Of the Promise of Sale and Contract to Sell

Saúl Litvinoff
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I. PROMISE TO CONTRACT

A. The Problem

In the process of entering into a sale or any other contract giving rise to an obligation to give, the parties may agree that the transfer of ownership will take place at a later moment. If this later moment refers to the happening of a condition or the elapsing of a term, there is no problem: the parties have created an obligation to give subject to a suspensive condition or term and, upon the arrival of the future and uncertain event of which the condition consists, or of the stated time, the obligation to give will automatically produce its effects without any further action by the parties.

They may agree, however, that the transfer of ownership will take place at the moment of delivery, or at the moment the price is paid, or, as is quite common in regard to immovables, at the moment a formal writing, a notarial act, is executed.1 In such a case the agreement does not purport an immediate transfer as further action by the parties is necessary to this end.2 The obligee is not rendered owner yet, to paraphrase article 1909 of the Louisiana Civil Code; certain obligations to do, arising from the agreement, must be fulfilled first.

In regard to both situations it is commonly asserted that the immediate transfer of ownership may be postponed by the parties' consent.3 In situations of the first kind this is quite clear. Some problems arise, however, from situations of the second kind.

Evidently, when the parties have provided that no transfer shall be effected until delivery, payment, or execution of an instrument,

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* This article forms part of a larger work and will appear in the author's treatise on Obligations, Book 2.

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1. 6 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 94 (1931); 2 WEILL, DROIT CIVIL-LES OBLIGATIONS 115 (1970). See also Sabatier, La promesse de contrat, in LA FORMATION DU CONTRAT, L'AVANT-CONTRAT 89 (1964).

2. See 3 ŒUVRES DE POTHIER 1-2 (Bugnet ed. 1861). Pothier's views, expressed before the Code Napoleon, are perfectly applicable to this matter since in a contract looking forward to a sale, but not yet a sale, the parties exclude the principle of immediate transfer first introduced in article 1138 of the French Civil Code.

3. See 1 COLIN ET CAPITANT, TRAITÉ DE DROIT CIVIL 1091 (Julliot de la Morandière ed. 1953); 6 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 94 (1931).
their intent must govern. The problem is to ascertain what kind of contract they have actually made. It cannot be said that it is a “sale” or a “contract of sale,” for, if that were the case, a transfer—pure and simple or subject to a condition or term—would have taken place at the moment of contracting since, under article 2456 of the Louisiana Civil Code, “the property is of right acquired to the purchaser . . . as soon as there exists an agreement for the object and for the price thereon.” If not a sale, what then?

B. The Proposed Solution

As a solution to this problem, the notion of avant-contrat (preliminary contract) was developed in Continental doctrine. Briefly stated, it consists of the assertion that, in the example set out above, the parties have not yet made a “contract of sale,” but rather a contract preliminary to the true sale; a contract that provides for the making of a later and final contract. The reference to a preliminary contract is not uncommon in the Louisiana jurisprudence.

As terminology, avant-contrat was soon found unsatisfactory for the reason that it may be confused with preliminary negotiations (pourparlers), which can never be considered a contract, preliminary or of any other sort. At times, the preliminary contract was called a compromis, but this label too was soon abandoned as it was easily mistaken for a different institution. Finally, consensus was reached on a designation of more traditional lineage, namely, the promesse de contrat, or promesse de contracter—promise to contract.

4. This is so even when the parties’ intent is not clearly expressed and it is necessary to interpret it according to the circumstances of the case.
8. 2 Demogue, Traité des obligations en général 5 (1923); 2 Weill, Droit civil - Les obligations 109 (1970).
9. See 6 Planiol et Ripert, Traité pratique de droit civil français 167 (2d ed. Esmein 1952); 2 Weill, Droit civil - Les obligations 109 (1970). The literal translation of promesse de contrat is “promise of contract.” The expression “promise to contract” is preferred here for idiomatic reasons. In Spanish law the expression promesa de contrato (promise to contract) is used interchangeably with contrato de promesa (contract of promise). See Blanco, Del contrato de promesa o promesa de contrato, 40
Although the examples favored by Continental doctrine always revolve around sale, the theory involved in this solution has a general scope, that is, it applies not only to contracts contemplating a later sale, but also to those contemplating other contracts such as lease, loan, or partnership.¹⁰

Such promises to contract may be unilateral or bilateral; each kind will be separately treated later.¹¹ In general terms, the requirements of capacity, object, and lawfulness for the preliminary contract are the same as for the final one.¹² When the promise is bilateral or synallagmatic, however, the question has arisen whether the preliminary and final contracts are not one and the same, since, from the viewpoint of requirements, nothing would seem to be lacking for the parties to have given their perfect consent. It must be said that no satisfactory answer has yet been given to this question in Continental doctrine.¹³ In principle, however, modern doctrine recognizes that the promise to contract has a validity of its own.¹⁴

The promise to contract is mainly a doctrinal creation. Neither the French nor the Louisiana Civil Code contemplates such promises in general. The two codes contain provisions pertaining to the promise to sell which have served as a foundation for further development and generalization by doctrine.¹⁵ The drafters of modern civil codes, however, have shown special concern for promises to contract. Thus, article 2932 of the Italian Civil Code of 1942 provides:

If a person who is bound to make a contract does not perform his obligation, the other party, when possible and unless he is barred by the instrument, can obtain a judgment producing the same effects as the contract which has not been made . . . .¹⁶

¹⁰. 2 Demogue, Traité des obligations en général 102 (1923); 2 Weill, Droit civil - Les obligations 109-10 (1970).
¹¹. See The Theory, Secs. II A, III A infra.
¹³. See 2 Demogue, Traité des obligations en général 16 (1923); 6 Planiol et Ripert, Traité pratique de droit civil français 168 (2d ed. Esmein 1952).
¹⁶. (Emphasis added.) To complete the picture, the article provides further: “In the case of contracts for the transfer of ownership of a specified thing or the establishment or transfer of another right, the action cannot be granted if the
The following paragraphs are devoted to a discussion of particular situations. Some conclusions will be drawn at the end.17

II. UNILATERAL PROMISES

A. General Principles

The Theory

A unilateral promise to contract is an agreement whereby one party obligates himself towards another to conclude a contract on the terms set forth, upon the other party's consent to enter into the contemplated contract.18 Through such an agreement, only one party is bound; the other, although he has accepted the former's obligation, has not yet consented to bind himself by any final contract, but he has the choice to do so by simply expressing his consent. In French and Anglo-American law, such an agreement is called an option.19 From the viewpoint of civilian contract categories it is a typical unilateral contract, as only one party is bound.20

The giving of such promises, or the granting of options, is very common in everyday business. Quite often, a party is interested in entering into a contract, buying some property, for example, but is not yet in a position to do so; he wants the right, however, to make the contract when circumstances permit. The best way to protect his interest is to obtain the other party's promise to contract, or option to purchase. Such a promise to contract may be one of the terms of another contract already concluded, as when a lessee is given an option to purchase the leased property at or before the expiration of the lease.21

Unilateral promises to contract are not confined to options to purchase. Options to sell are frequently granted by collectors or merchants interested in rare objects; such an option to sell amounts to a promise to buy on the part of the optionor.22 Finally, promises to

17. See Sec. IV infra.
contract, or options, may be given in regard to any contract other than sale.23

Since it is of the essence of the promise or option that the contemplated contract can be concluded solely by a declaration of the beneficiary’s will, all the essential elements of the final contract must be indicated with sufficient clarity at the moment the promise to contract is made.24 Thus, for such a promise to be valid, the promisor must have the required legal capacity, or must be properly represented, at the time of making the promise, for he is bound from that moment. The promisee or beneficiary, on the contrary, needs to be legally capable, or to be properly represented, only at the moment he consents to enter the final contract, for that is the moment at which he becomes bound.25

Similarly, the existence of any vice of the promisor’s consent, such as error, fraud, or violence, must be referred to the time of making the promise, whereas the promisee’s consent needs to be free from vice at the moment the option is exercised.26

The object and the cause of the emerging obligations must be lawful at the moment the option is exercised.27 The final contract thus is valid if the object and the cause of the parties’ obligations are unblemished at that moment, even if the object or the cause was unlawful at the time the promise was made.28 The promise cannot ripen into a final contract, however, if the cause or object ceases to be lawful after the promise is made.29

The duration of the beneficiary’s right is fixed by the promise when a certain period for exercise of the option has been expressly or impliedly agreed on by the parties.30 Otherwise, the right is subject

23. See The Scope, Sec. II A infra.
26. Id.
28. Id. A decision of March 14, 1860, reported in S. 1860.1.70, deals with the promise to enter into a contract of rent of lands (bail emphyétique). See Louisiana Civil Code article 2779, where the property involved could not be the object of such a contract at the moment the promise was made. See 6 Planiol et Ripert, Traité pratique de droit civil français 170 (2d ed. Esmein 1952).
to the regular prescriptive term for contracts; the promisor, however, may put the beneficiary or promisee in default by a notice to exercise the option within a reasonable time. This solution, clear in France, is perfectly compatible with Louisiana law.

A promise to contract is transformed into a final contract at the moment the beneficiary or promisee exercises the option. If the transition from promise to final contract requires an act, such as a formal writing, which the promisor refuses, the beneficiary or promisee may request judicial help. The court, having established the existence of the final contract at the moment the option was exercised, will enter a judgment that has the same effects as the missing act.

Nature and Rights

The unilateral promise to contract differs both from a simple offer to contract, or pollicitation, and from the final contract it contemplates. It lies somewhere in between. It is more than a simple offer, but less than a final contract. The full extent of these differences has already been explored elsewhere. It suffices to say here that, as distinguished from an offer, a unilateral promise to contract is already a contract in itself; it requires the consent of the two parties and gives rise to a firm obligation on the part of the promisor, an obligation correlative to a right that the beneficiary may assign and that will pass to his heirs upon his death. A simple offer, on the other

32. See LA. CIV. CODE arts. 111, 1112, 3542. See also Caston v. Woman’s Hosp. Foundation, Inc., 252 So. 2d 62 (La. App. 1st Cir. 1972), containing sufficient language to base the conclusion that a court may determine the term of duration of a contract, at least, with respect to termination.
34. See 2 WEILL, DROIT CIVIL - LES OBLIGATIONS 110 (1970).
36. See generally 1 S. LITVINOFF, OBLIGATIONS 270-73 (1969). On the passive side, the obligation also passes to the promisor's heirs upon his death, instead of terminating as in the case of a simple offer. See LA. CIV. CODE art. 1810. The right arising from the unilateral promise, however, will not be transmitted to the beneficiary's heirs if the promise was made intuitu personae, that is, in consideration of the beneficiary's person. See 6 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 173 (2d ed. Esmein 1952).
hand, is a mere unilateral act that expresses the offeror's consent alone.

The unilateral promise to contract, however, is not yet the final contract the formation of which it prepares. It is a unilateral contract that binds only the promisor; the promisee will be bound only if, through the exercise of his right of option, he chooses to give his consent to the final contract.

A unilateral promise to contract grants a certain right to the party to whom it is made. In French doctrine, such a right is called a *droit éventuel*—a contingent right. It is said that a contingent right is analogous to, but not identical with, a right subject to a suspensive condition. Attempts have been made to explain the difference in the light of an example that has become traditional. Assuming that a lease is entered into on condition that the lessee is appointed to a certain position, the contract is perfect upon the parties' consent, although the effects of such a contract, the parties' obligations to perform, do not arise until the occurrence of the future and uncertain event of which the condition consists. In a unilateral promise to contract, although the beneficiary's choice to enter into the final contract very much resembles a condition, it is not the parties' obligations but the existence of the contract itself that depends on the beneficiary's choice.

This distinction, however, is only apparently convincing. In the first place, the unilateral promise to contract must not be confused with the contemplated final contract. In the second place, it should be clearly understood that a condition, although potestative, is nonetheless a condition.

If unilateral promise and contemplated final contract are properly separated, it is easy to see that, upon the making of the promise, the beneficiary immediately acquires a right which is present and not contingent, although it is only a right to make a choice, to opt, and not the kind of right he can derive only from the final contract. Thus, if a unilateral promise of lease is made, the beneficiary immediately gets a right to make a choice. He does not yet have any right as lessee. For this, he must exercise his option. In other words, a unilateral

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37. See 2 Demogue, Traité des obligations en général 74-82 (1923); Verdier, Les droits éventuels, contribution à l'étude de la formation successive des droits (1955); Demogue, Des droits éventuels et des hypothèses où ils prennent naissance, 4 Revue trimestrielle de droit civil 723-91 (1905); Demogue, De la nature et des effets du droit éventuel, 5 Revue trimestrielle de droit civil 231-319 (1906).
38. 2 Demogue, Traité des obligations en général 74 (1923); 6 Planiol et Ripert, Traité pratique de droit civil français 172 (2d ed. Esmein 1952); 2 Weill, Droit civil - Les obligations 112-13 (1970).
promise to lease gives the beneficiary a present right to acquire a future one, which depends on his own decision. 40

The obligation arising from the unilateral promise is subject to a potestative condition. It is not, however, null, because the potestative condition is on the side of the beneficiary, the obligee, and only those potestative conditions on the side of the one who binds himself, the obligor, make the obligation null. 41

With reference to the traditional example, it can be readily seen in the light of this analysis that the obligation arising from a unilateral promise is as much subject to a suspensive condition as are the obligations arising from the lease which depend on the lessee's appointment. The difference lies in the nature of the condition—potestative in the former, casual or mixed in the latter. 42

40. In its original version, the doctrine of droits éventuels fails to see clearly these two rights, although it does contain some indications. See Demogue, De la nature et des effets du droit éventuel, 5 Revue trimestrielle de droit civil 231, 234 (1906). The existence of two stages of a right is discussed in Verdier, Les droits éventuels, contribution à l'étude de la formation successive des droits (1955). At any rate it is inescapable that the future or "contingent" right is already latent in the present right to opt. In 2 DEMOGUE, Traité des obligations en général (1923), a "contingent" right is also called an "imperfect" one.

41. LA. CIV. CODE art. 2024: "The potestative condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder." See also FRENCH CIV. CODE art. 1170. LA. CIV. CODE art. 2034: "Every obligation is null that has been contracted, on a potestative condition, on the part of him who binds himself." (Emphasis added.) See also FRENCH CIV. CODE art. 1174. See generally Brown, The Potestative Condition in Louisiana, 6 Tul. L. Rev. 23 (1931). For an analysis of the effects of potestative conditions in unilateral and synallagmatic contracts see Brown, Potestative Conditions and Illusory Promises, 5 Tul. L. Rev. 396 (1931). See also 1 S. Litvinoff, Obligations 465-69, 532 (1969); Palmer and Plauche, A Review of the Louisiana Law on Potestative Conditions, 47 Tul. L. Rev. 284-314 (1973); Smith, The Principle of Mutuality of Obligation and its Juridical Utility in Enforcing Contractual Fair Dealing, Festschrift Fur Ernst Rabel 279, 283 (1954). As a unilateral promise is a unilateral contract, it gives rise to only one obligation; as this obligation is not null, because the potestative condition lies with the obligee, the contract, which is practically identified with the only obligation it produces, is valid. It is different if the contract is synallagmatic, for in such a contract both parties are reciprocally obligees and obligors. Therefore, a potestative condition in either party makes the other's obligation null for lack of cause. See Smith, A Refresher Course in Cause, 12 LA. L. Rev. 2, 30-31 (1951). See also 10 Planiol et Ripert, Traité pratique de droit civil français 187 (1932).

42. LA. CIV. CODE art. 2023: "The casual condition is that which depends on chance, and is no way in the power either of the creditor or the debtor." See also FRENCH CIV. CODE art. 1169. LA. CIV. CODE art. 2025: "A mixed condition is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event." See also FRENCH CIV. CODE art. 1171.
other shortcoming of the traditional example is that it seems to overlook the fact that the unilateral promise is a unilateral contract, while the lease subject to a condition is synallagmatic or bilateral.

