

## SALIENT FEATURES OF THE CHILEAN LAW OF SALE.

The subject of sale in Chilean law is treated principally in the Civil Code, although the Commercial Code should be consulted. Chile, like all the Latin-American states, has a *codified* jurisprudence. And the excellence of the various Chilean codes makes them rank with the best corresponding codes of Continental Europe.

The Chilean Civil Code, which went into effect January 1, 1857, is one of the earliest South American codes.<sup>1</sup> In most respects it is the best of all Spanish-American Codes. The Chilean Civil Code is famous as chiefly the work of the renowned Chilean jurist Bello.<sup>2</sup>

The model of the Chilean Civil Code is the French Civil Code or Code Napoleon, the influence of which since its promulgation has gone over all the world.<sup>3</sup> But Bello was no slavish imitator; his work is highly original and creative. Because of its excellence the Chilean Code has obtained in Spanish America a large and merited influence. Colombia and Ecuador have adopted it almost textually; in the Civil Code of Argentina, the work of the great jurist Sarsfield, there are at least 170 articles inspired by the Chilean Code compiled about twenty years earlier.<sup>4</sup> The Chilean Commercial Code<sup>5</sup> went into effect January 1, 1867.<sup>6</sup>

<sup>1</sup> See Sherman, *Roman Law in the Modern World*, Vol. I, Sec. 308.

<sup>2</sup> Andres Bello, originally a Venezuelan, removed from Caracas to Chile, where, after 1829, he obtained high honors and office, including rectorship of the University and membership in the Senate of Chile. He gave many years of his life to elaborating a civil code for Chile. Although the codification commission of 1852 embraced with Bello the distinguished jurists Valenzuela, Ocampo (compiler of the Chilean Commercial Code), Tocornal, Barriaga, Irarrazaval, Reyes, together with President Montt of the Chilean Republic, yet Bello was the mainspring and principal member.

<sup>3</sup> See Sherman, *id.*, Vol. I, Secs. 258, 308.

<sup>4</sup> The present Argentine Civil Code went into effect January 1, 1871.

<sup>5</sup> In Continental-European and Latin-American law the boundary between the Civil and Commercial Codes is as follows: The *Civil Code* refers to "that part of the private law of a country which is applied to the non-commercial relations between individuals," while the *Commercial Code* or *Code of Commerce* "regulates commercial transactions as such, the laws of business, bankruptcy." See Sherman, *id.*, Vol. II, Secs. 256-257.

<sup>6</sup> It is the work of Gabriel Ocampo, one of the Civil Code codification commission, and is a fine code, very clearly and carefully drawn.

Sale is thus defined in Chilean law: "Purchase and sale is a contract whereby one person becomes obligated to deliver something, and the other pay money for it. The first is called the seller and the second the buyer. The sum of money which the buyer gives for the thing bought, is called the price."<sup>7</sup> This lucid definition admittedly connotes a Roman law origin.<sup>8</sup>

Chilean law, like the Spanish and Japanese, reiterates the Roman law rule that the sale of something not belonging to the seller is *valid*.<sup>9</sup> On this point the law of France and Italy is quite different,—the law of these countries holds such a sale to be voidable.<sup>10</sup>

But is the sale of something not in existence, but *in futuro*, valid in Chilean law? The answer is ordinarily in the affirmative.<sup>11</sup> Chilean law permits conditional as well as unconditional sales.<sup>12</sup>

Earnest, or "the giving of something to guarantee the completion or performance of the contract" of sale, is allowable.<sup>13</sup> And Chilean law, in harmony with French, Spanish, and Italian law,<sup>14</sup> permits rescission of a sale by returning the earnest:<sup>15</sup> this rule, which is of Roman law origin, is quite different from the Anglo-American rule regarding earnest as part payment of the purchase price and not allowing return of the earnest to operate as a rescission of the sale.

Chilean law holds that, just as soon as the price is settled, the sale is perfected.<sup>16</sup> But if the thing is sold on trial, by sample, weight, measure, the sale is not perfected until the thing has been found to be satisfactory by the buyer, or has been weighed or measured.<sup>17</sup>

<sup>7</sup> *Civil Code*, Art. 1793.

<sup>8</sup> See Sherman, *id.*, Vol. II, Sec. 780, for the definition of the sale in Roman law.

<sup>9</sup> *Civil Code*, 1815.

<sup>10</sup> See Sherman, *id.*, Sec. 780, footnotes 11-12.

<sup>11</sup> *Civil Code*, 1813.

<sup>12</sup> *Civil Code*, 1807.

<sup>13</sup> *Civil Code*, 1803.

<sup>14</sup> Sherman, *id.*, Vol. II, Sec. 782.

<sup>15</sup> *Civil Code*, 1803.

