a sale whatever, or if there can be such a contract, it cannot subsequently consensually or notionally effect the "sale" or conveyance. Finally, the "sale" of article 1472 is itself the product of a promise of sale because what happened between seller A and buyer B was an offer by the former accepted by the latter.[57] That offer had to be more than the expression of a willingness to chaffer, or invitation to enter into negotiations, or mere statement of invitation, if an unqualified acceptance so operated upon it that offer and acceptance together made a contract for a sale. The offer had to be in substance a promise by the offeror that if the offeree accepted his proposal, he, the offeror was bound to perform the undertaking contained in the proposal.

Upon this analysis the several species of "promise of sale" relevant to this discussion are —

(i) A promise to sell to B upon condition that B accepts the promise.

(ii) As in (i) but A also promises to keep open his conditional promise to sell for a stated period of time :

(iii) A unconditionally promises to sell to B.

(iv) As in (i) but the thing is not certain and determinate (including non existence) in the sense of article 1025.

The problem is — to which of these promises do or can the relevant articles in the first chapter of the fifth title apply ?

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[56] See Mignault, *op. cit.*, 23 to 32: an added factor may be that literal translations from French to English and conversely are unsatisfactory: for example, it is doubtful whether "promise of sale" is good English or even an adequate translation of "promesse de vente".

[57] The traditional approach is used, but, of course, it may have been the other way round and, in any event much more complex on the facts than here supposed.

Clearly article 1472 applies to (i) if B accepts. It also applies to (ii) if A does not seek to withdraw and B accepts. Even if A does in (ii) seek to withdraw within the time stated it should apply if, by his promise to keep open his conditional promise to sell, A's offer is frozen. It should apply to (iii) if B under the general law accepts the promise, for then there is a contract. It cannot apply to (iv) even if there is acceptance by B, if it requires a "sale" or conveyance which is synchronous with the contract, although article 1026 may apply.

It can be argued that article 1472 does not apply to (ii) because A can only be liable for breach of his obligation to keep his conditional promise to sell open, that is, his liability is restricted to damages. It can be argued that it cannot apply to (iii) because what is called for by the unconditional promise is not acceptance or a promise to buy but tender or payment of the price, in which event A is bound to convey not because of a contract in terms of article 1472 but because of performance by B of the act called for in the promise.

If article 1472 does not apply to (ii) or (iii), or both, it follows that there can be no consensual or notional conveyance by A of the thing he has promised to sell. The same holds true in respect of (iv) if article 1026 is construed as merely restrictive or expository of article 1025 and not as capable of, in due course, giving effect to a consensual conveyance. The result of all this would be that the only contract for a sale upon which consensual or notional conveyance can operate in Quebec law is a contract for a present sale. In all other cases, whether of promise or contract, or howsoever called, the conveyance can only take place by tradition or transfer of actual possession.

Is this so, or, because of the existence of articles 1026, 1476, 1477 and 1478, to what extent is it so ?

The answer to this question would be easy if there were little doubt as to the interpretation to be placed upon these articles, but no satisfactory interpretation is possible if each article is taken by itself. The attempt is, however, worth making if only the better to establish the point that the sooner the law of sale is restated the better for all concerned.

Article 1476 says — "a simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed in his favour . . ." The obvious comment is that no promise of sale can be equivalent to a sale because at best a promise can be no more than an obligation and a sale at least involves a conveyance. This article is not, therefore, intended to apply to a promise

of sale which as above explained forms part of a contract of present sale in terms of article 1472. It is arguable, therefore, that it is applicable to a promise of sale thereby meaning a promise to keep open a conditional promise of sale. This is possible, but preternaturally clumsy, in that at the very least it raises all the wearisome arguments whether the promisee is entitled only to damages and not specific performance. Many of these difficulties would vanish if the fiction of the "accepted" promise to keep an offer open were abandoned and the plain rule adopted that where it is satisfactorily proved that the offeror has stated that his offer will remain open for a period of time by the general law of sale such offer is irrevocable during that time, so that if the offeree accepts, there is a contract for a sale to which article 1472 can apply. It is true that this violates the prohibition of the doctrine of the unilateral juristic act, but commercial needs cannot wait upon the resolution by jurists of their metaphysical problems. If, in the sphere of sale, the Americans can ignore the more formidable doctrine of consideration,[58] in Quebec the law of voluntary obligations will not collapse merely because of such a small departure from orthodoxy.

Assuming article 1476 does not apply to a promise to keep open a conditional promise to sell, it may nonetheless be applicable to an unconditional[59] promise to sell. Again, such a promise cannot of itself be a sale for reasons already stated, and the further reason that the promisee cannot have a sale, which involves payment by him of a price, thrust upon him. The difficulties of the relationship between promisor and promisee are largely imaginary. Assuming the rejection of the doctrine of the unilateral juristic act, one device is to classify such a promise as an offer requiring acceptance from the promisee if he is to be permitted to enforce it. At all events, whatever the device used once the promisee has taken those steps necessary to make the promise binding on the promisor, for example, by formal acceptance or tender or payment of the price, there is an obligatory relationship between the parties upon which a sale, in terms of article 1472, can proceed.

Does article 1476 apply to an agreement for the sale and purchase of a thing which is not certain and determinate at the time when the agreement is made ? This seems to have been the opinion of Archibald C.J.[60] because article 1472 does not in terms apply to such

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[58] Uniform Commercial Code s. 2-205.

[59] That is, the promisor is not, as in an offer, calling for *consensus ad idem* by way of acceptance.