With these qualifications, the category of contingent rights—which may as well be called potestative—can be understood as encompassing those rights the acquisition of which depends on the will of the holder.43

From the "contingent" nature of the beneficiary's right, several important consequences are derived in French law. Such a right is a credit-right, a right in personam. Thus, if the contemplated final contract is one that purports a transfer, the beneficiary acquires no real—in rem—right until he exercises his option; for as long as he does not, his right is merely personal.44

The beneficiary is allowed to take measures conservatory of his right.45 He may, thus, enjoin the promisor from endangering the object of the contemplated contract, or impairing those of its qualities that induced the promise.46 The beneficiary cannot, however, bring the oblique or Paulian action.47

The unilateral promise cannot ripen into a final contract if performance of the promisor's obligation becomes impossible, as when the contemplated object is lost or destroyed without his fault.48 He is, however, liable for damages, if the loss or deterioration occurs through his fault.49 By virtue of the doctrine of unjust enrichment, the beneficiary owes compensation for improvements to the object made at the promisor's expense, unless they were made in bad faith.50

43. Unilateral promises to contract are not the only kind of legal transaction giving rise to droits éventuels. See Demogue, Des droits éventuels et des hypothèses ou ils prennent naissance, 4 Revue trimestrielle de droit civil 723-91 (1905). Other examples, however, are irrelevant here.

44. 6 Planiol et Ripert, Traité pratique de droit civil français 175-78 (2d ed. Esmein 1952); 2 Weill, Droit civil-Les obligations 113 (1970). For other consequences when the transfer of a real right is involved see Effects, Sec. II B infra.

45. 2 Demogue, Traité des obligations en général 74 (1923); 6 Planiol et Ripert, Traité pratique de droit civil français 173 (2d ed. Esmein 1952).

46. 2 Demogue, Traité des obligations en général 75 (1923); 6 Planiol et Ripert, Traité pratique de droit civil français 174 (2d ed. Esmein 1952).


48. 6 Planiol et Ripert, Traité pratique de droit civil français 175 (2d ed. Esmein 1952); 2 Weill, Droit civil - Les obligations 113 (1970).

49. 2 Demogue, Traité des obligations en général 87 (1923); 6 Planiol et Ripert, Traité pratique de droit civil français 175 (2d ed. Esmein 1952).

50. 6 Planiol et Ripert, Traité pratique de droit civil français 176 (2d ed. Esmein 1952). The promisor would be regarded as in bad faith if he made improvements with the sole purpose of causing the beneficiary to desist in view of having to pay a larger sum.
Scope

As was stated earlier, a unilateral promise may be made—an option may be granted—in regard to any kind of contract.\(^{51}\) Thus, an option to enter into a partnership is perfectly binding.\(^{52}\) As, however, a court could not decree the existence of a partnership between parties who disagree, such a promise is enforceable by damages and not by specific performance.\(^{53}\) This is so because partnership is a contract *intuitu personae* (made in consideration of the parties’ personality). It is different when what matters is capital rather than a party’s personality; thus, a decree of specific performance may be obtained against the defaulting underwriter of shares of stock.\(^{54}\) In this connection, an option is involved when a corporation issues debentures convertible into shares of stock; such unilateral promises are perfectly enforceable also.\(^{55}\)

When certain formalities are prescribed for a particular contract, it can be said that, in general terms, a unilateral promise to make such a contract is subject to the same formalities.\(^{56}\) Thus, a promise to make a donation if the prospective donee chooses to accept requires a notarial act for its validity.\(^{57}\) There are, however, exceptions to this rule of formalities that will be explained in detail later.\(^{58}\)

B. Unilateral Promise of Sale\(^ {59}\)

\(^{51}\) A unilateral promise to contract may envisage a bilateral contract, such as a unilateral promise to sell, or a unilateral contract, such as a unilateral promise to make a loan. Similarly, a bilateral promise to contract may envisage a bilateral contract, such as a bilateral promise of sale, or it may envisage a unilateral contract, such as a bilateral promise to enter a contract of deposit later. More on this in *The Theory*, Sec. III A infra. See generally Najar, *Le droit d’option, contribution à l’étude du droit potestatif et de l’acte unilatéral* 151-65 (1967).


\(^{56}\) 2 Demogue, *Traité des obligations en général* 62-63 (1923).


\(^{59}\) The expression “promise of sale” is here used as having a wider meaning than
The Background

Before the Code Napoleon, Pothier defined a promise of sale as a unilateral contract binding on the promisor, but imposing no obligation on the beneficiary or promisee. As an illustration he wrote:

For example, if we make a contract for the sale of my library and we introduce this clause: ‘I obligate myself also to sell to you the shelves if you wish to buy them,’ this clause constitutes a promise to sell the shelves to you.1

He further explained:

There is an important difference between the promise to sell and the sale itself. He who promises to sell a thing to you does not then sell it; he merely contracts the obligation to sell when you require him to do so.2

He concluded:

The contract of sale is a synallagmatic contract whereby each of the parties obligates himself to the other: but the promise of sale is an agreement by which only he who promises to sell obligates himself; he to whom the promise is made does not contract any obligation.3

The question whether a promise of sale could be specifically enforced was subject to controversy at the time.4 Indeed, if a decree of specific performance should compel the promisor to do something, it would amount to an interference with his personal liberty. In Pothier’s opinion, there was no such interference because no personal action of the promisor was required for the fulfillment of a promise of sale. He wrote:

The act which is the object of a promise of sale is not a bodily
and outwardly act of the obligor's person; it may be replaced by a judgment ordering that, in the absence of the obligor's willingness to execute the contract of sale, the judgment will stand for the contract.\textsuperscript{64}

Considering a promise of sale from the standpoint of the transfer of ownership, it is quite clear that for Pothier such a promise could not be more than a unilateral promise or unilateral contract. Indeed, under the ancient French law that Pothier expounded, ownership was not transferred by the contract itself but by delivery.\textsuperscript{65} Thus, a contract of sale was not a \textit{completed} sale at the time, unless of course consent, contract and delivery were simultaneous. The contract gave rise to the vendor's obligation to give the property—to transfer ownership—to the vendee, but, at the time, an obligation to give did not have the immediate effect of rendering the obligee owner, as in article 1138 of the Code Napoleon.\textsuperscript{66} Insofar as the transfer of ownership is concerned, then, a contract of sale made in Pothier's time would be called nowadays a synallagmatic or bilateral promise of sale, or contract \emph{to} sell in Louisiana, as the transfer was not simultaneous with the contract.\textsuperscript{67}

\textit{Doctrine and Jurisprudence}

The Code Napoleon contemplates a promise of sale in article 1589: "The promise of sale amounts to a sale, when there exists reciprocal consent of the two parties on the thing and on the price." If consent is reciprocal and the promise amounts to a sale, as the article has it, the promise it contemplates cannot possibly be a unilateral one as a sale is, by definition, a synallagmatic or bilateral contract. French doctrine has reached consensus in interpreting this article as the regulation of bilateral, and not unilateral, promises of sale.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{64} 3 \textsc{Oeuvres} de \textsc{Pothier} 191-92 (Bugnet ed. 1861).
\item \textsuperscript{65} \textit{Id.} at 1, 27. Delivery, and not the contract, was the act whereby the vendor transferred to the vendee all his rights over the thing; \textit{see Id.} at 21. \textit{See also 3 \textsc{Toullier}, \textsc{Le droit civil français} 394 (1833).} Delivery, or \textit{traditio}, could, however, be made through the fiction of introducing a clause of tradition, at least in the case of immovables. \textit{See 1 \textsc{Guillouard}, \textsc{Traités de la vente et de l'échange} 90 (2d ed. 1890); 10 \textsc{Planiol et Ripert}, \textsc{Traité pratique de droit civil français} 184-85 (1932).}
\item \textsuperscript{66} \textit{See 3 \textsc{Toullier}, \textsc{Le droit civil français} 394 (1833); see also 3 \textsc{Oeuvres} de \textsc{Pothier} 21 (Bugnet ed. 1861).}
\item \textsuperscript{67} \textit{See \textsc{The Code Napoleon}, Sec. III B i infra. \textit{See also 17 \textsc{Baudry-Lacantinerie et Saignat}, \textsc{Traité théorique et pratique de droit civil - De la vente et de l'échange} 41 (2d ed. 1900).}
\item \textsuperscript{68} \textit{See 5 \textsc{Aubry et Rau}, \textsc{Cours de droit civil français} 4-5 (5th ed. 1907). 17 \textsc{Baudry-Lacantinerie et Saignat}, \textsc{Traité théorique et pratique de droit civil - De la vente et de l'échange} 41-50 (2d ed. 1900); 2 \textsc{Colmet de Santerre}, \textsc{Manuel élémentaire de droit commercial et de la propre science].}
Unilateral promises of sale are recognized, however, in French doctrine and jurisprudence as valid contracts whereby one party obligates himself towards the other to make an actual sale when the beneficiary or obligee requires that the promise be fulfilled. Such a unilateral promise cannot be regarded as a sale for the lack of an essential element of the contract of sale. Indeed, until the beneficiary accepts or elects to buy through the exercise of the option granted him by the promise, he does not consent to the sale.

Unilateral promises of sale are governed by the general rules of obligations. The cause of the obligation arising from such a promise is the promisor's willingness to make an actual sale through the final contract, an interest that suffices to characterize the cause as onerous.

The general contractual requirements and the duration of a unilateral promise of sale are governed by the rules already discussed in regard to unilateral promises to contract in general.

Effects

For as long as the beneficiary or promisee does not choose to enter into the sale contemplated in the promise, the promisor remains the owner when the promise is one to sell. He retains the administration and the enjoyment, and he may even grant a lease of the property.

Similarly, the risk remains with the promisor when the promise is to sell. If the property is destroyed, he sustains the loss and performance of the promise becomes impossible. If the object is an immovable expropriated after the promise by eminent domain, the promisor is the only one who profits from the compensation—not the

69. See 10 Planiol et Ripert, Traité pratique de droit civil français 187 (1832); Req., March 18, 1912, D. 1913.1.198; Req., April 5, 1875, D. 1875.1.463.

70. 10 Planiol et Ripert, Traité pratique de droit civil français 187 (1832).

71. See Comment, 3 La. L. Rev. 629, 631-32 (1941).

72. Capitant, De la cause des obligations 54-55 (1923).

73. See The Theory, Sec. II A supra.


beneficiary who has no real right in the property. As the expropriation takes the thing out of commerce, the formation of the final sale is prevented.

The beneficiary may assign the promise like any other credit-right, unless it has been clearly stipulated, or the nature of the transaction shows, that the promise is made exclusively to the beneficiary. Such an assignment is governed by the rules provided in the Civil Code for the transfer of credits.

The beneficiary’s consent to enter the final contract may take the form of an express declaration of will, usually followed by the execution of a formal act of sale, or it may be tacit, as when the beneficiary or promisee makes a payment on account of the price, or when acting already as owner he sells the property to another.

The affirmative exercise of his option by the beneficiary turns the promise of sale into a final, a completed sale. This, however, has no retroactive effect as there is no synallagmatic contract until then.

As a consequence, ownership and risk are transferred at that moment. It is also with reference to that moment that the value of the thing must be established for lesion, if it is an immovable. Similarly, the hidden nature of defects giving rise to redhibition must be estab-

76. 10 Planiol et Ripert, Traité pratique de droit civil français 189 (1932).
78. See 17 Baudry-Lacantinerie et Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 46 (2d ed. 1900); 10 Planiol et Ripert, Traité pratique de droit civil français 194 (1932). Consent may be expressed by a simple letter, even sent by a mandatary, provided he has power of attorney. See Paris, Feb. 25, 1929, Gaz. Trib. April 17, 1929.
79. The lack of retroactive effect is commonly presented as a reason to distinguish between droits eventuels and obligations subject to a suspensive condition. See Capitant, De la cause des obligations 54-55 (1923); 10 Planiol et Ripert, Traité pratique de droit civil français 195 (1932). See Nature and Rights, Sec. III A supra. For the retroactive effect of the conditions see French Civil Code article 1179 and Louisiana Civil Code article 2041. The fulfillment of conditions, however, does not always have retroactive effect. There are too many exceptions. See 7 Planiol et Ripert, Traité pratique de droit civil français 387-90 (2d ed. Esmein 1954). See also Litvinoff and Tête, Louisiana Legal Transactions 157-58 (1969).
lished for the time at which the beneficiary exercised his option.\footnote{10} If the promisor refuses to perform, the court, upon finding that all the elements of a perfect sale are now present, will enter judgment of possession in favor of the vendee.\footnote{81} It is no longer necessary to order the promisor to execute the act of sale, in default of which the judgment will stand for the contract, as in Pothier's time.\footnote{84} This formula, however, is still used by French courts with a view to recordation of the judgment.\footnote{85}

If the promisor, in spite of his promise, sells the property to another, the latter acquires the ownership and the beneficiary may recover only damages from the promisor.\footnote{88} This is so because the unilateral promise of sale does not by itself transfer any real right to the beneficiary, but gives rise only to an obligation to do, entitling the obligee to recover damages in case of violation by the obligor.\footnote{87}

In general terms, this solution has been accepted by French courts.\footnote{88} If the third-party purchaser is in bad faith, however, as when he knew of the existence of the promise, French courts are inclined to annul the sale. For this they have at times resorted to article 1382 of the Code Napoleon to conclude that the purchaser in bad faith commits a delict and that the annulment of the sale is the only way to repair the delictual consequences.\footnote{89}

Recordation

The beneficiary may protect his interest, however, when the promise is to sell an immovable. Such a promise does not have to

\footnote{82. 10 Planiol et Ripert, \textit{Traité pratique de droit civil français} 195 (1932).}
\footnote{83. In Civ., July 3, 1850, D. 50.1.343, it was asserted that the beneficiary of the promise has a real action upon exercising his option. \textit{See also} Req., May 26, 1908, D.P. 1909.1.425. 2 Colin et Capitant, \textit{Cours élémentaire de droit civil français} 555 (10th ed. Julliot de la Monrandière 1953).}
\footnote{84. 10 Planiol et Ripert, \textit{Traité pratique de droit civil français} 197 (1932). See also 17 Baudry-Lacantinerie et Saignat, \textit{Traité théorique et pratique de droit civil: De la vente et de l'échange} 43-44 (2d ed. 1900).}
\footnote{85. Planiol et Ripert, \textit{Traité pratique de droit civil français} 196n. 3 (1932).}
\footnote{86. \textit{Id.} at 190-91 (1932). \textit{Cf.} 2 Demogué, \textit{Traité des obligations en général} 104-05 (1923).}
\footnote{87. See \textit{French Civ. Code} art. 1142; \textit{La. Civ. Code} art. 1926.}
\footnote{88. \textit{See, e.g.,} Toulouse, Nov. 30, 1892, S. 94.2.29. \textit{See also} 10 Planiol et Ripert, \textit{Traité pratique de droit civil français} 191 (1932).}
\footnote{89. Req., April 15, 1902, D.P. 1903.1.38, S. 1902.1.316; Nancy, April 4, 1906, D.P. 1908.2.148, S. 1906.2.241. Some authorities contend that it is doubtful that the purchaser commits a delict when he buys property which is encumbered only by the existence of a personal obligation on the part of the vendor. \textit{See} 10 Planiol et Ripert, \textit{Traité pratique de droit civil français} 191 (1932). Actually, it is said, such decisions are based on \textit{équité}, under the principle \textit{fraus omnia corrupit} (fraud corrupts every-}
be, but it may be, recorded. If it is, the recordation will be deemed sufficient to put the third-party acquirer on notice, and to require a conclusion that he was acting in bad faith if he purchased the property notwithstanding.

The beneficiary may also obtain from the promisor a mortgage as security for the damages he is entitled to recover in case of non-performance by the promisor. The recordation of such a mortgage would be deemed sufficient, also, to establish the third-party acquirer's bad faith.

Right of Pre-emption

A unilateral promise of sale may be made in the form of a pacte de préférence (right of pre-emption) whereby one of the parties obligates himself to give the first choice to the other if he ever decides to sell his property. Such pactes are not uncommon in contracts of lease. Most often, in such cases, the price is to be determined by the offers made by other parties.

A pacte de préférence is certainly not a sale since the prospective

thing). See 2 Colin et Capitant, Cours élémentaire de droit civil français 555 (10th ed. Julliot de la Morandière 1953). At times, the disappointed beneficiary has been allowed to bring the revocatory action against the sale made in fraud of his right, under article 1167 of the French Civil Code. However, such an action can be brought only in case of the obligor's insolvency, and the promisor, in such a situation, is not always insolvent. See 10 Planiol et Ripert, Traité pratique de droit civil français 191 (1932). See also La. Civ. Code arts. 1970-1971. But see Nature and Rights, Sec. II A supra. for the contention that the beneficiary cannot bring such an action before exercising the option.