In Chilean law the price must be certain or definitely fixed.<sup>18</sup> If there is actually no agreement or determination concerning the price, a contract of sale is not engendered at all,—the attempted contract becomes void; here the law of England and the United States holds the opposite,—Anglo-American law “implies a reasonable price or payment for a thing at what it is reasonably worth.”<sup>19</sup>

Moreover, Chilean holds that the price must generally be in money or its equivalent.<sup>20</sup> But “when the price consists partly of money and partly of something else, the contract shall be considered as an exchange if the value of the thing is superior to the sum of money, and as a sale in the contrary case.”<sup>21</sup> Chilean law allows the price to be fixed by a third person, but does not allow the price to be left to the determination of one of the contracting parties:<sup>22</sup> such is the rule also in all other modern law as well as in Roman law.<sup>23</sup>

Rescission of a sale for lesion or undervalue is a feature of Chilean law; if a thing is sold for less than half its actual value, the seller can rescind the sale, unless the buyer agrees to pay also the deficiency in price.<sup>24</sup> This rule as to lesion forms part of the evidence of the ultimate Roman law origin of the contract of sale in Chilean law. And the same doctrine of lesion exists also in modern French, Italian, and Spanish law.<sup>25</sup>

The effect of a sale on the thing sold is not, in Chilean law, to immediately transfer the ownership thereof to the buyer: Chilean law holds that delivery is essential to transfer the ownership.<sup>26</sup> This rule, which is of Roman law origin, is also law in

<sup>18</sup> *Civil Code*, 1801.

<sup>19</sup> *Civil Code*, 1821-1823.

<sup>20</sup> *Civil Code*, 1808.

<sup>21</sup> *Sherman, id.*, Vol. II, Sec. 784.

<sup>22</sup> *Civil Code*, 1793.

<sup>23</sup> *Civil Code*, 1794.

<sup>24</sup> *Civil Code*, 1809.

<sup>25</sup> *Sherman, id.*, Vol. II, Sec. 784.

<sup>26</sup> *Civil Code*, 1888-1892, 1896.

<sup>27</sup> See *Sherman, id.*, Vol. II, Sec. 785.

<sup>28</sup> *Civil Code*, 1817.

Spain.<sup>27</sup> But the Anglo-American, French, and Italian rule is just the opposite: in these systems of law "the title to the property sold passes by virtue of the contract of sale, without delivery or payment."<sup>28</sup>

Before delivery the advantages and the risk of the thing sold belong, in Chilean law, to the buyer.<sup>29</sup> This familiar rule of Roman law extraction is also law in Great Britain, France and Italy.<sup>30</sup>

When the seller makes delivery, Chilean law requires him to deliver the thing sold at the time and place agreed upon, and to the person mentioned in the contract of sale.<sup>31</sup> Furthermore the seller must warrant against the interruption of the buyer's peaceful possession of the thing sold;<sup>32</sup> in other words, if the buyer is dispossessed by a third person, the seller must compensate him.<sup>33</sup> This implied warranty of the seller is sometimes called warranty against the buyer's "eviction"; the name itself and the rule originated in the Roman law.<sup>34</sup> And this doctrine of eviction is a feature of all Continental-European and Latin-American law.<sup>35</sup>

Finally the seller must, in Chilean law, warrant the thing sold to be free from latent defects of secret faults,—often called "redhibitory" vices.<sup>36</sup> This implied warranty of quality, a jurisprudential legacy from Roman law,<sup>37</sup> is a feature of all modern law except the Common law of England and the United States.<sup>38</sup>

Thus the equitable and just *caveat venditor* of Chilean law

<sup>27</sup> Sherman, *id.*, Vol. II, Sec. 786.

<sup>28</sup> Sherman, *id.*

<sup>29</sup> *Civil Code*, 1816, 1829, 1830.

<sup>30</sup> Sherman, *id.*, Vol. II, Sec. 787.

<sup>31</sup> *Civil Code*, 1826, 1828.

<sup>32</sup> *Civil Code*, 1837.

<sup>33</sup> *Civil Code*, 1838-1856.

<sup>34</sup> Sherman, *id.*, Sec. 789.

<sup>35</sup> Sherman, *id.*

<sup>36</sup> *Civil Code*, 1837, 1857, *et seq.* "Redhibitory" and "redhibition" are terms of Roman law origin,—coming from the "actio redhibitoria": Sherman, *id.*

<sup>37</sup> Sherman, *id.*

<sup>38</sup> Sherman, *id.*

is seen to be a far more universal principle of law than the harsh *caveat emptor* of the Anglo-American Common law. However, the latter rule is now tending to approach the former in England and the United States.<sup>39</sup>

In cases of breach of the seller's implied warranty of quality, the Chilean law gives the buyer an election either to sue for the annulment of the contract of sale or to sue for a reduction in the price:<sup>40</sup> this feature, which is derived also from Roman law, is generally characteristic of Continental-European and Latin-American law.<sup>41</sup>

The buyer's obligations, in Chilean law, are: (1) He must pay the price agreed upon, and, if he fails to do so at the agreed time, the seller may sue for the annulment of the sale together with a monetary indemnity for damages; (2) he must accept the seller's delivery of the thing sold.<sup>42</sup> These obligations of the buyer are found in other modern systems of law, and form a part of the influence of Roman law in the modern world.<sup>43</sup>

Bello's work as chief author of the present Chilean Civil Code is characterized by many predominating features indicative of his learning and ability; lucidity and succinctness are perhaps the most striking qualities of his code. The Civil Code of Chile is probably the best fusion of its two sources, the old Spanish Partidas<sup>44</sup> and the modern Code Napoleon.

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<sup>39</sup> Sherman, *id.*

<sup>40</sup> *Civil Code*, 1860.

<sup>41</sup> Sherman, *id.*

<sup>42</sup> *Civil Code*, 1871, 1872.

<sup>43</sup> Sherman, *id.*, Sec. 791.

<sup>44</sup> Described in Sherman, *id.*, Vol. I, Sec. 290.