[60] *Clendenning* v. *Cox* (1915) 49 C.S. (Que.) 71 at p. 75.

an agreement. This construction leads to several absurdities, namely : (1) it refuses to concede that such an agreement can be classified as a contract for sale, whereas, (2) there is no good reason why the "sale" or conveyance of article 1472 should not take effect once the thing has become certain and determinate and the contract for a sale has fastened upon it, and (3) article 1026 seems to give to such an agreement the status of a contract for the alienation of a thing for a price. Of course, article 1476 does make sense if restricted to land; there the transfer of the proprietary right requires a formal conveyance, but the Code should have clearly stated conveyancing provisions distinguishing between corporeal moveables and land.

Article 1477 is also bewildering. It says — "If a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it: he who has given the earnest by forfeiting it, and he who received it by returning double the amount."

Earnest can perform two functions, as evidence that a contract has been made [61] or as liquidated damages for failure to perform. Here it seems to be performing the latter function. It is arguable that it cannot apply to the contract of article 1472 for there the "sale" or conveyance has taken place and the contract having been executed there can be no recession from it. On the other hand it speaks of a contract, therefore, it is capable of applying to the promise to keep open a conditional promise to sell which has not been accepted or an agreement for the sale of a thing not yet certain or determinate which has not yet reached the point that a sale or conveyance has taken place. In the former case there is no reason why the promisor or the promisee should give earnest in terms of damages (as distinct from evidence), but in the latter, as much may happen between the time of the making of the agreement and the thing becoming certain and determinate, earnest by either party can serve the function both of potential damages and of evidence.

Article 1478 says — "A promise of sale with tradition and actual possession is equivalent to sale". Archibald C.J., in the case already referred to, was of the opinion that this article, along with article 1476, applied to a contract for a sale where the thing was not certain and determinate. Leaving aside article 1026 this is tenable, but article 1478 is capable of the wider generalisation that whenever the requirements of article 1472 are not fulfilled any promise of sale, whether part of a contract or otherwise, cannot effect a consensual "sale" or conveyance. This may be better than a rigid

[61] As in article 1235 (4) but there it is arguable that the action contemplated is against the buyer for payment of the price.

rule that all "sale" must be consensual and delivery never anything more than a transfer of possession.[62]

The truth probably is that there can be no satisfactory interpretation of articles 1026, 1476, 1477 and 1478 because, as already stated, there is lacking in the Code a coherent statement and analysis of the facts and concepts which in real life are involved in events which culminate in the transfer from and by one person to another of the title or right of property in a thing. Much of the confusion which surrounds the relevant articles of the Code stems from the fact that the codifiers failed : (i) sufficiently to distinguish (a) between a contract for a sale and the sale or conveyance itself, and (b) a present sale and a future sale; (ii) to appreciate that when they introduced into Quebec law the concept of conceptual or notional sale (that is, conveyance) there was no need either to limit the term "sale" to a conveyance which was consensual only or to restrict consensual "sale" to a contract for a present sale; and (iii) to state clearly the circumstances in which article 1026 was to apply.

In this day and age, whatever may be their proper construction, the several articles of the present Code are far too exiguous and scanty for the needs of the continental entrepôt which is Montreal. Concepts and rules adequate to a rural cash sale and static economy may be a nuisance in the affluent and bewildering mobile consumer society which now engulfs us.

The new codifiers should, indeed must, deal specifically with many and difficult matters as, for example:

(i) Formation of the contract for a sale including (if so decided) a forthright declaration (whatever be the ground principle of voluntary obligation) that where an offer states that it is firm or irrevocable that the offeror is not free to revoke : there is no need to resort to any fiction;

(ii) The applicability of a doctrine of *culpa in contrahendo*, that is, that entering into contractual negotiations (even if no contract ensues) requires the entrant to take due care with respect to the truthfulness or accuracy of what he says or does and the consequences of the "reliance expectations thereby created";

(iii) The clear distinction between the contract for a sale and the conveyance;

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[62] Planiol, *op. cit.*, art. 1148: this is theory, practice may be otherwise; see Houin, S.P. 9, B.I. of I. & C.L., p. 24.

(iv) The circumstances which must be satisfied before a consensual [63] conveyance can take place, distinguishing between a conveyance which is synchronous with the making of the contract and that which is subsequent in time;

(v) The effect upon third parties and the rule that *possession vaut titre;*

(vi) The transfer of risks;

(vii) Whether there should be separate rules for a retailer — consumer transaction; and

(viii) The desirability of wholly separate rules where land is involved.

This list could be continued for long enough. The new codifiers will have the benefit of the labours of the 1964 Diplomatic Conference. Upon the limited code there prepared, with the aid of the literature thereon,[64] and the results of thoroughgoing field research, they can build a law of sale worthy to serve as a model for the Atlantic Community and beyond. What they must avoid is ancestor worship. Lawyers tend to venerate ideas whose corpses other men have long since buried. Montreal cannot afford such piety.

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[63] Assuming that the codifiers do not decide to return to the pre-1866 law, but that is another matter.

[64] For example, "Some Comparative Aspects of the Law relating to Sale of Goods", I. & C.L. Quarterly, Supplementary Publication No. 9: Honnold, "The Uniform Law for the International Sale of Goods and Critique" thereon by Berman both in Law and Contemporary Problems, Vol. XXX, No. 2: Nadelmann, "The Uniform Law on International Sale of Goods", and Tunc's Reply, 74 Yale L.J. 449 and 1409.