90. This kind of promise may be recorded since the issuing of the decree of Jan. 7, 1959, amending an earlier decree of Jan. 4, 1955. See 2 Weill, Droit civil - Les obligations 114 (1970). Before that time the beneficiary's right to record the promise was questionable as he did not have any real right. 2 Dehugue, Traité des obligations en général 97 (1923); 6 Planiol et Ripert, Traité pratique de droit civil français 177 (2d ed. Esmein 1952).

91. 10 Planiol et Ripert, Traité de droit civil français 192 (1932). But see 2 Weill, Droit civil - Les obligations 114 (1970) for the contention that recordation is of no avail for the beneficiary unless he can prove fraudulent collusion between the promisor and the third party.

92. 2 Dehugue, Traité des obligations en général 100 (1923); 10 Planiol et Ripert, Traité pratique de droit civil français 192 (1932).

93. Id.

94. 17 Baudry-Lacantinerie et Saignat, Traité théorique de pratique de droit civil - De la vente et du l'échange 46-50 (2d ed. 1900); 2 Colin et Capitant, Cours élémentaire de droit civil français 555-56 (10th ed. Julliot de la Morandière 1953); 10 Planiol et Ripert, Traité pratique de droit civil français 198-99 (1932). Although uncommon, this right of first choice may also be given by a prospective purchaser to a willing seller.

95. 10 Planiol et Ripert, Traité pratique de droit civil français 198 (1932).
vendee's consent cannot exist until the vendor offers to sell him the thing.\textsuperscript{96} Even if the offer is made, he is not bound to buy. It is not a simple promise of sale either, because the prospective vendor is always free not to sell the thing.\textsuperscript{97} It is rather a conditional promise of sale. The condition, although on the side of the obligor, is not purely potestative but it is simply potestative and, consequently, it does not make the obligation null.\textsuperscript{98} The enforceability of a \textit{pacte de préférence} is unquestionable. In regard to contractual requirements, transfer of ownership, risk and damages for nonperformance, a \textit{pacte de préférence} is governed by the same rules as unilateral promises of sale.\textsuperscript{99} It cannot, however, be assigned, as it is generally understood to be meant personally for the other party. Nevertheless, it may be made assignable by the express consent of the parties.\textsuperscript{100}

\textbf{ii. Common Law}

\textit{Option Contracts}

The early common law "option" is now termed "option contract," and is defined thus: "An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power of revocation."\textsuperscript{101} The reason for this change of terminology is to avoid ambiguity as the word "option" is frequently used to designate any continuing, although revocable, offer, and is also used, at times, to designate any power to make a choice.\textsuperscript{102}

\textsuperscript{96} It may, however, be made at a fixed price. See 17 Baudry-Lacantinerie et Saignat, \textit{Traité théorique et pratique de droit civil - De la vente et de l'échange} 48 (2d ed. 1900).
\textsuperscript{97} Planiol et Ripert, \textit{Traité pratique de droit civil français} 198 (1932).
\textsuperscript{98} See 1 Pothier, \textit{A Treatise on the Law of Obligations or Contracts} 112-13, 122-24 (Evans transl. 1806); 3 Toullier, \textit{Le droit civil français} 509-10 (1833). See La. Civ. Code art. 2035. See also 17 Baudry-Lacantinerie et Saignat, \textit{Traité théorique et pratique de droit civil - De la vente et de l'échange} 47 (2d ed. 1900). Unilateral promises of sale, like any other obligation, may be subject to casual or mixed conditions besides potestative ones. For example: "I promise that, if I move to Paris, I will sell my property to you for 1,000 piastres, if you will wish to buy." Although the interest of such a transaction is only theoretical, it can be said here that the general rules of obligations are applicable.
\textsuperscript{100} Planiol et Ripert, \textit{Traité pratique de droit civil français} 199 (1932).
\textsuperscript{101} Restatement (Second) of Contracts § 24A (1964). See also A. Corbin, \textit{Option Contracts, Selected Readings on the Law of Contracts} 228 (1831); 1 S. Williston on Contracts 198-206 (3d ed. 1957).
\textsuperscript{102} Restatement (Second) of Contracts § 24A, comment a; A. Corbin, \textit{Option Contracts, Selected Readings on the Law of Contracts} 229 (1931).
A promise that constitutes an option contract may be contained in the offer itself, or it may be made separately through a collateral offer to keep the main offer open.\textsuperscript{103}

The similarity between a unilateral promise to contract, in civilian terminology, and an option contract, in common-law terms, is, thus, striking. Both have been designed for the satisfaction of the same kind of need and for the protection of the same kind of interest.\textsuperscript{104} This identity of function is enhanced by the modern Continental practice of substituting the single word "option" for the traditional expression "unilateral promise to contract," for the sake of brevity and expedition.\textsuperscript{105}

Similarity, however, is not the same as identity. In order to meet the requirements for the formation of a contract, a promise requires consideration at common law.\textsuperscript{106} At civil law, instead, the question is not whether a promise is supported by consideration, but whether an obligation has a cause and, from this viewpoint, a party's will to be bound is an effective cause.\textsuperscript{107}

In both systems, however, an option is an onerous contract. At common law, this is so far the reason that consideration eliminates the otherwise gratuitous nature of the promise.\textsuperscript{108} At civil law, it is so because the promisor's interest in making the contemplated final contract suffices to give his obligation an onerous cause.\textsuperscript{109} The difference lies in the fact that, at common law, the element of onerousness, the consideration, is given to the promisor by the promisee, while, at civil law, the element of onerousness resides in the promisor's own will in the form of a motive.\textsuperscript{110}

\textsuperscript{103} Id.

\textsuperscript{104} See Smith, An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money, 20 LA. L. REV. 523, 525 (1960). Options, however, are not the only means of making an offer irrevocable. See UNIFORM COMMERCIAL CODE § 2-205; NEW YORK GENERAL OBLIGATIONS LAW, § 5-1109.

\textsuperscript{105} See 2 WEILL, DROIT CIVIL - LES OBLIGATIONS 109 (1970). See also The Theory, Sec. II A supra.

\textsuperscript{106} See Restatement (Second) of Contracts § 24A, comment c: "The traditional common-law devices for making an offer irrevocable are the giving of consideration and the affixing of a seal. The requirement of consideration may be met in any of the ways permitted . . . ; payment of money or some other performance by the offeree is effective, as is a promise of such performance; one option may furnish consideration for another, and a single consideration may support both a present contract and a future option . . . ."


\textsuperscript{108} 1 S. LITVINOFF, OBLIGATIONS 497 (1969).

\textsuperscript{109} See CAPITANT, DE LA CAUSE DES OBLIGATIONS 54-55 (1923). See also The Theory, Sec. II A supra.

\textsuperscript{110} Even at civil law, the beneficiary or promisee may pay or give something to
Finally, options are unilateral contracts under both systems of law. Here again, however, the reasons that make the contract unilateral differ. A unilateral promise to contract is a unilateral contract at civil law because it gives rise to only one obligation—the promisor's. An option contract is unilateral at common law because only the performance of one party is owed; the other has already performed when he gave consideration.

Options may be granted by a separate and independent agreement—the typical option contract—or may be granted by a term or provision of a larger agreement,

as where a lessee is given the option to purchase or to receive an extension of the lease, or where a partnership agreement provides that the survivor shall have the option of buying the interest of the other in case of death, or where a contract of sale gives also an option on other property or gives the vendor the option to repurchase, or where a lease or a contract of employment gives one party the option of terminating it on certain terms, or where a note-holder has the option of converting it into stock.

When the option is granted in contemplation of a sale, the property involved may be land, chattels, or any commodity. Options to sell or to buy listed securities are known informally as “puts” and “calls.”

the promisor for his promise, in which case there is no difference whatsoever between the two systems. See Colin et Capitant, Cours élémentaire de droit civil français 556 (10th ed. Julliot de la Morandière 1953); 1 S. Litvinoff, Obligations 271 (1969). See Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958), where a subcontractor was held bound by his own bid on grounds that it had been made for his own interest in obtaining the final contract, which induced justified reliance on the promise by the other party, a reasoning that strikingly resembles the civil law approach. Contra, James Baird Co. v. Gimble Bros., 64 F.2d 344 (2d Cir. 1933).

111. See 1 S. Litvinoff, Obligations 145-46 (1969).


Effects

For as long as the option-holder does not avail himself of his right, there is no change in the parties' position with regard to title and risk—both remain with the option-giver. During the time the option-holder is free to make his choice, however, the option-giver cannot act in derogation of the terms of the option. To this effect, it has been said: "An option is a unilateral contract, and it prevents the party who signs that contract from disposing of the property under consideration until the expiration thereof . . . ."117

If, during this period, the option-giver sells the property to another, the option-holder, upon exercising his right, may obtain a decree of specific performance against the third party who acquired from his vendor with notice of the option. Thus, the holder of an unrecorded first refusal option was held to have a paramount right to purchase land as against the subsequent purchaser who had received notice of the option after making a down payment. Recordation of the option serves as sufficient constructive notice to third parties.120

When the option-holder exercises his right, and the contract involves real property, the option contract ripens into a contract to sell, or a contract for the purchase and sale of property, as distinguished from a sale or completed sale. Such a contract is mutually binding. That is, the unilateral option contract is now turned into one involving mutual promises, namely, a bilateral contract. The discussion of the effects of such bilateral promises of sale, or contract to sell at common law, is undertaken later. It suffices here to say that the

120. See Dunlap v. Fort Mohave Farms, Inc., 89 Ariz. 387, 363 P.2d 194 (1961), where the court held that third parties having actual or constructive notice of the existence of an option take the land subject to the option. The option-holder has an action for specific performance against the third party, who may also be liable for damages. See also Lacy v. United States, 216 F.2d 223 (5th Cir. 1954); Hardinger v. Blackmon, 13 Wash. 2d 94, 124 P. 2d 220 (1942); Crowley v. Byrne, 71 Wash. 444, 129 P. 133 (1912).
122. See A. Corbin, Option Contracts, Selected Readings on the Law of Contracts 228, 231, 239 (1931); 1 S. Williston on Contracts 205-06 (3d ed. 1957).
123. See Specific Performance, Sec. II B iii infra.
new contract formed at the moment the option is exercised may be specifically enforced, at least when the object is land.124

When the object is personal property, there should be no obstacle to the application of the basic principle that title passes upon consent. In the case of real property, indeed, it can be readily presumed that the parties' intent is that no title should pass until a deed of conveyance is executed, which amply justifies the inference, not of a completed sale, but rather of a contract to sell upon exercise of the option.125 This is not so, however, in the case of personal property. Thus, if the object is sufficiently identified and the other contractual elements are present, title to personal property should immediately pass to the option-holder who becomes vendee upon giving his final consent.126 Under case law, however, this is not always clear. When an option to buy a valuable painting was granted to an art dealer, the court said that it would be unrealistic to assume that the owner would have been willing to relinquish title to such a valuable thing before a bill of sale was executed, or the price paid.127 In cases involving options to buy shares of stock, some decisions assert that a sale emerges from the exercising of the option; others, instead, prefer to find only an executory sale, or a contract for the sale of property, upon the same fact.128 When a piano was destroyed by fire while in posses-

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125. See 1 S. Williston on Contracts 205 (3d ed. 1957).


127. McKey v. Clark 233 F. 928 (9th Cir. 1916). A dealer holding an option to purchase paintings agreed to purchase them for defendant, who furnished the purchase price, and then to act as defendant's agent to resell the paintings on commission. After the owner delivered the paintings to the dealer, the latter executed a bill of sale to defendant, who after receiving possession, had them redelivered to the dealer for sale. Subsequently, the dealer became bankrupt and his trustee asserted ownership of the paintings. The court held that ownership did not vest in the dealer who acted as a mere conduit for the transaction.

128. See Tolbert v. Nibert, 167 Kan. 138, 206 P.2d 131 (1949), where in an action brought by one stockholder against another to compel specific performance of an option to sell shares of stock the court held that an option to purchase property becomes a binding, enforceable contract once the option is accepted. See also Cowin v. Salomon, 244 Ala. 285, 13 So. 2d 190 (1943). Notice of the optionee's election to exercise his option, when received by his optionor, "makes a 'contract' binding on both parties, and the relation of buyer and seller comes into existence." 13 So. 2d at 197. Schlein v. Gairoard 127 N.J. 358, 22 A.2d 539 (1941). This case involved an option to purchase 500 shares of stock. The court stated, "So long as it [option] remains unac-
sion of a party who had availed himself of an option to buy it, the court concluded that he sustained the loss; this seems to be so, however, because of possession and the rules governing conditional sales, rather than as a direct consequence of exercising the option.129

At any rate, it should be remembered here that the parties' intention must always prevail regarding the passage of title to personal property.130

iii. LOUISIANA LAW

The Civil Code

The promise of sale is dealt with in article 2462 of the Louisiana Civil Code. In its present version, this article contains two paragraphs. The first, concerning bilateral promises of sale, will be analyzed later.131 The second paragraph, specifically concerned with unilateral promises, reads:

One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise can not be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party.

The notion of an option purchased for consideration was first introduced into article 2462 in 1910, and later amended in 1920.132 Until then, the Louisiana Civil Code, like the French, did not contain

129. Ainsworth v. Rhines, 69 N.Y. 876, 34 Misc. Rep. 372 (1901). Plaintiff gave defendant an option to purchase a piano, an option of which defendant availed himself. After defendant failed to pay some installments on the piano, plaintiff demanded, pursuant to a prior agreement of the parties, that the piano be returned. The former, however, refused to return it and while in his possession the piano was destroyed by fire. The court determined that defendant must bear the loss. It is not clear from the case whether a bill of sale or any other writing was executed in connection with defendant's exercising of his option, or whether the court considered that ownership transferred when the option was accepted, when delivery took place, or when an act of sale was passed.


131. See The Civil Code, Sec. III B iii infra.

express language regarding a unilateral promise of sale. In France, the absence never was an obstacle to the recognition of unilateral promises as binding contracts under the general law of obligations. In Louisiana, however, the language of the second paragraph of article 2462 would seem to carry the implication that, before its introduction in 1910, no unilateral option contracts were recognized. Besides this, the requirement of consideration marks a strong departure from the doctrine of cause that permeates the Louisiana civil law of obligations. In search of reasons for the amendment of 1910, it has been said: "This could have been designed to change the Civil Code, or to adopt what was deemed to be the case law, or it might have resulted simply from an inadequate appreciation of the theory of cause and its recognition of the binding efficacy of the will." Indeed, it seems to have been commonly believed that, prior to the amendment of 1910, option contracts were not recognized by the Louisiana Civil Code and that the amendment was introduced in order to fill what was regarded as a gap. Such a belief was not incorrect if option contracts are understood in their common-law version exclusively.

Whatever the reasons for the amendment, the fact is that it marks a departure from French law as to the formation and the effect of a unilateral promise of sale.

From the viewpoint of formation, the requirement of consideration makes of the promise of sale a unilateral contract in the common-law, not in the civilian, sense. Viewed in a different perspective, the unilateral promise of sale, under the second paragraph of article 2462, is now a commutative contract—one party gives a promise, the other, a consideration. This is different in French law, as was shown above.

From this viewpoint of the effect, the exercise of the option does

133. See The Background, Sec. II B i supra.
134. See The Background, Sec. II B i supra.
136. Id. at 531.
137. See Moresi v. Burleigh, 170 La. 270, 127 So. 624, 625 (1930): "Prior to Act 249 of 1910, option contracts were not originally recognized by our Civil Code. Because of this hiatus in our law, article 2464 of R.C.C. was amended by said act, appending a second paragraph."
138. Id. at 626: "It must therefore be readily conceded that the common-law precedents must govern, it having been lifted bodily into our law by said amendatory statutes."
139. See Option Contracts, Sec. II B ii supra.
140. See La. Civ. Code art. 1768: "Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given, or promised by the other." See also 1 S. Litvinoff, Obligations 186-91 (1969). See Doctrine and Jurisprudence, Sec. II B i supra.
not transfer ownership, but turns the option contract into a bilateral contract to sell that gives rise to specific performance.\textsuperscript{141} In Louisiana law, however, ownership cannot be divided into a legal title and an equitable one, as at common law.\textsuperscript{142} As a consequence of this, risk also remains with the vendor when the option is exercised.\textsuperscript{143}

In sum, in French law, once the option-holder exercises his right, he acquires ownership immediately and also bears the risk. At common law, legal title remains with the vendor but, upon exercising his option, the vendee acquires an equitable title which is sufficient to burden him with the risk. In Louisiana law, ownership and risk remain with the vendor for as long as the contract to sell resulting from the exercised option is not transformed into a contract of sale.\textsuperscript{144}

The conclusion that an exercised option does not ripen into a completed sale but into a contract to sell is a departure from rules prevailing in French law, but is not incompatible with basic principles of either the French or the Louisiana Civil Code. Parties are free, indeed, to make a contract that is not exactly a sale because they do not intend a transfer of ownership upon their consent alone.\textsuperscript{145} When, in contemplation of a final sale, the parties begin by making an option contract, there is good reason, in the absence of express intention to the contrary, for the law to presume that they did not intend a displacement of ownership solely upon the exercise of his right by the option-holder. In this light, the second paragraph of article 2462 is certainly not incompatible with article 1909 of the Louisiana Civil Code.

It is different with the requirement of consideration, which cannot easily be reconciled with the theory of cause. The word "consideration" in article 2462, however, may not have the unmistakable meaning it suggests at first glance. To clarify this suggestion, it is worthwhile to compare the texts of the 1910 and 1920 amendments.

\begin{footnotesize}
\begin{enumerate}
\item 141. Moresi v. Burleigh, 170 La. 270, 127 So. 624, 626 (1930): "An agreement to sell must be distinguished from an option contract. In the former, the contract binds the one to sell and the other to buy. In the latter, the option is simply an election to purchase, with a continuing offer to sell, during the time limits, supported by a consideration. The continuing offer to sell cannot be withdrawn before the expiration of the time agreed upon. If the option or right of election be exercised, it then no longer exists, but on the other hand an agreement to sell arises by virtue of such acceptance which may be specifically enforced."
\item 144. Id. at 533-34.
\item 145. See The Problem, Sec. I supra.
\end{enumerate}
\end{footnotesize}
Under the text of 1910, an option had to be purchased "for value." 144 Under the text of 1920, an option may be purchased "for any consideration therein stipulated." 147 There can be no doubt that the language of 1910 meant a tangible consideration, such as a sum of money paid in hand. The language of 1920 is considerably more flexible. Flexibility seems to have been precisely the reason for the second amendment as the change from value to any consideration is the only material difference between the 1910 and 1920 texts. 148

This inference of legislative intent is a reasonable basis for interpreting the expression "any consideration," as now written in article 2462, in a way that renders it compatible with the Louisiana legal tradition. The result may be achieved by starting from "consideration" and then from "cause" until both meet midway.

Granted that "any consideration" was deliberately chosen to substitute for "value" in the older text, it becomes obvious that "any consideration" may be not only a tangible but also an intangible something. A promise, or a legal relation, is, precisely, something intangible that may serve the function of consideration. 149 If the anatomy of an option is carefully scrutinized, it is easy to see that the giver of an option always receives from the promisee an intangible something of this kind, even when he also receives something tangible besides. Indeed, by definition, an option contract requires the promisee's acceptance of the other party's promise not to withdraw the offer. 150 Such an acceptance—by its very nature, if not by definition—implies a promise to give thought to the offer and finally to reach a decision. This implied promise is what makes the promisee's acceptance relevant; otherwise, an option contract would be devoid of any sense as a legal transaction. The implied promise may not be "consideration" stricto sensu, but it certainly befits the notion of "any consideration" contained in article 2462. 151

146. See 3 LOUISIANA LEGAL ARCHIVES, pt. 2, at 1356 (1942).
147. Id.
148. There are also some immaterial changes of punctuation. See 3 LOUISIANA LEGAL ARCHIVES, pt. 2, at 1356-57 (1942).
149. See RESTATEMENT (SECOND) OF CONTRACTS § 75 D (1965): "[O]r either the offeror or the offeree may request as consideration the creation, modification or destruction of a purely intangible legal relation . . . . Consideration by way of return promise requires a promise as defined in §2." Id. at §2: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made . . . ." 150. See The Theory, Nature and Rights, Sec. II A supra. See also 1 S. Litvinoff OBLIGATIONS 270-73 (1969).
151. It might be said that the second paragraph of article 2462 actually says that the right may be purchased. The verb "to purchase," however, has other meanings at law than merely buying for money. See BLACK'S LAW DICTIONARY (3d ed. 1933);
More weight can be added to this reasoning starting now from "cause." It has been shown elsewhere that in the Louisiana Civil Code the word "consideration" is at times synonymous with "cause," and other times with "onerous cause." If "onerous cause" is substituted for "consideration" in article 2462, it can be readily seen, in the light of this terminological equivalence, that either the promisor's interest in selling or the promisee's express or tacit interest in buying, or both, will suffice to make onerous the cause of the promisor's obligation, which makes of the option an onerous contract. An onerous contract is as enforceable at civil law as is a promise "purchased" for consideration at common law.

This analysis shows that the second paragraph of article 2462 is closer to the theory of cause than at first it appears to be.

The relation between options under article 2462 and simple offers under article 1809 of the Louisiana Civil Code has been fully expounded elsewhere.

Louisiana Jurisprudence

Interpreting article 2462, Louisiana courts have clearly established that the exercise of the right of option brings about a binding "executory" agreement to sell and purchase which may be specifically enforced. For this, of course, the option must be reasonably

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152. See 1 S. Litvinoff, Obligations 522-25 (1969).
153. See Capitant, De la cause des obligations 54-55 (1923); 2 Colin et Capitant, Cours élémentaire de droit civil français 554-55 (10th ed. Julliot de la Morandiére 1953); See also Option Contracts, Sec. II B ii supra. See Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) for an interesting evaluation of the bidder's interest in getting the contract as a reason not to withdraw an offer at common law.
154. See 1 S. Litvinoff, Obligations 184 (1969).
155. It might be said that the legislative intent was to import the common-law approach to options into article 2464, as in Moresi v. Burleigh, 170 La. 270, 127 So. 624, 625 (1930). When such intent is undocumented, however, rules must be interpreted on the assumption that a given system of law is consistent with itself.
157. See J.F. Auderer Laboratories v. Deas, 223 La. 923, 67 So. 2d 179 (1953). A second sublessee sued the lessor for specific performance of an option to purchase the premises. The court concluded that when the second sublessee accepted the option,
The existence of lesion beyond moiety must be established according to the value of the property at the time the option is exercised, when the vendee raises this defense against the vendor who seeks specific performance. In the absence of express authority to buy, an attorney cannot validly accept an option for his client.

"a binding executory agreement to sell and purchase resulted which became subject to enforcement by specific enforcement . . . ." 67 So.2d at 182. See also Books etc., Inc. v. Krushevski, 266 So. 2d 496 (La. App. 4th Cir. 1972) for one of the most recent judicial statements of the principle that an option once exercised gives rise to a specifically enforceable contract to sell; McMickle v. O'Neal, 207 So. 2d 922 (La. App. 2d Cir. 1968), where the court stated the rule that "[A]n option is nothing more than an elective right that when exercised ripens into a binding contract to buy and sell . . . governed by the provisions of LSA-C.C. Article 2462." Id. at 924. See also Zemurray v. Boe, 235 La. 623, 105 So. 2d 243 (1958); Thompson v. Thompson, 211 La. 468, 30 So. 2d 321 (1947); Watson v. Bethany, 209 La. 989, 25 So. 2d 12 (1946); Morosi v. Burleigh, 170 La. 270, 127 So. 624 (1930). But see Price v. Town of Ruston, 171 La. 985, 132 So. 653 (1931). In that case plaintiffs were declared owners of property by virtue of their timely exercise of a recorded option to purchase the premises as against a third party to whom the property was adjudicated pursuant to foreclosure of a mortgage entered into by the owner. At the forced sale plaintiffs attempted to exercise their option to purchase by tendering an amount of money equal to that offered by the highest bidder, but the tender was refused and the deed was delivered to the former, defendant herein. In a subsequent separate action plaintiff sued the same defendant to recover a sum allegedly due for rent on the property which plaintiff alleged had been illegally possessed by defendant for more than one year after the improper adjudication. Price v. Town of Ruston, 19 La. App. 356, 139 So. 55 (2d Cir. 1932). In granting recovery the appellate court stated, "The obligation required of plaintiffs by the option had been fulfilled when they tendered the amount of the highest bidder to the sheriff . . . . The promise to sell having been fulfilled, the right under the option to buy having been accepted, and the conditions and terms fulfilled, the legal title passed to plaintiffs . . . . The contract which became binding upon the acceptance by plaintiffs under their rights under the option gave to plaintiffs the right as owners to demand specific performance of the obligation to deliver . . . . to them the property in question." 139 So. at 58.


159. See Lakeside Dairies v. Gregerson, 221 La. 503, 59 So. 2d 701 (1952), where plaintiff's action for specific performance of a contract for the sale of immovable property was deemed to have come into existence when the lessee accepted his option to purchase. At issue was a lower court's determination of the value of the property which was relevant to the supreme court's conclusion as to the validity of the defense raised of lesion beyond moiety. See La. Civ. Code Art. 2590: "To ascertain whether there is a lesion beyond moiety, the immovable must be estimated according to the state in which it was, and the value which it had at the time of the sale, or at the time the option was granted if the sale be made pursuant to a valid contract of option." See also, Farris v. Interstate Enterprises, Inc., 270 So. 2d 230 (La. App. 1st Cir. 1972). There the court held that an option to purchase an immovable could not be attacked on the ground that it was subject to lesion beyond moiety, before attempted exercise of the option.

The right of pre-emption, that is, the option and preferred right to buy property at the price offered by a third party in the event the owner desires to sell, has been recognized by Louisiana courts.161

Recordation of the option enables the holder to assert his right against a third party who acquired from the vendor.162 In the absence of recordation, the courts have said, Louisiana law makes no distinction between third parties who acquired the property with knowledge of the option and those who acquired it without such knowledge.163

Movables and Immovables

The language of the second paragraph of article 2462 is broad enough as to encompass movables as well as immovables. The words in the first paragraph, "if it relates to immovables," leave no doubt that the promise to sell which the article contemplates may relate also to movables.164

In this case the court held that an attorney for a corporation who was not an officer and had not been given written authority to accept on the corporation's behalf, could not exercise the corporation's option to acquire immovable property. See also LA. Civ. Code art. 2997.

162. See Watson v. Bethany, 209 La. 989, 26 So. 2d 12, 15 (1946): "The effect of the registering of contracts . . . options, is to give notice to the world of their confection and to provide protection to the owner of right there under against transactions involving third persons." See also Kingsberger v. Drouet, 149 La. 886, 90 So. 367, 372 (1922); Barfield v. Saunders, 116 La. 136, 40 So. 593, 596 (1906) and Price v. Town of Ruston, 119 La. App. 356, 139 So. 55, 58 (2d Cir. 1932) for the proposition that "An option to sell, which is in legal form and duly recorded, confers a real right on the optionee, of which third persons are bound to take notice." But see A. Yiannopoulos, Civil Law of Property 332 (1966) where it is stated: "A promise to sell (or the corresponding option to buy) cannot be regarded as a real right by any stretch of the analysis. This transaction, if recorded, merely confers a right on the prospective purchaser to perfect the sale as of the time of recordation in case interests of third parties are involved."

163. See LA. Civ. Code art. 2266; McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909) (which firmly established the rule that a third party's actual knowledge of a prior transaction affecting immovable property is not equivalent to registry). The court stated "[I]f it be true that one may acquire a valid first mortgage, though he know at the time that as between the mortgagor and another there already exists an unrecorded mortgage upon the same property, it must also be true that one may acquire a valid title to such property, though he know that as between his vendor and another an unrecorded title has already been passed. The law makes no distinction . . . between those who acquire property with knowledge of unrecorded contracts and those who acquire without such knowledge." 51 So. at 105. The principles enunciated in McDuffie seem properly applicable to recorded options which are "contracts affecting immovable property" within the contemplation of Civil Code article 2266. See also Riggs v. Eicholz, 127 La. 744, 53 So. 977 (1911). Kinchen v. Kinchen, 244 So. 2d 316 (La. App. 1st Cir. 1970); Loef v. Badalamenti, 192 So. 2d 246 (La. App. 4th Cir. 1966), to the effect that actual notice to a third party is not a substitute for recordation.

164. See The Civil Code, Sec. III B iii infra.
Thus, the exercise of his right by the holder of an option for movables gives rise not to a contract of sale, that is, a completed sale, but to an “executory” agreement to sell and purchase, that is, a bilateral or synallagmatic promise of sale which may be specifically enforced.\textsuperscript{65}

In general terms, however, movable things lack the uniqueness that a long-standing tradition has attached to immovable things, although exceptions must be made in such instances as works of art, antiques, or rare gems. For this reason, when movables are involved, article 2462 must be read together with articles 1926 and 1927 of the Louisiana Civil Code, according to which damages are awarded for the breach of an obligation to do when such compensation is not inadequate.\textsuperscript{66}

These principles have been given recognition by the Louisiana jurisprudence. Thus, in a case where the option involved shares of stock, movable things under article 474 of the Louisiana Civil Code, the court granted specific performance.\textsuperscript{67} When the movables are perishable things, readily marketable and of a fluctuating price, there is reason to believe that Louisiana courts would award only damages, as they do where a contract to sell such kinds of things not originating in the exercise of an option, is breached.\textsuperscript{68}

Even when the movable thing is of such a kind that specific performance should be granted, the option-holder cannot assert his right against a third party who acquired ownership, and got possession, from the vendor, according to article 1922; nor can he assert his right against creditors who seized the thing while it was in the vendor’s possession, according to article 1923 of the Louisiana Civil Code.

\textsuperscript{165} See Louisiana Jurisprudence, Contracts to Sell, Sec. III B iii infra.

\textsuperscript{166} LA. CIv. CODE art. 1926: “On the breach of any obligation to do, or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the following section.” LA. CIv. CODE art. 1927: “In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts.”


III. BILATERAL PROMISES

A. General Principles

The Theory

There is a bilateral promise to contract when the parties make mutual promises to conclude a certain contract at a later date. It is assumed that the parties have the necessary legal capacity and that all the requirements for a valid contract are present, including a clear indication of the object and terms of the contemplated contract.

An important difference between such promises and a unilateral promise is immediately noticeable: when the promise is unilateral, the final contract comes into existence as soon as the promisee makes his choice, while in the case of a bilateral promise the existence of the final contract would seem to depend on the parties being brought together again to make the contract. Because of this, the effects of a bilateral promise to contract are closely linked to the nature of the contemplated contract, that is, such effects depend on whether the contract is to be purely consensual, or formal, or real.

If the contract is to be consensual, that is, one which is formed upon the parties' consent without more, the bilateral promise to contact is indistinguishable from the contract itself as the terms of the latter must be agreed on at the moment the parties exchange their promises. Thus, as will be discussed in detail later, a bilateral promise of sale amounts to a sale. Similarly, a bilateral promise of lease amounts to a lease. The same is true in other instances, such as mandate, suretyship, and even partnership. Certainly, this immediate effect of the bilateral promise to make a consensual contract may be postponed by making the promise subject to a term or condition. Here, again, however, there is no practical difference between making a bilateral promise to contract subject to a condition and making the final contract in the same way.

169. See 2 Demogue, Traité des obligations en général 12-17 (1923); 2 Marty et Raynaud, Droit civil - Les obligations 98-99 (1962); 6 Planiol et Ripert, Traité pratique de droit civil français 167-72 (2d ed. Esmein 1952); 2 Weill, Droit civil - Les obligations 115-16 (1970).


171. See Execution of Another Instrument, Sec. III B iii supra.

172. See The Civil Code, Sec. III B iii infra.

173. See The Civil Code, Sec. III B iii infra.


175. 2 Demogue, Traité des obligations en général 14 (1923).

176. See Execution of Another Instrument, Sec. III B i supra.
In spite of all this, the notion of bilateral promise is useful when the conclusion of the final contract depends on some further action by the parties, or one of them, besides their consent, such as the appropriation to the contract of things yet unspecified, or the testing or measuring of things.\textsuperscript{177}

There are differences when the contemplated contract is formal or real.

\textit{Formal Contracts}

The parties may exchange informal promises to make a contract whose validity depends on a formality such as the execution of a notarial act. If such is the case, the contemplated contract is not concluded until the formal act is executed. The question here is about the binding force of the bilateral promise before the execution of the formal act. The answer depends upon whether the formality has been prescribed for reasons of publicity or prevention of fraud, or as a way of safeguarding the freedom of the parties' consent.\textsuperscript{178} In the latter instance, there is a tendency to call the formality a solemnity and to speak of solemn contracts.\textsuperscript{179}

If the formality seeks the prevention of fraud, or the protection of the interest of third parties, the bilateral promise to make a formal contract is binding and, under certain circumstances, it gives a right to specific performance.\textsuperscript{180} Thus, a notarial act is required when a debtor borrows money for the purpose of paying his debt and intends to subrogate the lender to the rights of the creditor.\textsuperscript{181} If the debtor agrees to subrogate the lender and then refuses to execute the notarial act, the court may order him to do so, stating that the judgment will stand for the subrogation in case of his unwillingness.\textsuperscript{182}

It is different when the formality has been instituted as a safeguard for the freedom of the parties' consent, as in the case of donation or marriage.\textsuperscript{183} Two parties may agree to appear before a notary

\textsuperscript{177} 2 Weill, Droit civil - Les obligations 115 (1970). See also 2 Demogue, Traité des obligations en général 18-19 (1923).

\textsuperscript{178} See 2 Demogue, Traité des obligations en général 42 (1923); 2 Weill, Droit civil - Les obligations 111-12 (1970); Sabatier, La promesse de contrat, in La formation du contrat, L'avant-contrat 111-12, 127-28 (1964); For a functional distinction of formalities on a policy basis see S. Litvinoff and Tête, Louisiana Legal Transactions 127-32 (1969).

\textsuperscript{179} See 1 S. Litvinoff, Obligations 203-04 (1969) and authorities therein cited.

\textsuperscript{180} 2 Demogue, Traité des obligations en général 43-44 (1923).


public at a later date and execute an authentic act whereby one will
donate some property to the other who will accept. Although a dona-
tion is the unilateral contract par excellence, the promise is typically
bilateral in the given example. The promise, however, is unenforce-
able because it is assumed that, in such a case, appearing before a
notary provides an opportunity for the parties to reflect on the conse-
quences of the act, as a way of protecting them against imposition or
their own inconsideration. It has been asserted, however, that either
party has a right to recover whatever expenses he may have incurred
in the expectation of executing the notarial act, a right arising from
the general principle governing quasi-delictual obligations under arti-
cle 1382 of the French Civil Code.

In the case of a promise to mortgage, the answer, in French law,
lies somewhere between the solutions just described. Under article
2127 of the Code Napoleon, a notarial act is required for the creation
of the real right of mortgage. If the parties, through a private writing,
agree to execute later an authentic act of mortgage, the private writ-
ing is regarded as evidence of a promise which cannot be enforced by
specific performance, but gives rise only to damages. There is no
such problem in Louisiana law since article 3305 of the Civil Code
recognizes the validity of a mortgage “contracted” by private writing.
The article adds that no proof can be admitted of a verbal mortgage.
This is as clear as it is fair when the existence of a real right vested
in the mortgage is at stake. The formal granting of a mortgage, how-
ever, when the required elements are present, should be regarded as
a bilateral promise not enforceable through specific performance, but
giving rise to damages for nonperformance.

184. For bilateral promises concerning unilateral contracts and unilateral prom-
ises concerning bilateral contracts see generally 2 Demogue, Traité des obligations en
Général 12-22, 41-45 (1923).
185. See French Civ. Code art. 1339; La. Civ. Code art. 2273. See also 1 S.
Litvinoff, Obligations 593-94 (1969); Litvinoff and Tête, Louisiana Legal
186. See La. Civ. Code art. 2315; 2 Demogue, Traité des obligations en Général
42 (1923). For a full discussion of the promise of marriage see Id. at 45-58 (1923).
obligations en Général 60 (1923). This is so regardless of the principal obligation
becoming immediately exigible; see authorities cited in Id. at 59. The immediate
exigibility of the principal obligation is very clear in Louisiana under Civil Code article
2055. There is no corresponding article in the Code Napoleon.
188. This is a fair solution when the lender, in view of an attractive business
proposition, secures the money from a third party in onerous terms; the action arising
from the principal obligation may not always provide the frustrated mortgagee with
an adequate remedy. At any rate, article 2277 must always be applied. Cf. 2 Demogue,
Traité des obligations en Général 63 (1923).
Article 1862 of the Spanish Civil Code is noteworthy in this context: "The promise to grant mortgage or pledge gives rise only to a personal action between the parties . . . ."

Real Contracts

Although not specifically classified as such in the Civil Codes of France and Louisiana, certain contracts that start with the delivery of a thing (res), following the Roman tradition, are called real contracts. Such are the loan for use, the loan for consumption, deposit, and pledge. These contracts are regarded as unilateral since they give rise to only one principal obligation, namely, the obligation of the one who received it to return the thing.

The parties, however, may exchange promises to enter into such a contract, that is, to deliver the thing, at a later date. Such a promise, quite clearly, does not amount to the intended contract since the thing has not yet been delivered. It is, however, a binding synallagmatic promise to make the pertinent contract. If not performed, this binding agreement gives rise to damages which usually are an adequate remedy.

189. For a full discussion of real contracts see 1 S. Litvinoff, Obligations 204-06 (1969). A few civil codes, however, contain real contracts as an express category. See e.g. Argentine Civ. Code art. 1141 (1869).
192. Id. at 64-65; 2 Weill, Droit civil - Les obligations 116 (1970).
193. The same solution may be reached on a different theory, but this is not the proper place to present it. For general comments on the decline of the notion of real contracts, although asserting the binding nature of synallagmatic promises in view of contracts involving the delivery of a thing, see 2 Demogue, Traité des obligations en général 65-70 (1923); Sabatier, La promesse de contrat, in La formation du contrat, L'avant contrat 112-16 (1964); 2 Weill, Droit civil - Les obligations 116 and 135-40 (1970). It is noteworthy here that article 312 of the Swiss Code of Obligations of 1911 defines loan as a synallagmatic contract thereby eliminating all unilateral-contract and real-contract overtones. See also 3 Toulliez, Le droit civil français 319 (1833). See also Bonnau v. Ville de Bahia, Trib. civ., Seine, 1928, D. 1929.2.141 with a note by Sabatier where the connection between real contracts and synallagmatic contracts is discussed in full.
194. There is no obstacle, theoretically, to obtaining specific performance of such a promise. See 23 Baudry-Lacantinerie et Wahl, Traité théorique et pratique de droit civil - De la société du prêt et du dépôt 360 (3d ed. 1907); 2 Demogue, Traité des obligations en général 65-70 (1923); see especially 2 Weill, Droit civil - Les obligations 139-40 (1970). In the vast majority of instances, however, damages constitute a sufficient compensation for the injured party. This applies in the common situation where a bank opens a line of credit for a client, regarded as a promise of loan. If the bank refuses to make the funds available, the client may compel it to do so, but
In this context, Louisiana courts have declared that a bilateral promise to store cotton is binding and gives rise to damages for non-performance.\(^\text{195}\) When a bilateral promise to lend money is involved, Louisiana decisions imply that damages may be recovered if sustained by proof.\(^\text{196}\) Specific performance is denied, however, on the basis of the common-law principle according to which an obligation to pay money cannot be enforced by specific performance.\(^\text{197}\) There is no reason to deny this remedy when, in accordance with article 1927 of the Louisiana Civil Code, damages alone are not an adequate compensation. Even in Anglo-American law, a principle of equity allows specific performance of an obligation to lend money when no other remedy would constitute a sufficient compensation.\(^\text{198}\)

**Requirements Contracts**

The scheme of a bilateral promise to contract fits situations where the parties agree on a series of contracts to be made in the future, as in the case of a "requirements" contract.\(^\text{199}\) Regarding each of the contemplated transactions, the original agreement is, precisely, an exchange of promises to enter into a contract later.\(^\text{200}\)

**B. Bilateral or Synallagmatic Promise of Sale**

**i. French Law**

**The Code Napoleon**

Article 1589 of the Code Napoleon has already been touched upon in the discussion of unilateral promises; its text, however, bears repetition here: "The promise of sale amounts to a sale, when there


\(^{196}\) Kenner v. Slidell Savings & Homestead Ass’n., 170 La. 547, 128 So. 475 (1930).

\(^{197}\) Id. at 128 So. 476; McGaw v. O’Beirne, 126 La. 584, 52 So. 775 (1910).

\(^{198}\) City of Camden v. South Jersey Port Commission, 4 N.J. 357, 73 A.2d 55 (1950).

\(^{199}\) See 1 S. Litvinoff, Obligations 201-02 (1969).

\(^{200}\) 2 Weill, Droit civil - Les obligations 116 (1970). The recognition of the binding force of such promises helps to solve the kind of difficulty that Louisiana courts experienced in matters involving contracts of this kind. See 1 S. Litvinoff, Obligations 535-39 (1969).
exists reciprocal consent of the two parties on the thing and on the price."

Two basic questions have arisen from this article. The first is whether the rule contemplates unilateral or synallagmatic promises. The great majority of the French commentators, focusing on the words "reciprocal consent," agree that the article contemplates bilateral or synallagmatic promises, that is, a promise to sell coupled with a promise to buy. There is, however, an illustrious dissent. This matter has already been sufficiently discussed.

The second question is about the effect of such a bilateral promise insofar as the transfer of ownership is concerned. Here, two answers have been given. The first is the answer of early commentators in whose opinion the article was meant to solve a problem inherited from ancient French law. Before the Code Napoleon, although it was clear that such promises did not effect a transfer, there was indeed a dispute as to whether an agreement involving a promise to sell coupled with a reciprocal promise to buy was enforceable through specific performance, or merely by damages for nonperformance, or simply was not enforceable at all. The early commentators, with only minor differences of detail, agreed that article 1589 was meant to put an end to this dispute in the sense that such promises were to be enforceable through specific performance. This, they said, is the way in which a promise of sale "vaut vente" (amounts to a sale), as the article has it. In their view, any other interpretation would ignore the intention of the parties who, under the new system of automatic transfer upon consent inaugurated by articles 1138 and 1583 of the Code Civil, would have made an actual sale (contrat de vente), if they

201. Aubry et Rau, Cours de Droit civil français 4-5 (5th ed. 1907); Baudry-Lacantinerie et Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 37-40 (2d ed. 1900); Beudant, Cours de droit civil français - De la vente et le louage 24 (1908); Colmet de Santerre, Manuel élémentaire de droit civil 76 (4th ed. 1901); Demogue, Traité des obligations en général 13 (1923); Duranton, Cours de droit français (3d ed. 1834); Guilloard, Traité des obligations de la vente et de l'échange 89 (2d ed. 1890); Huc, Commentaire théorique et pratique du code civil 41 (1897); Laromière, Théorie et pratique des obligations 447 (1885); Laurent, Principes de droit civil français 27 (1877); Weill, Droit civil - Les obligations 115 (1970).


203. See The Background, Sec. II B i supra.

204. See 6 Marcadé, Explication théorique et pratique du code Napoléon 163-69 (5th ed. 1852).

205. Id. See also 9 Toullier, Le droit civil français 40-45 (Duvergier ed. 1838); Trouplong, Le droit civil expliqué - De la vente 75-82 (1836). Toullier draws some subtle distinctions according to the parties' express intent.
had so intended, instead of merely exchanging promises. In this view, in sum, a bilateral promise of sale transfers neither ownership nor risk, but gives the parties, in case of nonperformance, the right to obtain a judgment that stands for the actual transfer. A bilateral promise of sale is, thus, not a sale but a contract that contemplates a later sale; a contract that fits very well into the category of innominate contracts.

In the second answer, a diametrically opposed approach is taken and it is asserted that a bilateral promise of sale is not less than a sale and that it does effect a transfer. In this view, article 1589 contemplates situations where the parties have used words of promise instead of words signifying the present doing of an act. This view seems to find support in the statement of one of the French redactors that such a promise contains all that is of the essence of the contract of sale. Moreover, in a report made for the travaux préparatoires it was explained: “If the contract, instead of comprising a sale, contains a promise of sale, the promise has the same force as the sale itself as the three requirements are gathered: the thing, the price and the consent.” Before the legislative body, when the projet was discussed, the assertion was made that a promise of sale is parfaitement assimilée à la vente (perfectly identified with a sale). Thus, if all the elements are present, the thing is individualized, and, in the case of an immovable, the agreement is recorded, the bilateral promise of sale literally amounts to a sale, that is, it transfers ownership and risk.

Although the first answer is logically and systematically more consistent, the second answer has finally prevailed and is supported by the great majority of French writers.

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206. For the impact of the views of these early commentators on the Louisiana jurisprudence see M'Donald v. Aubert, 17 La. 448-51 (1841). See also The Civil Code, Sec. III B iii infra.

207. 6 MARCADO, Explication du code Napoléon 166 (5th ed. 1852).

208. See 17 BAUDRY-LACANTINERIE ET Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 38 (2d ed. 1900); 2 COLIN ET CAPITANT, Cours élémentaire de droit civil français 556 (10th ed. Julliot de la Morandière 1953); 10 PLANIOIL ET RIPERT, Traité pratique de droit civil français 184 (1932).

209. See views expressed by Portalis in 14 FENET, Recueil complet des travaux préparatoires du code civil 153 (1836). See also 17 BAUDRY-LACANTINERIE ET Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 39 (2d ed. 1900).

210. 14 FENET, Recueil complet des travaux préparatoires du code civil 153 (1836).

211. Id. at 189. See also 17 BAUDRY-LACANTINERIE ET Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 39 (2d ed. 1900).

212. 5 Aubry et Rau, Cours de droit civil français 4-5 (5th ed. 1907); 17 BAUDRY-
PROMISE OF SALE

In a third view—a comment rather than an answer—the identification between bilateral promise and actual sale is so obvious that no article of the code is necessary to establish it.213

Execution of Another Instrument

There is agreement in French doctrine that a bilateral or synallagmatic promise of sale may be made purely and simply, in which case it produces its effects right away, or it may be subject to modalities such as term or condition.214

If there is a term, according to prevailing opinion, the time allowed for performance postpones actual delivery of the thing or payment of the price, but it does not postpone the transfer of ownership and risk.215 It may be different, however, if the parties have expressed an unmistakable intent that such effect shall not take place until the term matures.216

It is clear that the parties may subject the effects of the promise to any condition.217 If such is the case, through the operation of general principles, no effects take place until the condition happens.

Where immovables are involved, the parties may agree on the execution of another instrument, very probably a notarial act. In such circumstances, there is a tendency to say that this is a condition.218 As the bilateral promise of sale amounts to a sale, there should be no difference between a sale subject to a suspensive condition and a promise of sale subject to a suspensive condition; in either case, the actual sale will not take place until the contemplated notarial act is executed.

LACANTINERIE ET Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 39 (2d ed. 1900); Beudant, Cours de droit civil français - La vente et le louage 28 (1908); 2 Colin et Capitant, Cours élémentaire de droit civil français 556 (10th ed. Julliot de la Motanidère 1953); 1 Guilloard, Traités de la vente et de l'échange 90 (2d ed. 1809); 24 Laurent, Principes de droit civil français 27 (1877); 10 Planiol et Ripert, Traité pratique de droit civil français 185 (1932); 2 Weill, Droit civil - Les obligations 115-16 (1970). Contra, 2 Colmet de Santerrre, Manuel élémentaire de droit civil 134 (4th ed. 1901); 7 Demante, Cours analytique de code civil 19 (2d ed. 1887).

213. 10 Planiol et Ripert, Traité pratique de droit civil français 185 (1932).
214. Id. at 184. See also 2 Weill, Droit civil - Les obligations 115 (1970).
216. Id. See also 9 Toulvier, Le droit civil français 45 (Duvergier ed. 1838).
218. 10 Planiol et Ripert, Traité pratique de droit civil français 184 (1932); 2 Weill, Droit civil - Les obligations 115 (1970).
There is a question, however, whether such a stipulation is a true condition. In general terms, a condition is a future and uncertain event on which the effects of obligations depend. The later execution of a formal instrument is, no doubt, a future event, but little uncertainty is involved as such an event may be forced into existence through a judgment which stands for it. Such a "condition" is not casual for it consists of an event within the parties' control. It is not truly potestative either, for the essence of the potestative condition—even of a mixed condition—is to allow a certain freedom of choice that in this case the parties do not seem to have. It is easy to see that the parties do not mean the sale shall be perfect "if" a notarial act is executed, as in a true condition, but, rather, that the sale shall be perfect "when" the notarial act is made. At any rate, there is some basis in the Code Civil to regard the execution of another instrument as a condition since article 1588, dealing with sales on trial, says that such sales are always presumed to be made under a suspensive condition. It should be noticed, however, that there are obvious differences between the testing of things by one of the parties, the purchaser, and the execution of a formal instrument which requires action by the two parties. The idea of condition, applied to situations of this sort, has given rise to some confusion.

The Jurisprudence

French courts have shown some reluctance to consider as a suspensive condition a contractual stipulation for the execution of another instrument. For a long time, it was held that such a clause cannot always be regarded as a condition, as the court is free to delve into the parties' intent and to arrive at the conclusion that the clause simply provides a complementary formality which is not a condition of the contract. More recent decisions express a different approach in stronger language:

If the parties have otherwise agreed that ownership of the immovable is not to be transferred until the authentic act is executed, such stipulation is not conducive to interpreting the sale as having been made under a suspensive condition. The contract must be considered as a firm and definitive sale, perfect upon the parties' consent alone. It happens, however, that the ownership of

219. See FRENCH CIV. CODE art. 1169. See also LA. CIV. CODE art. 2023.
220. See FRENCH CIV. CODE art. 1170. See also LA. CIV. CODE art. 2024.
the immovable has not been transferred to the purchaser because such transfer, by virtue of an express stipulation of the contract, has been postponed until the execution of an authentic act which has not yet been made.\textsuperscript{222}

In another case, it was said:

The promise of sale amounts to a sale when there is reciprocal consent of the parties on the thing and the price; the formalization of the transfer by means of a notarial act does not have, by itself, the effect of retarding until that date the existence of the obligations of selling and buying.\textsuperscript{223}

It might be asked whether such thought-provoking decisions do not herald a return to the views of the early commentators.

\textit{Conclusion}

A glance at French doctrine and jurisprudence shows that the many problems that have arisen from bilateral promises of sale are mainly terminological. The coining of an expression equivalent to “contract to sell,” which is lacking in French legal parlance, could have helped to overcome confusion and hesitation, at least when it is clear that the parties do not intend a present transfer.\textsuperscript{224} As was shown above, when the execution of another instrument is involved, French courts, even today, take pains to make it clear that such agreements, although not sales, are nevertheless binding. This is striking in light of the existence of so strong a remedy as the action to obtain a judgment that stands for a contract, known in French law from ancient times.\textsuperscript{225}

There is, however, consensus that an agreement for the sale of things not yet individualized amounts to a bilateral promise of sale.\textsuperscript{226} A requirements contract also amounts to such a promise in relation to the future shipments which it foresees.\textsuperscript{227}

\textbf{ii. Common Law}

\textit{Contracts to Sell}

As stated by eminent authority:

\textsuperscript{222} Aix-en-Provence, Jan. 12, 1965, J.C.P. II 1965, 14312, with a note by Deghilaige.
\textsuperscript{224} See \textit{Louisiana Jurisprudence, Contracts to Sell}, Sec. III B iii \textit{infra}.
\textsuperscript{225} See \textit{3 O\text{\^u}UVRES DE POTHIER} 192 (1861).
\textsuperscript{226} See generally \textit{2 WEILL, DROIT CIVIL - LES OBLIGATIONS} 115-16 (1970).
\textsuperscript{227} \textit{Id}. 
The most fundamental distinction in the law of sales is between a contract to sell in the future and a present sale. The distinction is often expressed by the terms 'executory' and 'executed' sales. Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is actually transferred.22

In ordinary cases, it is said, the law deals either with contracts that involve a present transfer of title or with contracts under which the seller will thereafter make a transfer of title.229

Thus, sales on the one hand, and contracts to sell on the other, parallel the French distinction between contrats translatifs de propriété and non translatifs de propriété, which is the same as the distinction between contracts that purport a transfer and contracts that do not purport a transfer, in the English words of the Louisiana Civil Code.230 In French and Louisiana law, however, the distinction is made for contracts in general, which at common law the distinction is made for one kind of contract in particular, namely, sales.

In an ordinary contract to sell, the seller agrees that he will effectuate the transfer of the property at a future time. He may, however, agree that the property shall pass at some time in the future without further act of will on his part. This is presented as an intermediate category in which the assent to the transfer is given at the time of the bargain, but the transfer itself does not take place immediately.231 There is doubt whether such an intermediate transaction is a sale or a contract to sell. It would seem, however, that it resembles a sale rather than a contract to sell, as the property is transferred as a direct consequence of the original bargain and there is nothing more the seller is bound to do for the transfer to be effective later. The designation of such a transaction as a sale is in keeping with the

228. 1 S. WILLISTON ON SALES 3 (1st ed. 1948). See also Christ, The Law of Contracts and Sales 165, 173 (1938) for some illuminating examples.

229. 1 S. WILLISTON ON SALES 14 (1st ed. 1948). See Rush v. Smitherman, 294 S.W.2d 873 (Tex. Civ. App. 1956), where the seller of an automobile accepted part payment and gave the buyer possession. The court found a contract to sell. In Alamo Cas. Co. v. William Reeves & Co., 258 S.W.2d 211 (Tex. Civ. App. 1953), the court noted that where present transfer of title is not contemplated, the transaction is merely a contract to sell, rather than a sale which requires an intent to immediately transfer ownership. See also Hambrick v. Bedsole, 93 Ga. App. 192, 91 S.E.2d 205 (1956).


general use of expressions such as "conditional sales," since it is inescapable that a conditional sale is a common illustration of the intermediate category of bargain.232

When a seller does not own the property he bargains to sell, such an attempted sale, even when the buyer knows that the property is not the seller's, gives rise to an obligation to transfer title to the buyer thereafter.233 Thus, when the parties purport to make a sale but their intention cannot be carried out in full, they are notwithstanding held to have made, if not a sale, at least a different but binding contract.234

It is quite clear, so far, that a contract to sell, that is, an agreement whereby title to property will be transferred at a future time, is at common law what a bilateral or synallagmatic promise of sale is at civil law.235

Thus, whether title has been transferred or not is what determines whether a particular transaction is a sale or a contract to sell. Such a determination requires, at times, an inquiry into the parties' intention. When goods are involved and the agreement of the parties clearly reflects their intent, title passes accordingly. If the parties do not express their intent, however, the law, on the basis of various factors, will make a determination of their presumed intent. If at the time the contract is made something other than delivery remains to be done to the goods, the parties are presumed to intend no transfer of title until the things to be done are done. If, however, all that remains is delivery of the thing, the presumption is that the parties intend an immediate transfer of title.236

Concerning title, it has been said that it

is an abstract term signifying certain legal rights and liabilities in respect to a particular thing . . . . Common usage declares that a given person possesses these relationships to a thing because he possesses 'title' to it. As a matter of fact, he is more

232. 1 S. Williston on Sales 15 (1st ed. 1948).
233. 1 S. Williston on Sales 385 (1st ed. 1948).
234. See Stabler v. Ramsey 89 A.2d 544 (Del. 1951) for the principle that one contracting for the sale of a thing not owned at the time of the contract, may become liable in damages for the nonperformance of his obligation. See also Bates v. Smith, 83 Mich. 347, 47 N.W. 249 (1890); Battle Creek Valley Bank v. First Nat. Bank, 62 Neb. 825, 88 N.W. 145 (1901); Spielberg v. Harris, 202 Wis. 591, 232 N.W. 547 (1930).
235. See The Code Napoleon, Sec. III B i supra.
236. J. Waite, The Law of Sales 261, 270 (2d ed. 1938): "[I]f the contract relates to specific goods to which it is not contemplated that anything shall be done before delivery of possession, it is presumed that title is intended to pass at once, even though both transfer of possession and payment are intended to occur at a later date." See Harris v. Beebe, 144 Iowa 735, 123 N.W. 938 (1909); Stewart v. Henningsen Produce Co., 88 Kan. 521, 129 P. 181 (1913); Lauber v. Johnston, 54 Wash. 59, 102 P. 873 (1909); Wheless v. Meyer Schmid Grocer Co., 140 Mo. App. 572, 120 S.W. 708 (1909).
properly said to have title because courts recognize those relationships as attaching to him. The place of title is not a determinative of relations; it is the conclusion to be determined from them.\textsuperscript{237}

No doubt, an accurate study of sales should be directed to determining the rights and liabilities with respect to a thing which are acquired through the various types of contract, rather than being centered on the question whether or not title has passed.\textsuperscript{238}

When land is involved, owing to the need for a deed of conveyance, it is easy to presume that the parties did not intend a transfer of title in the absence of such a deed.\textsuperscript{239} Nevertheless, "When parties contract to buy and sell land, an equitable interest in the land at once passes to the buyer, which equity treats in various ways as if it were a property right. It is sometimes called an equitable title."\textsuperscript{240}

When a contract to sell has been made, the purchaser has a right to require husbandlike conduct of the vendor in possession.\textsuperscript{241} This is comparable to the obligation of keeping the thing safe which is placed on the obligor of an obligation to give at civil law.\textsuperscript{242}

The purchaser may assign his right arising from a contract to sell, as an option holder may assign his.\textsuperscript{243}

\begin{footnotes}
\footnote{237. J. Waite, The Law of Sales 261 (1938).}
\footnote{238. See Williston, The Law of Sales in the Proposed Uniform Commercial Code, 63 Harv. L. Rev. 561, 566 (1950). See also W. Hawkland, Sales and Bulk Sales Under the Uniform Commercial Code 79-103 (1955). "The 'title' concept is relatively unimportant under the UCC. Under the UCC the lawyer's search does not start with a location of title. Rather, his search should start with an analysis of the problem in terms of narrow issues, and an ascertainedment of whether or not the UCC contains specific provisions dealing with those issues. If it does not contain specific provisions dealing with those issues the search ends at that point . . . [only] then the title concept must be employed." Id. at 90-91. Hawkland contrasts the UCC approach with the "lump concept" approach employed at common law and under the Uniform Sales Act, whereby the court's decision as to the possessor of title in each case "dictates the answer to myriad problems on liability for risk of loss, on liability for price as against damages . . . etc."

\footnote{239. This, of course, is a matter of statutory regulation in jurisdictions where statutes similar to the English Real Property Act of 1845 have been enacted. See 3 American Law of Property § 11.3 (1962).

\footnote{240. 1 S. Williston on Sales 386 (1st ed. 1948). See Vannerman, Risk of Loss, in Equity, Between the Date of Contract to Sell Real Estate and Transfer of Title, 8 Minn. L. Rev. 127 (1924). See also Shaughnessy v. Eidsmo, 222 Minn. 141, 23 N.W.2d 362 (1946).


The enforceability of a contract to sell requires, of course, compliance with the statute of frauds.\textsuperscript{244}

\textit{Specific Performance}

When ordinary chattels are involved, without transfer of possession, a contract to sell gives the buyer only a personal right against the seller for damages in case of breach. When real estate is involved, however, a contract to sell may be specifically enforced against the vendor.\textsuperscript{245} It has been said, traditionally, that "Specific performance is an equitable remedy, is not one of right, but of grace. It rests in the sound discretion of the trial court, which is to be exercised in the light of the facts of the case."\textsuperscript{246} In spite of this, courts of equity tend towards granting decrees of specific performance, very much as courts of law award damages for breach, provided certain requirements are met.\textsuperscript{247} Indeed, to obtain a decree of specific performance, there must be a valid contract which would be enforceable at law without injustice to the other party; the agreement must be definite and certain and without any fraud or unfairness.\textsuperscript{248} There must be mutuality of obligation, and the enforcement of specific performance, in the particular case, must be in conformity with the general principles of equity, as when the remedy at law is inadequate.\textsuperscript{249}


\textsuperscript{245} 7 S. Williston on Contracts 893 (3d ed. 1963). But see H. McClintock on Equity § 45 (2d ed. 1948), for situations where equity may grant specific performance of contracts involving chattels. Where chattels have been considered as unique, equity may afford the remedy of specific performance. See Hughes Trust & Banking Co. v. Consolidated Title Co., 81 Fla. 568, 88 So. 266 (1921); Haworth v. Jackson, 80 Or. 132, 156 P. 590 (1916). Even when the personalty lacks uniqueness, equity may give relief where damages cannot be accurately ascertained and therefore a monetary award would not be adequate. H. McClintock on Equity § 45, at 108, 109 (2d ed. 1948).


\textsuperscript{247} 7 S. Williston on Contracts 893 (3d ed. 1963). See Walter v. Warner, 298 F.2d 481 (10th Cir. 1962); Fox v. Skellenger, 216 F.2d 534 (9th Cir. 1954); Lacey v. Bennett, 210 Ark. 277, 195 S.W.2d 341 (1946); Martin v. Albee, 93 Fla. 941, 113 So. 415 (1927); Pearson v. George, 209 Ga. 938 (1953), 77 S.E. 2d 1 (1953); Petersen v. Olsen, 112 N.W.2d 874 (Iowa, 1962).

\textsuperscript{248} 7 S. Williston on Contracts 895, 897 (3d ed. 1963).

\textsuperscript{249} 7 S. Williston on Contracts 896, 898 (3d ed. 1963). See Glauert v. Huning, 266 S.W.2d 653 (Mo. 1954). In this case the court granted specific performance of an oral agreement to convey real estate and stated that "to refuse plaintiff relief in the nature of specific performance would work an injustice and would be inequitable." \textit{Id}. Plaintiff had performed his part of his contract and the court was of the belief that his performance was not adequately compensable in money.
A decree of specific performance may be enforced not only against the vendor, but also against anyone who took title from him with knowledge of the purchaser's rights. In a majority of jurisdictions, the purchaser who has recorded the contract is allowed to charge third parties with constructive notice of his rights, acquiring, in effect, a right in rem.\textsuperscript{250} Under the registry laws, therefore, the purchaser's rights between the time of the contract and the time for performance are very close to full ownership.\textsuperscript{251}

As was shown earlier, a contract to sell may result from the exercise of his right by the holder of an option.\textsuperscript{252} In this context, there is little doubt that specific performance may be decreed when the option contract is, in itself, a principal and independent contract. An option, however, may consist of a simple offer plus a collateral agreement not to revoke the offer within a stated period, for a consideration.\textsuperscript{253} In such a case, it has been suggested, the breach of the collateral agreement by the offeror should only render him liable for damages, without giving a right to specific performance to the offeree, as the collateral agreement contains only a promise not to revoke and not a promise to sell.\textsuperscript{254} Such views have been rejected by the weight of authority, and specific performance has been granted regardless of the form in which the option has been cast.\textsuperscript{255}

\textit{Title and Risk. The Doctrine of Equitable Conversion}

When a specifically enforceable contract to sell land has been made, the vendor has the legal title to the land, but subject to an obligation to convey it. He has the right to hold the legal title as security for the price, and the right to receive payment. The purchaser has a right to receive a conveyance of the legal title, a right generally subject to the condition of his paying the price, and an

\textsuperscript{250} 7 S. Williston on Contracts 900 (3d ed. 1963). See Anderson v. Yaworksi, 120 Conn. 390, 181 A. 205 (1935); Hodges v. Logan, 82 So. 2d 885 (Fla. 1955). \textit{But see} Schultz & Son v. Nelson, 256 N.Y. 473, 177 N.E. 9 (1931), holding that executory land contract sales may be recorded for the purpose of preserving evidence, but such recordation does not constitute constructive notice.


\textsuperscript{252} See Effects, Sec. II B ii supra.

\textsuperscript{253} See A. Corbin, Option Contracts, Selected Readings on the Law of Contracts 228, 235 (1931). \textit{See also} Option Contracts, Sec. II B ii supra.

\textsuperscript{254} Whittier, Restatement of Contracts and Mutual Assent, 17 Cal. L. Rev. 441 (1929).

obligation to pay the price.\textsuperscript{256} The vendor's legal title is, no doubt, real property; his beneficial interests, however, including the security interest which equity attaches to the right to collect the price, are personal. The purchaser's right to receive the land is regarded by equity as real property because, upon performance of the correlative obligation, it will ripen into full legal title.\textsuperscript{257}

These results are achieved through the doctrine of equitable conversion, based on the maxim that equity regards as done that which ought to be done.\textsuperscript{258} It applies whenever an obligation to sell land arises from a will, contract, or court order. While the obligation is executory, "equity generally will adjudicate the rights of the parties as they would have been if the conveyance has actually been made."\textsuperscript{259} In contracts to sell land, equity treats the land as if it had been converted into personal property. That is, equity will adjust the parties' rights and liabilities in conformity with what they would have been if the contract had been performed.\textsuperscript{260}

The specific enforceability of a contract to sell land at the time the parties' rights are fixed is a prerequisite to equitable conversion by contract. Thus, there is no conversion if the vendor did not have title at the moment he contracted to convey it.\textsuperscript{261} Conversion does not take place either if the memorandum required by the statute of frauds is signed only by the vendor and the contract, therefore, cannot be enforced against the purchaser.\textsuperscript{262}

The doctrine of equitable conversion has been criticized as a useless and even harmful fiction.\textsuperscript{263} It has also been defended as a useful tool for those cases where the parties clearly intend that a

\textsuperscript{256} H. McClintock on Equity 286 (2d ed. 1948). See 2 Pomeroy's Equity Jurisprudence 21-25, 31-33 (5th Ed. 1941); 4 S. Williston on Contracts 2604 (Rev. ed. 1936).

\textsuperscript{257} See Langdell, Equitable Conversion, 18 Harv. L. Rev. 1, 83, 245 (1904-05); Miller, Equitable Conversion by Contract, 26 Ky. L.J. 56 (1937); see also H. McClintock on Equity 286 (2d ed. 1948).

\textsuperscript{258} H. McClintock on Equity 284 (2d ed. 1948). See 2 Pomeroy's Equity Jurisprudence 8-39 (5th Ed. 1941) for comprehensive treatment of the principle that "equity regards that as done which ought to be done." Specifically see id. at 31, 32 on conversion. See also 4 S. Williston on Contracts 2607 (Rev. ed. 1936).

\textsuperscript{259} H. McClintock on Equity 284 (2d ed. 1948).

\textsuperscript{260} Id. See 2 Pomeroy's Equity Jurisprudence 32, 33 (5th ed. 1941). See also Sherman v. Flack, 283 Ill. 457, 119 N.E. 293 (1918); Marvin v. Bowlby, 142 Mich. 245, 105 N.W. 751 (1905); Greenman v. McVey, 126 Minn. 21, 147 N.W. 812 (1914); Fowler v. Whelan, 83 N.H. 453, 144 A. 53 (1928); Chambers v. Preston, 137 Tenn. 324, 193 S.W. 109 (1917) for illustrations of the nature and effect of a conversion.


\textsuperscript{263} See Stone, Equitable Conversion by Contract, 13 Colum. L. Rev. 369 (1913).
substantial interest shall pass to the purchaser while the vendor re-
serves the legal title only as security for the price. At any rate, the
doctrine has been almost universally adopted by the courts.

Courts of equity frequently resort to the analogy of a trust in
determining the rights and liabilities arising from such a transaction,
treating the vendor as trustee of the legal title for the purchaser. It
has been suggested, however, that, rather than treating the vendor
as trustee, it would be more realistic to treat him as a mortgagee.

As a consequence of being regarded as owner by equity through
the doctrine of equitable conversion, the purchaser bears the risk of
loss without fault of either party from the time the contract to sell
land becomes specifically enforceable. This rule has been criticized
on grounds that the true intention of the parties is not to transfer
ownership until possession is given and that, consequently, the risk
should not pass to the purchaser until he has possession, since the
ability to protect the thing against loss rests on the party who has it.
Possession, however, has not received special attention of the courts
in deciding which party bears the risk.

264. See H. McClintock on Equity 285 (2d ed. 1948): “Perhaps a reconciliation
of the different views would be to adopt the principle that, except possibly for the
purpose of determining the descent of the interest of the respective parties in the event
of their deaths, the conversion should not take place until the contract manifests an
intention that the substantial ownership has passed, the time when the purchaser will
say not ‘I have contracted to buy the land’ but ‘I have bought it.’”

265. See Id. at 284.

266. See In re Reid’s Estate, 26 Cal. App. 2d 362, 79 P.2d 451 (1938): “It is
frequently said that on the making of an executory contract for the sale of land, of
which specific performance would be decreed, a court of equity, regarding as done that
which ought to be done, will consider the purchaser as the owner of the land. It is also
frequently said that the vendor holds the legal title in trust for the purchaser, and
occasionally the purchaser is said to be the trustee of the vendor as regards the pur-
chase money.”

267. See H. McClintock on Equity 286 (2d ed. 1948). But see 7 S. Williston on

268. H. McClintock on Equity 300 (2d ed. 1948); 7 S. Williston on Contracts
865-68 (3d ed. 1963); Miller, Equitable Conversion by Contract, 26 Ky. L.J. 26, 56, 63,
64 (1937). For exceptions to the rule see 7 S. Williston on Contracts 868-74 (3d ed.
1963). See also Vanneman, Risk of Loss in Equity, Between the Date of Contract to
Sell Real Estate and Transfer of Title, 8 Minn. L. Rev. 127 (1924).

269. See 7 S. Williston on Contracts 939-55 (3d ed. 1963). See also H. McClin-
tock on Equity 300-01 (2d ed. 1948).

270. H. McClintock on Equity 301 (2d ed. 1948). See 4 Pomeroy’s Equity
Jurisprudence 480-83 (5th ed. 1941); Vanneman, Risk of Loss in Equity, Between the
Date of Contract to Sell Real Estate and Transfer of Title, 8 Minn. L. Rev. 127 (1924).
See also Reife v. Osmers, 252 N.Y. 320, 169 N.E. 399 (1929) (as an example of a court
expressly rejecting the test of possession as determinative of the location of risk). But
see Good v. Jarrard, 93 S.C. 229, 76 S.E. 698 (1912) (where the respective courts treated
A few jurisdictions disregard the doctrine of equitable conversion, and the common-law rules of contract are applied which prevent recovery of the price by the vendor in case of loss, as he can no longer convey what he agreed to convey.\footnote{271}

Equitable conversion also takes place upon the exercise of his right by the holder of an option.\footnote{272}

iii. Louisiana Law

The Civil Code

The first paragraph of article 2462 of the Louisiana Civil Code deals with the bilateral or synallagmatic promise of sale. A short history of this text will bring clarity to the discussion.

Article 2437 of the Louisiana Civil Code of 1825 provided:

A promise to sell amounts to a sale, when there exists a reciprocal consent of both parties, as to the thing and the price thereof; but, to have its effect, either between the contracting parties or with regard to other persons, the promise to sell must be vested with the same formalities, as are above prescribed . . . in all cases where the law directs that the sale be committed to writing.\footnote{273}
This text only reproduced the corresponding article of the Louisiana Digest of 1808; the sole difference is in the number of the article concerning formalities in one code and the other. 274

So far, the requirement that the promise must be made with the formalities prescribed for a sale of the same thing is the only difference between this article and its direct source, article 1589 of the Code Napoleon. 275 The difference, however, marks no departure from the source as it is clear in French law that the promise to make a contract for which a special form of proof is required is subject to the same form of proof. 274

Article 2437 of the Louisiana Civil Code of 1825 became article 2462 in the Code of 1870, as it went untouched through the revision of 1869.277

Article 2462 underwent important modifications in 1910. Besides addition of a new paragraph, already discussed, the original paragraph was made to read:

A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same. 278

In this version, there can be no doubt that the first paragraph of article 2462 contemplates a bilateral or synallagmatic promise of sale. Such a conclusion was correct even before the 1910 amendment for the reasons already expounded in the discussion of the French article 1589. 279 After the amendment, however, the reference to either party introduced into the article was strong enough as to dispel any remaining doubt. 280 Indeed, only a bilateral or synallagmatic contract can give to either party the right to enforce it.281 It is also clear that such a contract does not create any obligation to give, but only gives rise to obligations to do.

274. Id.

275. However, the French text of the Louisiana article contains the expression la promesse de vendre (the promise to sell) and not la promesse de vente as the French article reads. The difference is noteworthy for the discussion in the text. See 3 LOUISIANA LEGAL ARCHIVES, pt. 2, at 1357 (1942). See The Code Napoleon, Sec. III B i supra.

276. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 63 (1923).


279. See The Code Napoleon, Sec. III B i supra.


281. See The Background, Sec. II B i supra.
The reasons for reforming the article have not been expressed, but they can be surmised from a glance at the reaction of the courts to the original version.

Before the amendment, the one paragraph of article 2462 was as puzzling as its French counterpart. As in France, so also in Louisiana, the problem arose when parties had exchanged promises to buy and sell immovable property and had agreed to execute another instrument later. In early decisions, Louisiana courts aligned themselves with one of the interpretations of French article 1589 and arrived at the conclusion that a bilateral promise of sale was indeed a sale. Thus, where parties had agreed to reduce the contract to a public instrument, ownership was transferred by the first agreement.\(^\text{282}\)

This view was changed later. In the leading case of *M'Donald v. Aubert*, it was said:

> We understand article 2437 [2462] to mean that a promise to sell, when the thing to be sold and the price of it are agreed upon, is so far a sale that it gives to either party a right to claim *rectâ vià*, the delivery of the thing or payment of the price; *but such a promise does not place the thing at the risk of the promisee, nor does it transfer to him the ownership or dominion of it*. If by consent of both parties a promise to sell is cancelled, such an agreement could not be viewed as a retrocession of the property; and third persons having a general mortgage recorded against the promisee would have acquired no right or lien on the same, because it never belonged to their debtor.\(^\text{283}\)

In support of this contention, the court cited distinguished French authorities expressing such views.\(^\text{284}\)

In a later case, a petitory action was brought on the strength of a contract whereby one party agreed to sell and the other to buy land as soon as possession could be given; the court said:


\(^{284}\) Pothier, Toullier and Troplong; see 17 La. 451. See *The Code Napoleon*, Sec. III B i supra.
The law would be censurable for a strange violation of the principles of reason and justice, and for a shortsighted view of expediency, if it deprived individuals of the right of making prospective agreements for a sale, or told them that if they make each other a reciprocal promise to buy and sell a thing a year hence, for example, that they should be absolutely considered as having made a present sale...286

This might have settled the problem of whether a bilateral promise of sale effected a transfer of ownership, but it soon gave rise to the question whether such an agreement ought to be specifically enforced. As a matter of fact, although the right to claim rectâ viâ (by specific performance) the delivery of a thing had been recognized in the M'Donald case, the specific performance of other obligations to do was denied in very general terms. At times, Louisiana courts would say that specific performance is not a matter of right, but rests in the discretion of the court.286 The lack of proper distinctions and the use of general language full of equity overtones created uncertainty. In a case involving obligations to do arising from a bilateral promise of sale that concerned immovable property, the Louisiana court, not long before the 1910 amendment, finally made a careful distinction and asserted that the parties to such a contract are “entitled” to specific performance.287

Against this background it can be understood that the 1910 amendment to the first paragraph of article 2462 was introduced for the purpose of establishing beyond any doubt: (1) that a bilateral promise of sale does not effect a transfer of ownership; (2) that such a promise gives a right to specific performance. The amendment was warranted by developments in French doctrine and in French and

287. Giralt v. Feucht, 117 La. 276, 41 So. 572 (1906). The court said: “According to article 1926 the obligee is 'entitled' to damages or specific performance 'at his option' and according to article 1927 he is 'entitled' only to damages in ordinary cases, 'but may' be awarded specific performance in cases where damages would be inadequate relief. Reading these two articles together, that is to say, reading the word 'may' in conjunction with the twice used word 'entitled' to which it stands in co-relation, the word 'may' must be given, we think, the meaning of shall, and the articles must read that, where damages are inadequate relief, the court, not 'may,' but 'shall' or 'must,' order specific performance. If the obligee is 'entitled' to a thing, the court has no discretion about according it to him or not, but is obliged to do so.” 41 So. 573-74.
Louisiana jurisprudence. A second paragraph, as was explained earlier, was introduced to give legislative expression to the unilateral promise of sale, thereby completing the picture.288

Article 2462 marks some differences between French and Louisiana law. Leaving aside the typical case where the parties agree to reduce a contract on immovable property to expression in another instrument, and stating conclusions in general terms, it can be said that in France, in the present state of the law, a bilateral promise of sale is a sale and as such transfers ownership and risk, unless there is strong indication of a contrary intent of the parties.289 In Louisiana, instead, a bilateral promise of sale is not a sale; it transfers neither ownership nor risk, and only gives the parties the right to specific performance.290

If article 2462 is read now in the light of what has been explained about the common law, the conclusion might be reached that introduction of a common-law approach was intended not only in the second, but also in the first, paragraph. This is not so. To begin, a bilateral promise of sale does not effect in Louisiana any equitable conversion as at common law.291 Further, the 1910 amendment enacted one interpretation of article 1589 of the Code Napoleon made by eminent French jurists. Although not the one finally accepted by French courts, this interpretation of the French and of the original Louisiana article is the more rational, and also the more fair on policy grounds.292

In sum, in Louisiana a “promise to sell,” as article 2462 has it, is synonymous with promise of sale and with bilateral or synallagmatic promise of sale, as “option” is synonymous with unilateral promise of sale.293

288. See The Civil Code, Sec. II B iii supra.
289. See The Code Napoleon, Sec. III B i supra.
291. See Title and Risk. The Doctrine of Equitable Conversion, Sec. III B ii supra.
292. See The Code Napoleon, Sec. III B i supra.
Louisiana Jurisprudence. Contracts to Sell

The expression "contract to sell" has been adopted by the Louisiana jurisprudence. It is a clear expression meaning an agreement to buy and sell where the parties are "looking forward to a sale," but which is not yet a sale as it does not transfer ownership. The use of this expression can be justified in three different ways. In the first place, "contract to sell" is a current term of art in English, and English is the official language in which the Louisiana law is expressed.

In the second place, contract to sell does not suggest any of the many doubts that its French counterpart, the promesse synallagmatique de vente, has given rise to. In the third place, Louisiana courts seem to believe that there is no way of making a binding executory agreement to buy and sell under French law, which is incorrect but also inconsequential.

The notion of a Louisiana contract to sell arises from article 2462 of the Civil Code, and it is the same as a bilateral promise of sale. It may be entered into directly by the parties according to the first paragraph of the article, or it may be the result of a prior unilateral promise, or option, made under the second paragraph of the article.

In spite of the common-law origin of the words, Louisiana courts do not resort to the common law in case of breach, but find the appropriate solutions in the armory of remedies provided in the Civil Code.

In general terms, the determination of whether a contract is one to sell or one of sale is dictated by a careful evaluation of the contract.

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295. See Contracts to Sell, Sec. III B ii supra.

296. See The Code Napoleon, Sec. III B i supra.

297. See Bornemann v. Richards, 245 La. 851, 161 So. 2d 741, 744 (1964): "Suffice it to say that the French commentators were referring to completed sales since the French, neither in practice nor in law, admitted the 'promise to buy and sell' as is authorized by the law of this state." The court cited 2 PLANIOL, TREATISE ON THE CIVIL LAW, pt. 1, at §1400, 1407 (Louisiana State Law Institute trans. 1959). But see The Code Napoleon, Sec. III B i supra.


300. See Comment, 26 TUL. L. REV. 498, 499 (1952).
tual language to ascertain whether a transfer was intended or not. 301

A contract to sell results from the typical situation where immovable property is involved and the parties have agreed on the execution of a formal instrument:

An agreement for the sale of real estate, which contemplates the passing of the property not immediately and by virtue of the agreement, but by an act to be executed at a later date, and which contains all the elements of a sale, such as the price, the property and the consent of the parties, is merely a promise of sale, unless the intention of the parties clearly indicates that the agreement is to constitute a completed sale. 302

As a contract to sell does not bring about a transfer, ownership and risk remain with the vendor and the "insurable interest" is his. 303

301. The courts have found a contract to sell where the parties resorted to the following expressions: "I have this day agreed to sell," Peck v. Bemiss, 10 La. Ann. 160 (1855); "I have this day bargained, sold, and delivered . . . Titles to said property to be made at our convenience," Broadwell v. Raines 34 La. Ann. 677 (1882); "Sold this day . . . when done, Baldwin, or his heirs, will give good deed," Baldwin v. Morey, 41 La. Ann. 1105, 6 So. 796 (1889); "The act of sale . . . is to be passed within the next 15 days . . . " Millaudon v. Brenan, 5 La. App. 583 (1927). See Comment, 3 LA. L. REV. 629, 636 (1941).

302. Noto v. Blasco, 198 So. 249, 432 (La. App. 1st Cir. 1940). The rule is well established in the Louisiana jurisprudence. See Smith, An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money, 20 LA. L. REV. 522, 543 (1960): "The rule that an agreement for the sale of an immovable where the parties contemplate a formal act of sale at a later date, is to be treated as a contract to sell or convey the property at the date agreed upon is perhaps a sound one . . . . The chances are that most laymen would not count themselves as owners of an immovable until the accomplishment of an act of sale." See also Davis v. McCain, 171 La. 1011, 132 So. 758 (1931); Campbell v. Richmond Ins. Co., 145 La. 455, 100 So. 679 (1924); Trichel v. Home Ins. Co., 155 La. 459, 99 So. 403 (1924); Smith v. Hussey, 119 La. 32, 43 So. 902 (1907); St. Landry Loan Co. v. Etienne, 227 So. 2d 599 (La. App. 3d Cir. 1969).

303. See Gibsland Supply Co. v. American Employers Ins. Co., 242 So. 2d 310 (La. App. 2d Cir. 1970). Plaintiff corporation sued its insurer to recover for damages to its building resulting from a fire. Defendant-insurer attempted to avoid coverage on the ground that plaintiff had no insurable interest in the building at the time of the fire. Prior to the damage plaintiff's president had in fact signed a cash deed, reciting $10,000 as consideration for the sale of the building. The deed, however, was not to be delivered until the vendee paid the full purchase price. Before this had occurred the building was damaged by the fire. In support of his position that plaintiff had relinquished title to the vendee defendant urged that Louisiana Civil Code article 2456 was dispositive of the case. Article 2456 provides that a sale "is considered to be perfect between the parties and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid." The court, however, relying upon the jurisprudence, asserted that article 2456, considered in connection with a written agreement for the sale of land, "may give either the vendor
A contract to sell may be subject to a suspensive condition such as obtaining court approval for the sale of property belonging to a succession, or the prior sale of other property by one of the parties. When such is the case, a right to specific performance of the agreement cannot be exercised until the condition is fulfilled. If the property deteriorates between the time of the agreement and the fulfillment of the condition, the rights of the intended vendee are governed by articles 2044 and 2471 of the Louisiana Civil Code.

The recordation of a contract to sell makes it effective against third parties. In this context, it is worthwhile to remember that: "Unlike the rule at common law, it is the public policy of this state that in order to affect third parties, all transactions touching upon or affecting title to real or immovable property must be recorded." As a consequence, a third party's actual knowledge is not the equivalent of recordation whenever the right of an intended vendee under an unrecorded contract to sell is in conflict with the right of a third party who acquired from the vendor.

or the vendee an action for specific performance, but ownership does not pass until such action is taken." 242 So. 2d at 314. It being established that plaintiff had maintained ownership despite the agreement to sell the building contracted before the fire, he had an insurable interest in the premises.

304. See Bornemann v. Richards, 245 La. 851, 161 So. 2d 741 (1964); Boudreaux v. Elite Homes, Inc., 259 So. 2d 669 (La. App. 4th Cir. 1972). The condition may also be the securing of a loan for financing the transaction. See Parker Mead, Inc. v. Cutrer, 239 So. 2d 729 (La. App. 1st Cir. 1970).


306. Bornemann v. Richards, 245 La. 851, 151 So. 2d 741 (1964). See also Note, 25 LA. L. REV. 569 (1965). The question whether the execution of the act of transfer is in itself a suspensive condition is still open. In the Bornemann case, however, the court gave an indirect answer suggesting that the act is not a condition. Indeed, the court asserted that when there is a true suspensive condition such as obtaining court approval, neither party has a right to specific performance until the condition is fulfilled, which is correct. See Bornemann v. Richards, 245 La. 851, 161 So. 2d 741, 746 (1964). When the parties must come together and execute the act of transfer however, the right to specific performance belongs to them from the moment the agreement is made, which indicates that the execution of the formal act is not, technically at least, a condition. This should be generalized to base a conclusion that when there is no other "condition" than the execution of a notarial act, the consequences of deterioration of the property are governed by Louisiana Civil Code article 2455 rather than by articles 2044, and 2071, which is a fairer solution.


308. Martin v. Fuller, 214 La. 404, 37 So. 2d 851, 856 (1948). See also McDuffie v. Walker, 125 La. 152, 51 So. 100 (1910).

PROMISE OF SALE

A contract to sell may be made concerning movable things.\textsuperscript{310} For reasons already explained, however, Louisiana courts in such cases are inclined to allow only damages instead of specific performance.\textsuperscript{311} Some special transactions in movable things, such as the sale of things not yet individualized, or the sale of a thing to be manufactured, fit easily into the category of the Louisiana contract to sell.\textsuperscript{312}

\textit{Earnest Money}

When a promise to contract is accompanied by the giving of earnest money, significant differences occur. Article 2463 of the Louisiana Civil Code provides: "But if the promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise; to wit: he who has given the earnest, by forfeiting it; he who has received it, by returning the double." The same rule is contained in article 1590 of the Code Napoleon.

According to doctrine, the French article contemplates the giving of earnest as accompanying a bilateral or synallagmatic promise of sale.\textsuperscript{313} This is consistent with the interpretation of article 1589 of the Code Napoleon as envisaging bilateral or synallagmatic promises.\textsuperscript{314} The giving of earnest, however, may accompany a promise to make any synallagmatic contract other than sale; thus, an interesting case dealt with earnest involved in a contract of exchange.\textsuperscript{315} On the other hand, although not expressly contemplated in the Code Civil, there is consensus that a unilateral promise of sale, an option, may also be accompanied by the giving of earnest.\textsuperscript{316}


\textsuperscript{311} See Movables and Immovables, Sec. II B ii supra.


\textsuperscript{313} See 17 BAUDRY-LACANTINERIE ET Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 56 (2d ed. 1900); 2 Colin et Captant, Cours élémentaire de droit civil français 561 (10 ed. Julliot de la Morandière 1953); 10 Planiol et Ripert, Traité pratique de droit civil français 224 (1932).

\textsuperscript{314} See The Code Napoleon, Sec. III B i supra.

\textsuperscript{315} Lyon, July 2, 1875, S. 1876.2.240, D.1876.5.176. See also 17 BAUDRY-LACANTINERIE ET Saignat, Traité théorique et pratique de droit civil - De la vente et de l'échange 58 (2d ed. 1900).

\textsuperscript{316} 10 Planiol et Ripert, Traité pratique de droit civil français 223 (1932); Paris, March 14, 1929, Gaz. Trib. July 19, 1929; Lyon, Dec. 6, 1928, Gaz. Pal. July 8,
In French law, the giving of earnest suspends the transfer of ownership. That is, when earnest is given, a promise of sale does not amount to a sale in the terms of article 1589 of the Code Napoleon; the transfer takes place only when neither party chooses to recede from the contract.317

When a deposit in money is made at the moment of entering a transaction, such a deposit may be: (1) earnest or forfeit money given for the right of receding from the contract; (2) something given to "bind the contract"—denier à Dieu—as a token that the agreement is regarded by the parties as irrevocable; (3) a payment made on account of the price. In the absence of a contrary intent of the parties clearly expressed, such a deposit is regarded as earnest or forfeit money.318

In Louisiana, the giving of earnest is not necessary to suspend the transfer of ownership as, under article 2462 of the Civil Code, no such transfer is effected by a promise either bilateral or unilateral.319 It is only a substitute for performance, that is, either party may demand

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1929. But see 17 Baudry-Lacantinerie et Saignet, Traité théorique et pratique de droit civil - De la vente et de l'échange 60 (2d ed. 1900), where the effects of earnest are limited in such an instance.

317. See 2 Colin et Capitant, Cours élémentaire de droit civil français 561 (10 ed. Julliot de la Morandière 1953); 10 Planiol et Ripert, Traité pratique de droit civil français 225 (1932). There has been considerable discussion in French doctrine, however, as to whether the giving of earnest makes a completed sale subject to a resolutory condition or a transfer subject to a suspensive condition. The latter view prevails in modern doctrine and jurisprudence. See 17 Baudry-Lacantinerie et Saignet, Traité théorique et pratique de droit civil - De la vente et de l'échange 56-58 (2d ed. 1900).

"The reason of the matter supports the view that by putting up earnest money it should be taken as the intention of the parties that ownership is not to pass until the election is made. Forfeit money in such case is given to secure the privilege of withdrawing and as long as it is doubtful whether performance will be rendered, it seems incontestably better to say that the transfer of ownership is suspended. It is to be observed that although a withdrawal will here operate as a resolutory condition to the existence of the contract consisting of the mutual promises, the election by both parties to perform operates as a suspensive condition to the transfer of ownership thereunder, or the perfected sale. Put another way, viewed contractually the condition is resolutory, but from the standpoint of the transfer of property in the thing it is suspensive. In other words, that which is suspended is a right of property and the enforceability of the duty to deliver and the duty to pay." Smith, An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money, 20 La. L. Rev. 522, 536 (1960).

318. See 17 Baudry-Lacantinerie et Saignet, Traité théorique et pratique de droit civil - De la vente et de l'échange 56-60 (2d ed. 1900); 2 Colin et Capitant, Cours élémentaire de droit civil français 561 (10 ed. Julliot de Morandière 1953); 10 Planiol et Ripert, Traité pratique de droit civil français 224-25 (1932). The French word arrhes is not synonymous with forfeit money (dedit), neither is, technically, the word "earnest." See Black's Law Dictionary (3d ed. 1933).

319. See The Civil Code, Sec. III B iii supra.
specific performance or recede from the contract forfeiting the money given in earnest, or returning double this amount in the terms of article 2463.\textsuperscript{320} Thus, it was said in one case:

Obviously, Article 2463 . . . is a means whereby the parties relinquish their right to compel specific performance, reserving to themselves the right to recede from the contract, in which case they, by their own covenant, stipulate as liquidated damages, the amount that is recoverable for their failure to comply, i.e., the vendee by forfeiting the amount deposited and the vendor by returning the amount deposited with a like amount.\textsuperscript{321}

Unlike its French counterpart, article 2463 of the Louisiana Civil Code has to be regarded as contemplating unilateral and bilateral promises, since, after the 1910 amendment, article 2462, unlike article 1589 of the Code Napoleon, envisages promises of both kinds.\textsuperscript{322} Because of this, as the second paragraph of article 2462 expressly provides for the purchasing of an option for “any consideration,” there is a possibility of regarding as earnest money any sum paid for the option. Such an approach is mistaken; whatever the option-holder pays for the option is paid for the right to buy or not at his convenience; it is not paid to allow the option-giver an opportunity to recede from the agreement by returning double the amount. The parties may, if they wish, couple an option with the giving of earnest, but unless their intent is clearly expressed in that sense, what is paid for the option is not to be considered as forfeit money.\textsuperscript{323}

When a deposit is made in connection with a bilateral promise of sale, that is, a Louisiana contract to sell, the first reaction by Louisiana courts was to follow the French approach that in the absence of a showing of the parties’ contrary intent, such a deposit is earnest money.\textsuperscript{324} This view was changed, however, and a different approach adopted whereby any deposit made in such a connection is regarded as earnest money even when referred to by the parties as money given to bind the contract or as payment on account of the


\textsuperscript{321} Ducuy v. Falgoust, 228 La. 533, 83 So. 2d 118, 123 (1955).

\textsuperscript{322} See The Civil Code, Sec. III B iii supra.


purchase price. A deposit, thus, instead of being earnest money in the absence of a contrary intention of the parties, is always earnest money unless the parties expressly say it is not so. The solution is not to be commended as it disregards the intention of the parties.

The principle of article 2463 is applicable to immovables and movables alike as the article makes no distinction. The Louisiana jurisprudence follows this view.

IV. CONCLUSION

Unilateral and Bilateral Promises

Some firm conclusions can be drawn from the preceding discussion of unilateral and bilateral or synallagmatic promises to contract. The notion of a unilateral promise has a neat profile and serves an important function in people's everyday business whenever a transaction starts by a choice one party gives to the other. From the fact that such a promise is unilateral, the nature of the agreement can be readily understood without any possibility of confusing it with the contract the parties are looking forward to. The latter comes into existence only when the party to whom the option has been given adds his consent. In an option, in other words, there is an "if" element which explains why the option is given and also marks the transition when the option is exercised.

The profile of a bilateral or synallagmatic promise to contract is considerably less distinct. Here, the two parties' consent is needed from the beginning. Indeed, a party cannot validly bind himself to agree later; he has to agree now, even if the perfection of that to which


326. See Note, 6 Tul. L. Rev. 129, 130 (1931): "The jurisprudence . . . has so firmly established the foregoing rule, that it is now necessary for the parties, if they do not wish to forfeit the right of specific performance, to incorporate an express provision in their contract negating any presumption that the sum deposited is earnest money . . . ." See also Hebert, The Function of Earnest Money in the Civil Law of Sales, 11 Loyola L. J. 121 (1930).


he is agreeing is supposed to be arrived at later through some additional action on his part, or the other’s part, or both.29 Because of this, the possibility of confusion between a bilateral or synallagmatic promise to contract and the promised contract itself remains open, more in France than in Louisiana, as was shown above.30 The picture can be clarified, however, by an understanding that a valid bilateral promise to contract must be made in such a way that the final contract can be brought into being through the specific performance, voluntary or forced, of the original promise.

Stages in Contracting

Clear or not, bilateral promises to contract are designed to fill important needs. The fact that these needs are, perhaps, too many, has contributed to obscure the concept.31 Indeed, in spite of emphatic statements, the paramount principle of consensualism does not account for many situations.32 At times, a formality is required, or the delivery of a thing prescribed, to make a contract of a certain kind.33 Such ingredients cannot always be produced right away. When such is the case, the parties need the means to prepare the perfection of their agreement. As the contract they make now is not yet the final one, it cannot be given the latter’s name. If such designations as bilateral promise or preliminary contract are found confusing or unsatisfactory, it is always possible to think in terms of innominate contracts.34

In a contemporary approach, the problem of a promise to contract, unilateral or bilateral, or preliminary contract, is presented as one of a series of steps leading up to the conclusion of a contract. Special circumstances of the parties, or the special nature of a contract, or the complexity of its object, may require that a final contract

329. See 2 Puig Brutau, Fundamentos de derecho civil, pt. 2, at 19 (1956). If such consent, as given now, is insufficient for a binding agreement, quasi-delictual liability may be incurred if one party, through the other’s fault, has been incited to rely to his detriment. See Nik, Rechtsvergleichendes zur Haftung fur culpa in contrahendo, Zeitschrift fur auslandisches und internationales Privatrecht 345 (1953). See also Flagella, Dei periodi precontrattuali e della loro vera ed esatta costruzione scientifica, 3 Studi giuridici in onore di Carlo Fadda 271 (1906).

330. See The Theory, Sec. III A supra.

331. More careful distinctions between agreements in preparation of obligations to give and agreements in preparation of obligations of other kinds might have avoided confusion. Similarly, a more detailed analysis of the contractual interest to be protected would have contributed clarity. See generally 2 Puig Brutau, Fundamentos de derecho civil, pt. 2, at 25-30 (1956).

332. See 1 S. Litvinoff, Obligations 203, 218-23 (1969).

333. See Formal Contracts, Real Contracts, Sec. III A supra.

be reached through a series of contractual stages, one being the so-called promise to contract which, vis-à-vis the final step, looks very much like a preliminary one.\textsuperscript{335}

At any rate, in the particular case of contemplated sales, and more specifically when immovables are involved and the parties have agreed to execute another instrument, the Louisiana concept of a contract to sell, has contributed a solution that is perfectly functional.

\textsuperscript{335} \textsc{Demoge}, \textit{Traité des obligations en général} 1-5 (1923); \textsc{Puig Brutau}, \textit{Fundamentos de derecho civil}, pt. 2, at 7 (1956); \textsc{Sabatier}, \textit{La promesse de contrat}, in \textit{La formation du contrat, L'avant-contrat} 96, 118-19 (1964).